

**An Assessment of the
Immediate and Longer-Term Needs
of the
New Orleans Public Defender System**

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New Orleans Public Defender System**

Justice, in the criminal sphere, is the law-breaker receiving what is due him or her, both in process and punishment. And it is the process, not the punishment, which distinguishes just governments. In the United States, we have agreed that before the government can take away our liberty, it must first provide us with a fair process. This process is not a gift—rather, it is owed to us—it is due us. That is the simple meaning of Due Process. What this process includes is what makes it complex. So complex, in fact, that whenever the government seeks to remove a citizen's liberty, the government is represented by an attorney (usually called a prosecutor or district attorney). Justice therefore dictates that throughout this complex process, the citizen facing the loss of liberty should also be represented by an attorney. Our pledge of allegiance promises in its last three words: "...justice for all." Consequently, citizens too poor to afford an attorney must be provided an attorney by the government.

Martin Luther King said, "Injustice anywhere is a threat to justice everywhere." Every day in New Orleans, public defenders are called upon to represent our poorest citizens. This report seeks to ensure that Orleans Parish defenders have the resources, skills, and management structure necessary to protect "justice for all."

I. BACKGROUND

During the final quarter of 2005, as federal national disaster relief efforts coordinated by FEMA in the aftermath of Hurricane Katrina evolved from an emphasis on life-saving to infrastructure rebuilding and subsistence support, the Bureau of Justice Assistance (BJA) of the U.S. Department of Justice, working through the Louisiana Commission on Law Enforcement

(LCLE), the "State Administrative Agency" for Congressional appropriations for state and local criminal justice system improvement, established a liaison relationship with the Southeast Louisiana Criminal Justice Recovery Task Force. This task force was established, with LECD assistance, to conduct criminal justice system needs assessments and coordinate system rebuilding efforts in the four Louisiana parishes hardest hit by Katrina: Orleans, Jefferson, Plaquemines, and St. Bernard. The Task Force, in turn, established several committees, or working groups, to focus on specific components of the criminal justice system in the four jurisdictions, including a *Courts Committee*, a *Law Enforcement Committee*, and a *Corrections Committee*. BJA staff interacted regularly with these working groups and, although not having any national disaster relief funds at its disposal, provided whatever consultant services it could from its existing grantee and contractor network around the country.

In February 2006, the Judicial Committee of the Task Force, which is responsible for state and local courts, clerk's offices, indigent defense services, and other court-related entities was confronted with having to respond to a situation where the absence of resources, both fiscal and human, to provide constitutionally valid legal representation to the thousands of pretrial detainees whose cases were pending (including many even awaiting filing of charges) in New Orleans metropolitan area courts had the criminal justice system on the verge of closing down completely. The LCLE and the Task Force petitioned BJA for emergency financial assistance to enable the indigent defense system to operate at minimally acceptable levels for a several month period while pending state and federal relief bills for the hurricane devastated areas worked their way through the respective legislative appropriations processes.

Agreement was reached that BJA would first commission an independent needs assessment of the indigent defense service delivery crisis in Orleans Parish, at least, since it represented the vast bulk of the metropolitan area-wide problem.

To conduct the assessment, BJA turned to its National Training and Technical Assistance Initiative project at American University (AU), which specialized in criminal justice system-wide analyses. The task presented was to select a team to travel to New Orleans for a two-three day site visit, where they were to meet with and interview appropriate criminal justice officials, legal system and community representatives, visit offices of the Orleans Indigent Defender Program (OIDP), collect available data related to indigent defense in Orleans Parish, and, based on the information collected, develop recommendations to address the immediate and longer-term needs for indigent defense in the Parish.

It was envisioned that the team's report was to form the basis for the Parish's application to BJA for the emergency short-term funding.

The AU technical assistance project recommended, and BJA and the Judicial Committee of the Task Force approved, the following three nationally experienced indigent defense and pretrial process specialists for the assessment team:

Nicholas L. Chiarkas, Chief Public Defender for the State of Wisconsin;

Randolph N. Stone, Clinical Professor of Law, University of Chicago Law School and former

Public Defender of Cook County, Illinois; and
D. Alan Henry, Consultant and former Executive Director of the Pretrial Services Resource Center, in Washington, DC.

The local coordinator for the team's work was Justice Catherine D. Kimball, of the Louisiana Supreme Court, who is the Chair of the Judicial Committee of the Task Force. Elizabeth Griffith, Deputy Associate Director for Policy of BJA, was the BJA liaison for the assessment effort and accompanied the team on its site visit.

II. THE SITE VISIT

Following several teleconferences for orientation purposes among team members, AU project staff, BJA officials, and New Orleans Task Force representatives, the team met in New Orleans and began interviews the evening of March 14, 2006, with interviews starting again the following morning and continuing for two days. The team completed its site visit on March 17, 2006.

During the visit, the team met with the following individuals:

- Hon. Catherine D. Kimball, Justice of the Louisiana Supreme Court, and Chair of the Judicial Committee of the Southeast Louisiana Criminal Justice Recovery Task Force
- Dr. Hugh M. Collins, Judicial Administrator, Supreme Court of Louisiana
- Hon. Calvin Johnson, Chief Judge, Orleans Criminal District Court
- Hon. David Bell, Chief Judge of the Orleans Parish Juvenile Court
- Hon. Gerard Hansen, Orleans Criminal District Court Judge
- Tilden Greenbaum, Orleans Parish Indigent Defender
- Danielle Berger, Accountant, Orleans Indigent Defense Board
- J.C. Lawrence, former member, Orleans Indigent Defense Board
- Bill Short, Chief Deputy Sheriff, Orleans Parish
- Hon. Marlin N. Gusman, Orleans Parish Criminal Sheriff
- Mary Baldwin Kennedy, Colonel, Orleans Sheriff's Office
- Hon. Helen Berrigan, Chief Judge of the U.S. District Court, Eastern District of Louisiana
- Jim Letten, United States Attorney for the Eastern District of Louisiana
- Virginia Schlueter, Chief Federal Defender, Eastern District of Louisiana
- Terry Ebbert, Director, Homeland Security for New Orleans
- Carmelite M. Bertaut, President, New Orleans Bar Association
- Shannon Bruno, President, Louis Martinet Society
- John T. Fuller, Attorney
- Edith Jones, President, Urban League of New Orleans
- Danatus King, President, New Orleans NAACP
- Pam Metzger, Director, Tulane Law Clinic
- Denise LeBoeuf, Attorney
- Michelle Ghetti, Professor, Southern Univ. Law Center and member of Indigent Defender Task Force
- Laurie White, Attorney, former ODP Board member

