

THE NORTH CAROLINA STATE BAR

JOURNAL

SPRING
2017



IN THIS ISSUE

Title IX Sexual Misconduct Cases *page 8*

Melvin F. Wright to Retire from CJCP *page 14*

The Public Defender System in North Carolina *page 24*

The Public Defender System in North Carolina—Its History and Future

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Public defender offices have existed in North Carolina since 1970, evolving into a system serving approximately a third of the state, complemented by a system of private assigned counsel (PAC) and contract attorneys. While public defend-



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er offices have many recognized benefits, institution of public defender offices has proceeded in a piecemeal fashion.

However, the recent recommendation of the Criminal Investigation and Adjudication Committee of the North Carolina Commission on the Administration of Law and Justice (NCCALJ) to establish a more comprehensive system of public defender offices may reinvigorate the expansion process and foster implementation of a cohesive plan. This article describes the history of public defender offices in the state, their challenges and advantages, and the potential for their growth.

The Slow March from *Gideon*

In 1963, in *Gideon v. Wainwright*, the United States Supreme Court recognized a

constitutional right to the appointment of counsel for felony charges in state courts,¹ and later Supreme Court decisions extended the right to counsel.² Immediately following the *Gideon* ruling, the state of Florida, from whence *Gideon* arose, moved to create a statewide public defender system to safeguard this important right.

North Carolina, which had joined Florida in opposing the requirement to provide counsel in an *amicus* brief, soon enacted a law providing for the appointment of counsel for indigent defendants charged with felonies and, at the judge's discretion, misdemeanors,³ and the state Senate directed the Legislative Council to study, investigate, and

report on the advisability of implementing a public defender system. The council's committee on the subject examined the PAC system in the state at the time and noted support for PAC, but also concerns about attorneys' available time and resources, experience, and timely appointment, as well as the system's effect on the length of defendants' pretrial detention and the undue burden on attorneys who appeared in court-appointed cases for "miserly sums."⁴ The committee ultimately left it to the full General Assembly whether to draft legislation to institute a public defender system, but it made recommendations as to what such legislation should contain if enacted, including a

statewide system “in keeping with the uniform System of Courts now being developed for the state.”⁵

The developing “uniform system” referred to a contemporaneous effort to overhaul North Carolina’s hodgepodge lower court system. To address the problem of inconsistency in courts across the state, in 1955 the North Carolina Bar Association (NCBA) created the Bell Commission, which made its recommendations for overhauling and unifying the court system in 1958, leading to North Carolina voters’ passing a constitutional amendment allowing for the system in 1962.

In 1963 the General Assembly created the North Carolina Courts Commission to prepare and draft legislation to reconstruct the court system by January 1, 1971. In June 1967, the commission was further mandated by the state Senate to study the feasibility of establishing a public defender system in the state.⁶

The Courts Commission report in 1969 followed the road map of the Legislative Council’s study. The commission first looked at the assigned counsel system in light of federal court rulings and a recent North Carolina case conferring the right to counsel more broadly than *Gideon*, and concluded that North Carolina should expand its coverage accordingly.⁷ The Courts Commission’s criticisms of the assigned counsel system echoed those of the Legislative Council as to lack of uniformity, low fees placing an undue burden on PAC, and disparities between attorneys’ experience and the seriousness of the cases to which they were assigned. Conversely, the commission identified the advantages of a public defender system as providing experienced, competent counsel through specialization and decreasing costs in large, populous jurisdictions. The commission dismissed the main concern that public defenders might be less zealous or independent than they should be, and recommended that public defender offices be created in five mostly single-county, metropolitan districts—Mecklenburg, Guilford, Forsyth, Wake, and Cumberland/Hoke (which at the time comprised the 12th Judicial District)—and for “experimental purposes” two more rural, multi-county districts—the 25th and 7th Judicial Districts.