- Jelpi Picou, Executive Director, Capital Appeals Program
- R. Neil Walker, Director, Louisiana Capital Assistance Center
- Steven Singer, Majeeda Sneed, Joseph Walsh, and Courtney Schroeder, Loyola Law School Criminal Defense Clinic
- Rick Teissier, Attorney
- George Kendall, Attorney, Holland & Knight
- Michael A. Ranatza, Executive Director, Louisiana Commission On Law Enforcement
- William Kline, General Counsel, Louisiana Department of Corrections
- Scott Griffith, Drug Court Program Director, Louisiana Supreme Court
- Frank Neuner, President, Louisiana State Bar
- E. Pete Adams, Director, Louisiana District Attorneys Association
- Beverly S. McKenna, Publisher, New Orleans Tribune
- Mike Perlstein, Reporter, New Orleans Times Picayune
- Lamont Williams, Information Technology, Federal Public Defender
- Lisa Kung, Southern Center for Human Rights

Additional telephone interviews and follow-ups occurred after the team had left New Orleans.

We especially thank Justice Kimball, Judicial Administrator Hugh Collins and Task Force Special Counsel Chip Coulter, without whose help we would not have been able to carry out this task. They provided us with several meeting rooms at the Supreme Court; arranged for interviews and operational observations; shared insights; and, in short, met all of our needs with grace, openness and professionalism.

Besides providing us their time to answer questions about the indigent defense issue, many of the interviewees were also extraordinarily helpful in providing data, case law, relevant statutes, press clippings, and other useful material for our consideration.

Although our days on site were full, it is impossible to obtain a complete picture of the indigent defense process in New Orleans in two days, let alone to understand that process in the context of the broader criminal justice system. We realize that there are many more people whose counsel would have no doubt further illuminated our task.

Still, thanks to the frank and open discussions held with local criminal justice professionals, we believe that we have a fairly accurate picture of the indigent defense process, the ODP, and the general criminal process in Orleans Parish. In the subsequent sections of this report, we describe the present state of indigent defense and offer recommendations that we believe will help to improve not only indigent defense services, but also the quality of the justice system in general.

III. INDIGENT DEFENSE IN NEW ORLEANS

After arrest, persons appear before a judicial officer for first appearance. At this point the arrestee, unless s/he already has an attorney, will have an ODP attorney available to "stand in"

for this brief appearance. The critical issue at this first hearing is bail; whether the person will be released pending the actual filing of charges (and eventual disposition of the case) or remain incarcerated. However, the attorney for the defense has not talked with the arrestee and has only the "gist sheet" (summary of basis for arrest) to shed light on the allegations.

The prosecutor (assistant district attorney) recites the arrestee's arrest/conviction record and recommends a bail amount. We were told that in the vast majority of cases, the bail amount requested by the prosecutor is granted. After bail is set, the case is continued pending the prosecutor's charging decision.

When setting bond, the judicial officer has no information about the defendant's ties to the community, history of bail and/or probation, or history of drug abuse or mental illness. Also, the judge does not have conditions of release, such as a bail-monitoring program, available.

The ODP attorney tells the defendant that a lawyer will be appointed at the next appearance, and the defendant is taken back to jail; sometimes the ODP gives the defendant the court papers to retain since there is no ODP file at this time in which to keep such material.

The defendant is then held in jail for a minimum of 45 days (misdemeanors) or 60 days (felony charges). During this period of detention, the defendant has no contact with any attorney unless s/he has been able to hire one.

At the next appearance, the defendant is assigned to a particular court for trial and disposition. Before Katrina, the ODP had attorneys assigned to all criminal courts and is attempting to cover the smaller number of operational criminal courts now. If the defendant does not already have an attorney, the ODP attorney in court is assigned to the case. We are told that in most instances, after the attorney speaks briefly with the defendant, one of three options takes place. First, the prosecutor may request a continuance because s/he is not yet prepared to file a case. Second, the prosecutor may decide not to file charges at all. Third, both sides are ready, and the formal arraignment takes place, with the case then set for trial (or, in some instances, a preliminary hearing at the defendant's request). (We received statistics compiled by the ODP for March and June of 2005. The data showed that no preliminary hearings took place for their clients during those two months.)

It is not clear how many continuances are allowed; we were told that is determined by the individual judges. One of the judges interviewed said that he scheduled a status hearing every thirty days. Nor was there available data regarding average time to disposition; in fact, there was no data that would give us the caseload of the office or the caseload of individual ODP attorneys.

In comparison, the Sheriff's Department provided us with current data that identified the number of incarcerated persons in the parish jail with open state cases, as well as those incarcerated for probation violations and parole violations. In addition, the Department could tell us the numbers for those incarcerated around the state or in Department of Correction facilities. Unfortunately, these numbers focus on people, not cases, as would be expected from a sheriff's department.

They also would not include those persons with charges pending who had obtained their release by posting bail. Thus, the Sheriff's data gave us only part of the picture of pending ODP cases in the Parish.

IV. THE ORLEANS PARISH INDIGENT DEFENSE PROGRAM

Our interviews revealed general agreement on the following information (some admittedly impressionistic, but on which we had to rely in the absence of time for courtroom observations and the unavailability of statistical data and files for review), about ODP:

- Everyone agreed that the office is under-financed now and that it had been before Katrina. The office is funded primarily by traffic ticket revenues.
- The system of indigent defense is court-based, rather than client-based. The ODP lawyers are assigned on an indefinite basis to a particular court with a particular judge and attempt to defend all indigent clients who happen to appear in that court (there are six attorneys currently assigned to Criminal Court). Under these circumstances, the attorney tends to focus on the preferences and work patterns of the particular judge to whom s/he is assigned and with whom s/he works every day, rather than on the indigent defendants who pass through the court.
- We were told that, aside from those cases in which the government decides not to file, very few cases are disposed of at the first or second hearings before a trial judge. When the government receives a continuance for filing purposes, there is nothing before the court, so no plea can be entered even if the defendant wishes to enter a guilty plea.
- We were told that ODP lawyers rarely meet with their clients, particularly when the clients are in jail.
- The ODP attorneys are paid \$29,000 per year; however, it appears that the job itself is in some instances less than half-time. Attorneys assigned to criminal courts are expected to stay in the court until adjournment. Consequently, if a court adjourns at noon, as sometimes happens for a variety of reasons, the attorney is free to leave. In still other courts, attorneys have in the past been able to work one week and then be off for the following week, with the court covered by another ODP attorney "splitting" coverage of the court.

ODP attorneys are allowed to have a private practice—including criminal cases—as long as the cases are not before the judges to whom they are assigned in their ODP capacity.

- While we heard significant criticism of the ODP process from virtually all of those interviewed, in most instances the remarks were aimed at the program and its administration; many of those interviewed said that the individual attorneys appeared to be very good lawyers.

- There appeared to be little accountability within the office. There were no client files or any other records or data, save a monthly tabulation of cases closed and how they were closed (e.g., trial, plea, dismissal). There is no phone number for the office, and clients cannot come to the office. We were told that attorney evaluations seem to be passive, based on judicial satisfaction with the attorneys assigned to their court. There is no supervisory evaluation of public defenders on such core skills as communication with clients, recognition of legal issues, or trial preparation.

V. RECOMMENDATIONS

The strain brought on by Katrina and its after effects have been well documented. The hurricane displaced thousands; people lost their homes and loved ones, personal treasures, jobs...virtually everything in many instances. And criminal justice professionals were not spared. Professionals were often faced with the harrowing choice of doing their jobs (without communications, assignments, or structure), or helping people in desperate need; often family members.

The most basic problem facing the justice system was adequate staffing, a problem that still faces many parts of the system. The OI DP was particularly vulnerable, ironically because of the anachronistic way that indigent lawyers are paid. The lawyers in OI DP are paid primarily by the revenue from traffic tickets. But police have had more serious issues than issuing traffic tickets to attend to since Katrina. As a consequence, money to pay for lawyers has dried up; 75% of the indigent defense lawyers in the New Orleans office have been laid off, while arrests continue to average between 85 and 100 per day.

Without indigent defense lawyers, the system grinds to a halt. People wait in jail with no charges, and trials cannot take place; even defendants who wish to plead guilty must have counsel for a judge to accept the plea. Without indigent defense lawyers, New Orleans today lacks a true adversarial process, the process to ensure that even the poorest arrested person will get a fair deal, that the government cannot simply lock suspects and forget about them.

Despite the efforts of many professionals in the New Orleans criminal justice system, it appears to us that the only justice that can be meted out today is for those who can pay for a lawyer and a bondsman. For the vast majority of arrested individuals (primarily the poor, as in virtually every urban justice system), justice is simply unavailable.

Until a system for providing counsel to these people—not counsel serving primarily the court or the process—is implemented, they will remain in jail, their numbers increasing daily as new arrests are made. There is no time to waste.

The focus of our recommendations is on the immediate needs of the Orleans Parish public defender program. However, we recognize that any short-term fix will have long-term

ramifications; that what we recommend for Orleans Parish could be duplicated in other parishes or broadened to establish a regional or statewide public defender program; and that any modifications to the present public defender program will have corollary implications throughout the Orleans Parish (or broader) criminal justice system.

Consequently, in this section we present recommendations for both short-term and long-term actions to address the indigent defense needs in Orleans Parish. The short-term actions are primarily asking a leader in the law to oversee the restructuring of the public defender program; the hiring of private attorneys to immediately begin to address the backlog of cases attributable to Katrina; and the beginning of a process to create a viable, client-focused defender program. We agree that no effort should be made nor money spent on recreating the public defender philosophy and focus (court- and process- oriented, rather than client -centered) that existed before Katrina. Although many incarcerated clients are unaccounted for due to Katrina, if the public defender provided vertical, client-focused representation and kept records, each public defender would know who his or her clients were; would have contact information; and would have located them months ago.

The long-term actions are generally the completion of the necessary steps to restructure the defender program. These actions are described in more detail below in section VI. No doubt those coming after us will refine and adjust our long-range goals—we present them only as one example of a better destination.

A. Short-term goals and recommendations

The team's research suggests that an estimated 2,000 pre-trial detainees need services in Orleans Parish. Also, we were told that 85-100 people are arrested each day in Orleans Parish. Immediate action is necessary to provide the constitutional right of legal representation to these detainees. Simultaneously, policy makers need to set up a structure and process to ensure an effective and stable defender program.

We propose a five-month emergency intervention plan with following six goals:

1. Change the public defender program from court-and-process-centered to a client-centered public defender program;
2. Address the detainee backlog—represent all defendants waiting for hearings;
3. Gather five months of solid, accurate minute-by-minute data upon which the future (long term recommendations) can be based. You will also discover what works, what does not, and what is necessary;
4. Appoint a professional, committed Board;
5. Begin hiring full-time, client-centered public defenders; and
6. Create an atmosphere in which the criminal justice system is working together as a system instead of cloistered and disconnected parts.

We propose seven recommendations to achieve these goals:

1. Designate an esteemed individual to serve for a limited period of time (five-six months) as an interim director and coordinator (IDC) of the Orleans Parish indigent defense system to begin the development and implementation of a strategy to restructure it.

The IDC should be a leading and respected figure of the New Orleans legal community (e.g., law firm partner, retired judge or appellate court justice, former law school dean, law school professor, director of a legal services provider or non-profit, corporate counsel or CEO, bar association leader) with a demonstrated commitment to improving the legal system. A major responsibility of the IDC will be to create and develop reliable case management information and data while implementing practices to decrease backlog, track clients, and secure clients' release from pre-trial detention. The IDC would also create, implement, and monitor the process of appointing private lawyers to indigent defendants. The IDC will lay the foundation for performance standards and training modules, and begin the process of coordination, collaboration and dialogue with all of the major criminal justice system actors: public defenders, legal service providers, law schools, the District Attorney's Office, Sheriff's Department, trial court judges, private lawyers, police department, and client advocacy groups.

The IDC would help conduct a search for a permanent director for indigent defense services in conjunction with a newly reconstituted Orleans Indigent Defense Board.

An amount of \$75,000 should be allocated for compensation of the individual (or, perhaps, for at least partial recompense to the organization loaning his/her services) selected to serve in the temporary but critical IDC role. The IDC would need funds for a small staff, resources, access to expertise, and office space. We estimate the cost would be \$120,000 to hire an attorney assistant, an administrative assistant, and a numbers (data) person. We estimate that the IDC will need another \$20,000 for office space, supplies, services and extraordinary expenses.