Only two of the Courts Commissions’ recommended sites were selected as pilot projects.⁸ In 1969 the General Assembly

established public defender offices in the 12th and 18th Judicial Districts as of January 1, 1970.⁹ Wallace C. (Wally) Harrelson took the oath in Guilford County on that date as North Carolina’s first chief public defender, and Sol. G. Cherry started a month later in District 12. In addition to Harrelson, the Guilford office employed two assistant public defenders, a legal assistant, and an investigator. The Guilford office at that time handled cases involving felonies, misdemeanors carrying more than six months’ punishment or fines greater than \$500, juvenile delinquency, post-conviction proceedings, and all appeals to the North Carolina and United States Supreme Courts. The Cumberland/Hoke office was similarly small and operated out of a trailer until 1975.¹⁰

As part of a 1971 study of public defender systems, a review by the Virginia State Bar Board of Governors of the new North Carolina public defender offices revealed positive impacts. The board heard favorable comments from judges and others involved with the public defender system. Those interviewed included two of Harrelson’s former clients, who praised his work on their cases and the interest he showed in them, and one maintained that “nobody, not even the best retained attorney, could have done a better job.”¹¹ The board further found in a limited comparison to non-public defender districts that the offices achieved lower costs while getting better outcomes, including greater rates of dismissals, convictions resulting in probation and suspended sentences, and terminated trials.

Defender office expansion continued in the years that followed, albeit slowly and not very steadily. According to former Cumberland County public defender, now Superior Court judge, Mary Ann Tally, the reason for the slow progress was that the process of creating a public defender office was treated like a local bill, instigated at the behest of an individual legislator to benefit his or her district, without much broader consideration as to whether public defenders might efficiently and cost-effectively serve other areas.¹²

In 1973, a public defender office was instituted in Buncombe County, with the chief public defender appointed by the senior resident superior court judge.¹³ The following year, the Office of Special Counsel was established to represent respondents in involuntary commitment proceedings.¹⁴

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Legislation creating public defender offices in Judicial Districts 26 and 27 (later 27A, Gaston County) was passed in 1975, designating the governor as the appointing authority.¹⁵ That year, the first Public Defender Conference was held in Atlantic Beach in a hotel room with the speakers addressing attendees from between the beds.¹⁶

Not until 1981 was another public defender office created, the then-District 3 Public Defender Office (later the Pitt and Carteret County Offices).¹⁷ Spurred by Tally and others,¹⁸ that year the legislature also created the Office of the Appellate Defender.¹⁹ From 1983 to 1990, four other offices followed in Districts 15B (Orange and Chatham Counties),²⁰ 16A (Scotland and Hoke),²¹ 16B (Robeson),²² and 14 (Durham).²³ Meanwhile, reportedly related to the election of a Republican governor, in 1985 appointment authority for all chief public defenders was vested in their senior resident superior court judges.²⁴ However, an exception was made in 1987, when appointment authority for the 16B public defender was conferred on the “other” resident superior court judge,²⁵ who retained that power until 1997, when Senior Resident Superior Court Judge Joe Freeman Britt had left the bench and appointment authority was transferred to the new senior resident.²⁶

In 1991 the General Assembly required the Administrative Office of the Courts (AOC) to compare the expenditures on PAC in Districts 4A, 5, and 10 between May 1991 and April 1992 to what it would have cost to have public defender offices there, with the explicit legislative intent of implementing an office in any of those jurisdictions where it would save money.²⁷ The AOC was also to report on an analysis of the cost-effectiveness of the existing public defender offices. The AOC found that almost all of the existing

offices were cost-effective under at least one of three methods of comparison to PAC spending.²⁸ As to the three districts under consideration, the AOC concluded that public defender offices would not have produced cost savings because, in an effort to prevent the creation of new offices, the three districts had each undertaken short-lived cost-cutting measures such as flat-fee and reduced attorney payment schemes as well as more efficient court structuring.²⁹ In light of these underwhelming results, the only other defender office established in the 1990s was the Office of the Capital Defender, initiated in 1999 as a pilot program within the Office of the Appellate Defender.³⁰