All three of the review team members have agreed to commit ourselves and our agencies' expertise to assist with this Herculean task by providing any support that the IDC would request.

2. Immediate action should be taken to ensure that the Orleans Indigent Defense Board (OIDB) is independent (free of political or judicial influence or pressure), committed to the rights of our poorest citizens, and diverse.

The current Orleans Indigent Defender Board is down to three members; individuals were stepping down from the Board even as we were undertaking our interviews. By statute, new Board members are to be nominated by local bar associations to the Orleans Parish District Court for appointment. We understand that Chief Judge

Calvin Johnson has already called for such nominees from the bar.

The revamped OIDB should include members who bring management experience, technological experience, and experience with the Louisiana Legislature to the Board's deliberations. We also recommend that Board members serve staggered three-year terms.

3. Determine the scope of the problem/challenges confronting the indigent defense delivery system by establishing reliable data on the current backlog and what measures can be taken to reduce it as quickly as possible.

There is no available count as to the caseload of indigent cases currently before the criminal courts of New Orleans. Without this information, no effective plan can be developed; without knowing the breadth of the problem, suggesting a precise solution is impossible.

Although the Sheriff's office has current data as to the number of persons being held in a pretrial status in both the local jail and statewide, the office tracks persons; not cases. The OIDP office does not keep records of their clients out on bond or incarcerated clients, for that matter.

Since Katrina hit, The Louisiana Capital Assistance Center has taken on the task of tracking down persons in jail awaiting court action and filing habeas motions in the courts as necessary. To arrive at an accurate count of the current indigent cases, we recommend that the Center be contracted to continue that process as described below. We estimate the cost of this for a five-month period to be \$100,000.

Persons with pending cases should be divided into "Incarcerated" or "Released" categories. The following data should be collected on each person:

I. INCARCERATED

- Date incarcerated
- Initial Appearance Date
- Charge(s)
- Bail set
- Other holds
- Has there been an arraignment? Judge's name/court
- Plea entered
- Attorney appointed
- Name
- Preliminary Hearing
- Status Hearing
- Number of continuances
- Next court date

II. RELEASED ON BAIL

- Date arrested
- Initial Appearance Date
- Charge(s)
- Bail posted
- Date released on bail
- Arresting and Judges name/court
- Attorney and Contact info
- Plea
- Number of court appearances
- Next Court date

As the data is collected, cases should be triaged for court activity, beginning with cases in which the defendant has been held past the statutory limit without charges being filed; cases in which the person has been incarcerated longer than the maximum sentence the instant charge would allow if convicted; and the oldest cases.

4. Private attorneys (from the CJA list, former public defenders, and others) should be recruited immediately to address the backlog of indigent cases and new cases coming in every day. These lawyers should provide vertical representation (representation by the same attorney throughout the case) to all persons presently awaiting a court appearance who qualify for court-appointed counsel.

The recruitment goal should be a cadre of 40 competent private attorneys willing to commit an average of 15 hours per week for the 20 weeks of the five-month immediate response period, or a total of 120,000 hours of legal services. While it is not possible to predict with precision the impact this infusion of legal services would have on the current indigent defendant backlog in the short-term, it is our opinion that in conjunction with the other recommendations in this section – early representation in new cases, inventorying and triaging of existing cases, proactive case screening and negotiation with the District Attorney's Office, and coordination with other system actors -- several thousand cases could be fairly disposed of during the emergency intervention period.

A rate of \$60 per hour for the attorneys recruited for this element of the short-term response plan has been suggested by several legal system-knowledgeable people who talked to us. Although this amount is significantly less than the hourly rate of \$90 that is the current federal rate for criminal appointments, local officials and attorneys agree that it is sufficient to attract qualified private attorneys to accept appointments. Any lesser amount may be less than the overhead costs for many private attorneys and thus may jeopardize efforts to recruit and retain qualified attorneys to accept appointments.

In our experience, there is, on average, two months from the time an attorney accepts

a case until it is complete and the bill is paid. Therefore during the first two months of the five-month short-range plan, few if any bills will come due. Thus the cost estimate for 40 private attorneys, at \$60 per hour and each averaging 15 hours per week for 12 weeks (the last three months of this five-month period), is \$432,000.

In support of the enhanced legal representation for indigents envisioned by the above recommendation, consideration should be given to allocating a small portion of this \$432,000 to the local law school clinical program, or to a consortium clinical program, to improve the delivery of legal services to the indigent. For example, the clinical programs could establish a "bail project" designed to provide more and better information to the lawyers in court for purposes of obtaining reasonable conditions of release for their clients. Clinical programs could also develop representational models for advocacy at the initial bail hearing and at subsequent hearings to reduce bail. In any event, the law schools should be encouraged to have a continuing voice in the restructuring of the indigent defense system.

A final costing of this recommendation must take account of the fact that support services for public defenders generally run 1:4. Therefore, add to the direct costs for attorneys another \$108,000 for investigators, expert witnesses, and alternative sentencing specialists.

5. Planning should begin immediately to implement the long-term recommendations, which are discussed in the next subsection and in section VI, below. The major organizational restructuring that we recommend will take longer than five months to achieve. Tasks such as securing adequate funding, recruiting and hiring staff, locating and leasing office space, and designing a functional case management system will require extensive planning and hard work. We recommend that the IDC convene a planning team comprising interested parties who share the vision of an adequately-funded and client-focused defender program. Many of the people listed above would be logical participants in such an effort.

6. A retired judge should be hired to handle the habeas and probable cause cases and to work with Louisiana DOC to schedule hearings on the pending parole revocation cases. Estimated cost to hire a retired judge is \$45,000.

7. Officials in the indigent defense effort should work with the Sheriff's Department to expedite transport of inmates and ensure that attorneys have immediate access to inmates who are part of the backlog cases, etc. Officials should similarly work with the District Attorney's Office to dedicate two experienced prosecutors to review the "no charges yet" and "low bond" groups, either to decline charges or make plea offers. Set aside \$60,000 to assist the Sheriff and the District Attorney with this effort. This proposal recognizes the importance of all justice agencies having adequate resources for the system to deal effectively with the effects of Katrina.

The total cost for this five-month immediate plan would be \$960,000. However, keep in mind that there will be bills coming in from cases completed after this five-month initial response period. It is recommended that an additional \$100,000 be set aside to pay those bills as they come in. (Billings that extend beyond, say, the sixth month after the initial crisis response, will be costs included in the yearly budget for the re-structured Indigent Defense System). Thus, the five-six-month Katrina immediate response total would be **\$1,060,000**.

B. Long-term recommendations

As recommended above, the IDC should convene a planning team to implement the recommended restructuring of the Orleans Parish defender program. The following recommendations, explained in more detail in section VI, below, describe the central elements of this restructuring:

1. The philosophy and structure of the public defender program should change from court-focused or appearance-focused to a client-focused program.
2. The IDC, working with the planning team recommended in the previous subsection (V. A. 4.), should propose state and/or municipal legislation to ensure the long-term independence of the OIDP.
3. The Louisiana State Legislature and Orleans Parish officials should work together to provide the Orleans Parish defender program with funding in a manner that is adequate, predictable, and data-driven. Reliance on parking tickets as the main source of funding lacks these attributes. Much has been previously written about this problem; there is essential agreement that some form of parity with the District Attorney's funding should exist. The critical problem is the present source of funding: when a natural disaster occurs, parking tickets (either issuing or paying them) are rarely a priority. Yet, that is when the criminal justice system is most necessary for a community; it must be able to continue. Strong consideration should be given to a system of state funding; programs that rely on local funding often result in having the least resources in economically-challenged areas, where the need for services is greatest.
4. The defender program should rely, in the long run, primarily upon full-time staff attorneys to represent clients. Public defenders generally provide the highest quality and most cost-effective indigent defense services. Public defenders develop expertise in criminal law that allows them to handle cases both skillfully and efficiently. Furthermore, a well-managed defender organization can play a positive and influential role in improving the justice system (for example, by working with other

agencies to develop effective community interventions in lieu of imprisonment for non-violent offenders):

Full-time public defenders should have parity with the District Attorney's Office as to pay, benefits and retirement. Full-time indigent public defenders should not be permitted to engage in the outside practice of law.

5. The Orleans public defender program should implement and maintain an up-to-the-minute management information system as described below, pp. 22-24.
6. The Orleans public defender program should have professional offices where staff can conduct legal research, meet with clients and witnesses, and brainstorm cases.

In the following section, we expand upon our recommendations for restructuring the delivery of indigent defense services in Orleans Parish.

Note: Our estimates of the number of backlog cases and continuing number of new cases are based on the interviews that we conducted and published reports about the justice system. We caution, however, that because of the incredible devastation caused by Hurricane Katrina, there may be a considerable margin of error in estimates of both the current situation and the future trends in the justice system. Also, when we could not confirm numbers (such as likely operating costs for the size of office that we recommend, we used numbers from the State Public Defender offices in Milwaukee, Wisconsin, a city of roughly 600,000. Consequently, Orleans Parish decision makers will have to determine, for example, whether actual labor or rental costs differ from some of our estimates. The Wisconsin State Public Defender system is referenced throughout the restructuring discussion, not as a model program, but rather as a starting point (and point of comparison for cost purposes) for a program that will inevitably be adjusted to better suit the needs of Orleans Parish and Louisiana.

VI. RE-STRUCTURING INDIGENT DEFENSE SERVICES IN ORLEANS PARISH

This proposal outlines the necessary components for an effective indigent defense system in Orleans Parish. The proposal requires the commitment of resources, both short-term and on a continuing basis. Perhaps more importantly, the proposal requires structural and philosophical changes in how indigent defense is provided.

An effective system of indigent defense must primarily serve the clients. Such a system also provides substantial benefits to the public: for example, by promoting effective alternatives to incarceration and enhancing respect for the justice system. However, the primary focus must be on providing effective representation to clients throughout all critical phases of their proceedings.

Effective representation requires manageable workloads, reasonable performance standards, and skilled and data-driven management.

The American Bar Association's publication, *ABA Ten Principles of a Public Defense Delivery System* [hereinafter *Ten Principles*], provides a concise synopsis of the general elements of an effective, client-focused public defender program. This proposal provides some additional detail to assist Orleans Parish in taking the practical steps necessary for a dramatic transformation of its present system.

A. Competent and ethical representation

1. Client-focused representation

Critical to competent and ethical representation is that it be client-focused, instead of court-focused or appearance-focused. See American Bar Association Model Rules of Professional Conduct 1.1 (competence), 1.3 (diligence), and 1.4 (communication). The present practice in Orleans Parish has been described as focused primarily upon court events, with little or no communication with clients or case preparation on their behalf prior to and between court appearances. In fact, it appears that often the public defenders do not consider that they have an attorney-client relationship except when the defendant or suspect is brought to court.

Thus, a fundamental change must occur to ensure that public defenders (whether salaried employees or private-bar contractors) actively and zealously represent their clients throughout the critical time period that a case is formally pending (or during the incarceration of suspects who have not yet been charged).

In no instance should any detained arrestee be without counsel—appointed or retained—more than twenty-four hours after the initial appearance. The most critical issue that we see is a long-standing issue exacerbated by Hurricane Katrina: detainees have no representation for the first 30 to 45 days of their incarceration, other than the presence in court of a public defender (who usually says nothing in their behalf) during the brief bail hearing. Nor is there any review of the merits of the case—by prosecution, defense, or judiciary—during that time.

Thus, we view as critical the authority and resources necessary for the prompt assignment of an attorney, so that the attorney can provide meaningful representation at the initial appearance.

2. Performance standards

Meaningful performance standards are necessary to let public defenders know that they are expected, for example, to communicate adequately with clients, advocate (in and out of court) on their behalf, and prepare for hearings by learning the relevant facts and law. The public defender agency also needs to have supervisory staff to review attorney performance to ensure that public defenders adhere to these standards in representing their clients. See *Ten Principles*, p. 3.

3. Attorney workload

The agency must have adequate staff and other resources to handle the actual volume of cases (including the ability to assign cases to the private bar when the volume is excessive). An excessive workload impedes a public defender's ability to provide competent representation. See *Ten Principles*, p. 2. We propose a model used for budgeting purposes in Wisconsin, recognizing that future collection of data in Orleans Parish may support modifications of specific numbers. The model generally estimates the volume of cases that staff public defenders can ethically and competently handle, assigning different case weights to case types according to their relative complexity.

For example, a public defender in Wisconsin is expected to handle the equivalent of 200 felony cases (excluding first-degree homicides and other cases carrying a maximum penalty of 25 years or more of initial confinement). Wisconsin has a statute that defines the caseload of a staff public defender for budgeting purposes. Wis. Stats. sec. 977.08(5)(bn) (annual caseload standard is 184.5 felonies or other specified volumes for other case types). The Wisconsin State Public Defender has developed internal case weights, see Appendix p. ii, that modify the statutory weights on the basis of attorney time records.

In practice, most public defenders carry a mixed caseload (for example, felonies, misdemeanors, revocation cases, and juvenile cases). Thus, they handle an average of 300-350 cases, depending on the percentages of each case type. The Wisconsin State Public Defender's computerized information system has elements, described in more detail below in section C, pp. 22-24, that allow managers to review periodically the average attorney time spent on various case types and to adjust the internal case weights accordingly.

4. Definition of cases

A standard definition of a case, for purposes of public defender appointments, is essential to accurate measurement and fair distribution of workload. The Wisconsin definition is a good starting point: "a case is defined as representation provided by an attorney on one or more charges or allegations within a proceeding." Definitions should also be developed for specific case types, such as felony (probably with a separate category for the most serious non-capital felonies), misdemeanor, and juvenile.

Clear definitions of case types are necessary for the weighted-caseload system described in the previous section, which in turn helps in allocating cases internally and in reporting the office's workload to external stakeholders.

Given the reports of the high number of persons incarcerated for substantial periods without the filing of formal charges, it is critical that the scope of public-defender representation include bail reviews and other early representation for persons in

custody. Early representation is essential in Orleans Parish because of the frequency with which persons are held for several weeks or months, without access to an attorney, without judicial review of their bail status, and without formal charges being brought. Under the present system, it appears that such uncharged persons must rely upon the prosecutor or the sheriff to determine when they should be released.

In conjunction with other case definitions and with collection of case-related data, the public defender can determine the appropriate weight or value to assign to early representation compared to representation in formal court proceedings (for example, Wisconsin assigns an internal weight for such representation of .35 felony equivalent on the basis of average attorney time, but New Orleans data may lead to a greater relative weight to this type of representation since it appears that prosecutorial charging decisions take longer).

5. Eligibility standards

Before a public defender is appointed, and as soon as possible after arrest, applicants should be screened for financial eligibility. *See Ten Principles*, p. 2. The screening can be done either by the defender program staff or by a separate organization. Promptness is important, however, to facilitate appointment of counsel at the earliest possible time after arrest. Financial eligibility standards can be linked to the federal poverty guidelines, but should also take into account the amount of money that would likely be necessary to retain counsel (an amount not built into the federal poverty guidelines). If an applicant has recently been found eligible for another needs-based program, this finding can serve as a basis for public-defender eligibility.

The program (or the organization handling eligibility) should have a mechanism to consider information from other sources to investigate possible fraudulent applications. The program should also develop a process to allow applicants to seek review of an initial finding that they exceed the financial threshold for appointment of a public defender.

B. Effective management structure

To support and sustain a program of competent and ethical representation, Orleans Parish will need an effective management structure for its public defender agency. Such a structure is essential not only for day-to-day internal operations, but also for documenting for budget-related purposes the office's workload and resource needs.

This section describes several of the most-critical management functions. Specific staffing levels and duties are discussed below in section E.

1. Hiring and supervising staff

Two critical internal functions are the hiring and supervision of staff. *See Ten*

Principles, p. 3. The initial hiring of staff will be especially intensive, given the need to recruit and hire the numbers of staff needed to provide competent and ethical representation. We anticipate that outside entities, such as the local bar association, local law schools, and the Louisiana Indigent Defense Assistance Board (LIDAB), will provide volunteers to assist with this hiring initiative.

Given the diverse population of Orleans Parish, the defender system needs a recruitment and hiring strategy designed to ensure a diverse workforce, which will communicate effectively with clients and will promote their trust and confidence in the defender program.

In addition to initial hiring, there is a continuing need to recruit and hire staff. The Orleans Parish public defender will experience turnover, given the anticipated number of staff and the salary limitations inherent in public service. Thus, an important management function is an ongoing recruitment and hiring process that includes providing current information about job duties and employment opportunities, interviewing applicants, and checking applicants' references before offering them employment.

Effective supervision of staff is also critical to ensure that they learn and adhere to the performance expectations for effective client-focused representation. Supervisors must have adequate time to observe staff performance, to receive feedback from others (such as comments from judges, clients, and clients' relatives), to discuss performance issues with staff, and to document performance issues that may require formal personnel actions [see Appendix, pp. iii-xv, for copy of Wisconsin State Public Defender attorney performance evaluation]

2. Training and mentoring staff

Training and mentoring are essential to the professional development of staff. Training for attorneys should include skills training and training on substantive law. Skills training can be most effectively presented in small groups in which participants can role-play the various stages of a criminal proceeding and receive individual critiques from experienced trainers. Training on substantive law includes presentations on specific areas of law (such as rules of evidence, constitutional rules, and elements of specific offenses).

Additional training needs include training for support staff, pertinent ethical rules, and workplace issues (such as training on cultural competency, health and safety, and laws against harassment).

The management team will also need training in topics including leadership skills, performance monitoring, and long-range strategic and budget planning.

3. Certification and appointment of cases to the private bar

The staff size recommended in this proposal represents an increase for the Orleans Parish defender program. Nonetheless, given the need to keep staff workloads manageable and to provide all clients with competent and ethical representation, the defender will need the capacity to assign cases to private attorneys. *See Ten Principles*, p. 2. The defender program will assign cases to private attorneys not only because of the sheer volume of anticipated cases, but also to avoid ethical problems presented by representation of clients with conflicting interests (such as co-defendants charged in the same proceeding or suspected of the same crime). In addition, a mixed system provides cost-effective flexibility. For example, when cases increase and decrease, the program can simply increase and decrease the number of cases going to the private bar, instead of hiring and firing staff attorneys.

We recommend that private attorneys receive payment of \$60 per hour for work on Orleans Parish indigent defense cases. This rate has been recommended by several people whom we interviewed. Although this amount is significantly less than the federal hourly rate of \$90, local officials agree that it is sufficient to attract qualified private attorneys to accept appointments. Any lesser amount may be less than the overhead costs for many private attorneys and thus may jeopardize efforts to recruit and retain qualified attorneys to accept appointments.

Two major components of assignment of cases to the private bar are the certification of participating private attorneys and the actual case assignment process. A certification process promotes quality representation by requiring that attorneys attain certain levels of experience and proficiency before handling the most serious cases (see Appendix, pp. xvi-xvii, for Wisconsin State Public Defender Minimum Attorney Performance Standards, which are expectations for both staff and private attorneys). Such a process also includes a mechanism to investigate alleged misconduct and, if necessary, to suspend or terminate certification.

The appointment process matches specific public-defender cases with certified attorneys willing to accept appointments. The process should strive for fairness by offering all certified attorneys an equal opportunity to obtain appointments in a given case category. Support for the defender program can be damaged if favoritism is shown toward some attorneys. The appointment process also includes review and payment of private bar invoices. The review process requires written guidelines regarding permissible expenses, authority to modify or deny invoices under certain circumstances, and accurate recordkeeping (primarily of number of appointments and amount of payments).

The appointment of cases can be handled by the courts or by the public defender program. In Wisconsin, the State Public Defender is the appointing authority, both for cases appointed to staff attorneys and for those appointed to private attorneys who are certified for defender cases. This system has the advantage of insulating the

courts from any possible appearance that future appointments or payments might be jeopardized by aggressive litigation (such as criticizing or appealing judicial decisions).

The Wisconsin State Public Defender has an Assigned Counsel Division that oversees certification, invoice review, and payments. This division maintains extensive records of the appointments and payments to the private bar. It also works with State Public Defender training staff to include private attorneys in pertinent agency-sponsored training programs.

4. Recordkeeping and reporting

Accurate recordkeeping is critical to the success of a defender program. Given the volume of cases in Orleans Parish, a functional case-management system needs to collect the data described in this section for both internal and external purposes.

For internal purposes, such as equitable distribution of workload, the program needs data regarding the average attorney time spent on different case types. Recordkeeping is also essential to respond to inquiries from clients and their families, inquiries that often include requests for prompt communication with the assigned attorney.

For external purposes, the defender program needs to collect sufficient information to answer reasonable questions that can be anticipated from key stakeholders. The history of indigent defense is a perpetual struggle for adequate resources to ensure competent and ethical representation. Generally, indigent defense providers have to make persuasive, data-driven presentations to funding sources to obtain (and often to maintain) resources.

The defender program's data must allow the program's management to explain the program's work, the connections between the volume of work and the requested resources, and the quality of the work. Thus, the defender program needs to develop and maintain accurate records regarding number of cases, attorney time per case, and other items described in the next section.

C. Data collection

Information technology (IT) operations support the core business function of any modern organization. The implementation of an efficient and effective IT structure is critical to the overall success of an improved Orleans Parish defender program. This subsection summarizes IT functions necessary to support the Orleans Parish public defender staff. A more-detailed list of recommended IT functions and an estimate of IT-related budget requirements are in the Appendix, p. xviii.

The following are critical areas of data collection. Decision makers need to consider the unique circumstances of Louisiana and Orleans Parish to determine whether to collect

additional types of critical data.

1. Number and type of cases

The number and nature of cases handled by the defender program are important as approximate measures of both individual and aggregate workload. The weighted system of assigning cases, described above, p. 17, depends upon accurate data regarding the total numbers of various case types assigned to each attorney. Total cases in each category for the program help document staffing needs and the budget for the private-bar appropriation. In conjunction with data regarding the average cost per case (discussed in the next subsection), this type of data is valuable in estimating the total projected direct-service cost for the program.

2. Attorney time and cost per case

The average cost per case can be largely calculated from data regarding the number of cases and the attorney time per case. Other pertinent variables include staff salaries (including fringe benefits and including both support staff and attorneys) and program operating costs. If the program experiences or anticipates a significant increase in caseload, the data on cost per case can help in preparing budget proposals to increase program capacity.

3. Case dispositions

Data on case dispositions help promote quality by showing, on both an individual and an aggregate basis, the litigation activity of public defenders (and private attorneys accepting appointments). Examples of disposition information collected in Wisconsin include whether a trial occurred (if so, jury trial or bench trial), whether the charges were dismissed or reduced, and the sentence received (if the client was convicted).

Not only is this type of information helpful in supervising staff attorneys, it also helps to respond to inquiries from policy makers. For example, Wisconsin's dispositional data allows the State to estimate the potential impact of converting certain non-violent misdemeanors to non-criminal ordinance offenses (the non-criminal violations do not trigger the right to a public defender; thus, this type of change can save money in the defender budget). If very few defendants are receiving jail sentences, the effect on the judicial system may be different than if a high percentage of defendants receive jail time. Without the data, the defender program cannot respond to these types of questions about proposed legislative changes.

Information about incarceration may show that the defender program successfully advocates for dispositional options that are less costly (and more effective in reducing recidivism) than imprisonment. With growing interest in and information about community-based sentencing options, the defender program can document its success

in presenting the courts with smart and cost-effective sentencing plans.

4. Measures of key case-related activities

Other important information regarding case-related activities includes the use of expert witnesses, investigators, and client service specialists (client service specialists are professionals trained in social work and with expertise in working with clients and their families to develop effective alternatives to incarceration, such as treatment programs and other supportive community services). Similar to data discussed above, this type of data assists both with supervision of staff and with preparation of budget reports and requests. Internally, this information documents the work of support staff (investigators and client service specialists) and also shows the frequency with which individual attorneys enlist their assistance. Externally, this information can show the importance of support staff and expert witnesses (for example, by linking this information with information on dispositions, discussed in the previous subsection).

D. Link between resources and quality representation

A system of accurate case weights, combined with the type of recordkeeping described above, provides a mechanism to estimate the number of cases that the defender program could reasonably handle, given the size of the staff. For example, 70 staff attorneys, with a similar support-staff ratio to the Wisconsin State Public Defender, could handle about 14,000 standard felonies per year (excluding the most-serious cases, in which the defendant faces potential incarceration of 25 years or more for a single offense). Collection of data over time will enable the defender program to determine (and periodically adjust) the relative case weights for other case types, such as misdemeanors, juvenile delinquency proceedings, and early representation (clients taken into custody but ultimately released without formal charges). The capacity of the defender staff can then be estimated in comparison to the anticipated volume of cases.

Following is a hypothetical example of estimating staff capacity for budgeting purposes (using Wisconsin case weights and staff capacity of 200 standard felonies per attorney):

<u>Case type</u>	<u>Case Weight</u>	<u>Attorney Caseloads</u>
8,000 standard felonies	1.0	40
600 aggravated felonies	3.0	9
10,000 misdemeanors	0.5	25
4,000 juvenile delinquencies	0.55	11

In this example, the defender program is responsible for providing representation in four categories of cases, each type requiring, on average, a different amount of time. The program would need 85 attorneys handling full-time caseloads to provide competent and

ethical representation in all cases. Thus, if the program instead has 70 attorneys (full-time equivalent, accounting for attorneys who are part-time or who have additional responsibilities), the program can estimate staff capacity and the resulting number of cases (and thus the projected cost) for the program's private-bar component. The equivalent of 15 full caseloads needs to be appointed to the private bar in this hypothetical example.

E. Budget estimate

In this subsection, we estimate the costs of establishing and operating a client-focused defender eligible for its services. Our estimates are based on the available information about the present volume of cases in Orleans Parish. Because of the dramatic effect of Hurricane Katrina on the present Parish population, we note that re-population could affect the volume of cases (and thus the defender system's operating costs).

Available information suggests that the Orleans Parish public defender currently needs the capacity to provide counsel for approximately 480 new cases each week. Those cases, with varying degrees of complexity, would translate into 296 felony-equivalent cases per week, or 15,400 on an annual basis. We project the following staff and annual funding levels would be necessary to provide quality vertical representation to the clients, based on Wisconsin's experience. These projections can be adjusted to reflect actual levels of operational support that the public defender program receives from Orleans Parish and for prevailing wage rates.

1. Staff Attorneys - We estimate that 70.0 full-time equivalent (FTE) staff attorneys could handle approximately 91% of the cases. (The remaining cases would be appointed to private bar attorneys; see #8, below.) We assume an average salary and fringe benefit package of \$54,000 (average salary of \$40,000, plus a 35% fringe benefit rate).
2. Legal Secretaries - 23.5 FTE legal secretaries would provide a ratio of 1.0 secretary for every 3.0 attorneys. We assume an average salary and fringe benefit package of \$37,800 (average salary of \$28,000, plus a 35% fringe benefit rate).
3. Investigators - 10.0 FTE investigators would provide a ratio of 1.0 investigator for every 7.0 attorneys. We assumed an average salary and fringe benefit package of \$48,100 (average salary of \$35,600, plus a 35% fringe benefit rate).
4. Client Services Specialists (Alternative Sentencing Specialists) - 3.5 FTE client service specialists would provide a ratio of 1.0 client services specialist for every 20.0 attorneys. We assumed an average salary and fringe benefit package of \$42,800 (average salary of \$31,700, plus a 35% fringe benefit rate).
5. Attorney Supervisors - Four full-time equivalent attorney supervisors would provide an average supervisory ratio of 17.5 attorneys per supervisor. We assumed an average salary and fringe benefit package of \$67,500 (average salary of \$50,000, plus a 35% fringe benefit rate).
6. Management - We recommend that in addition to the Chief Defender, two full-time Deputy Chief Defender positions be established, each with a compensation package of \$87,750 (\$65,000 salary plus a 35% fringe benefit rate): A Deputy Chief Defender

for Legal Services would oversee the work performed by the attorneys, attorney supervisors, secretaries, investigators and client services specialists; and a Deputy Chief Defender for Administrative Services would oversee the personnel described below in the next subsection.

7. Administration - 1.0 FTE for payroll and benefits (\$35,000 salary plus 35% fringe); 1.0 FTE for Human Resources, Staff Development and Training (\$50,000 plus fringe); 3.0 FTE information technology professionals (with an average salary of \$45,000, plus fringe); 3.0 FTE for finance, purchasing and accounts payable, including auditing and paying private bar attorneys (a total of \$100,000 plus fringe for the three); and 1.0 FTE for reception and administrative support (\$25,000 plus fringe).
8. Private Bar funding - We project that \$770,000 per year would be needed to pay private bar attorneys for the cases that the staff attorneys would not be able to handle due to time constraints or conflicts of interest. This projection assumes an hourly rate of \$60.
9. Supplies and Services - An annual services-and-supplies budget of \$1,100,000 is projected to be needed for the remaining program costs. These costs include rent, supplies, IT, expert witness and interpreter fees, phones, transcripts, etc.

The total funding needed to run the Orleans Parish public defender program is projected to be \$8.2 million per year. Another \$1,150,200 will be needed to purchase computer equipment, licenses, peripherals, and to develop a management information system. IT requirements are detailed in Appendix p. xviii. Additional funding of \$305,000 will be needed in the first year for one-time costs associated with desks, chairs, and other equipment.

We also estimate that the cost to retain private bar attorneys (at \$60 per hour) to clear up the current backlog of cases would be an additional \$1,069,000. That figure will continue to grow until sufficient resources are provided to handle all the new cases that enter the system each day.

In sum, we estimate that the first-year cost for the Orleans Parish public defender program will be \$10,724,200, and the subsequent annual cost will be \$8,200,000. As noted previously, local officials will need to adjust these estimates on the basis of the local population, economy, and trends in criminal justice (most importantly, changes in the volume of criminal cases).

It is imperative that a stable and adequate funding source be established for the Orleans Parish public defender program. Without that commitment, it will remain impossible to provide defendants with the representation to which they are constitutionally entitled.

VII. Conclusion

The City of New Orleans, along with the entire Gulf Coast, was terribly affected by Hurricane

Katrina; the city's criminal justice system was not exempt. But there are positive signs that indicate that the system is already moving forward, changing the ways that people and cases proceed through the system. The professionals in the system have demonstrated numerous times their capacity to adapt and change; examples of ingenuity by judges, Sheriffs Department officials, defense counsel, and the District Attorney's Office were reported to us repeatedly during our interviews.

There is still much to do, however, and all segments of the system need assistance in bringing together a new, more-effective, and fair criminal justice process. Our focus on the defense of arrested indigents has allowed us to make recommendations that we believe, if implemented, will result in a fairer, more cost-effective, and just system.

Although these recommendations will by no means "cure" all the problems of the system, they will go a long way towards the eventual goal for the justice professionals in New Orleans: better justice for its residents.