In 2000 the Commission on Indigent Defense Services and the Office of Indigent Defense Services (collectively referred to as “IDS”) were established and given responsibility for the provision of indigent representation, including defender offices.³¹ Since IDS began operating fully in 2001, it has overseen the implementation of five new legislatively created public defender offices covering Districts 21 (Forsyth),³² 1 (Camden, Chowan, Currituck, Dare, Pasquotank, and Perquimans),³³ 10 (Wake),³⁴ 29B (Henderson, Polk, and Transylvania),³⁵ and 5 (New Hanover).³⁶ IDS has additionally separated the Office of the Capital Defender into its own entity and, at the request of local officials, expanded the First District Public Defender Office to cover the Second District as a regional office. Although IDS has encouraged the creation of additional public defender offices where it would be more cost-efficient than paying private counsel to handle the cases, institution of new offices in IDS’s tenure has often been at the instigation of local actors. Moreover, IDS is statutorily required to consider public comment on whether creating or expanding an office is advisable and welcomed. Ultimately, enabling legislation for new offices is required and is generally left up to the area’s legislative delegation, making the current process not dissimilar from the pseudo-local bill method of the past.

Notwithstanding this incremental approach, in addition to the statewide defender offices, 16 public defender offices presently serve 31 counties in 17 judicial districts. The offices employ slightly over 275 assistant public defenders and handle around a third of the indigent cases in the state, covering a variety of case types includ-

ing adult criminal capital and non-capital; juvenile delinquency; abuse, neglect, dependency, and termination of parental rights; involuntary commitment; child support contempt; specialized treatment courts; and others. Because public defender offices cannot handle all of the cases they cover due to conflict of interest and workload considerations, PAC and/or contract attorneys receive overflow cases via assignment systems that the offices manage. Such a mixture of public defenders and private counsel working with a coordinated appointment process is endorsed by the American Bar Association (ABA).³⁷

Public Defender Office Challenges and Benefits

In addition to the constraints on proliferation of public defender offices caused by the pseudo-local bill approach and the continued measured process of creating offices, other challenges may have contributed to public defender offices’ not taking deeper root in the state. Early concerns about public defenders included the ideas that defenders might not fight for their clients or that they would be too “friendly” with the prosecution.³⁸ While these fears do not appear to have been realized, they implicate a much bigger problem of public defenders being worn down by years of low pay, overwork, and lack of resources,³⁹ which could lead over time to the defenders’ leaving to pursue other career paths.

From a broader standpoint, opening a public defender office may not make economic sense in certain areas. Although the costs of operating a public defender system are more predictable than costs for PAC, it is difficult for public defender offices to achieve cost savings given the extremely low current hourly rates for PAC. Particularly where court caseloads are low, providing representation through public defenders at a higher cost that includes overhead is less justifiable than paying private counsel. Similarly, the lack of flexibility inherent in having an institution handle cases can make fluctuations in case volume problematic. Starting an office requires initial outlays by the state and the affected county or counties, as the latter are responsible by statute for providing office space.⁴⁰ Moreover, harkening back to the Courts Commission’s concerns about zealotry and independence, appointment of chief public defenders by

their local senior resident superior court judges can create the appearance that a public defender may be beholden to the judge and that the office might thus restrain its advocacy. Considerations like these have led the ABA to emphasize the importance that the defense be wholly independent of the bench.⁴¹

Despite these challenges, public defender offices offer many benefits. The Courts Commission recognized the ability to specialize as one of the main strengths of public defender offices, as did many former chief public defenders (now judges and a district attorney) interviewed for this article. In fact, public defenders now not only specialize in the practice of criminal law, but have also developed in-house concentrations on areas such as DWIs, forensics, immigration, and drug trafficking. The former public defenders additionally cited increased opportunities for training and in-house support as virtues of public defender offices. For example, Superior Court Judge Jesse Caldwell stated that the abilities “to concentrate and focus, and to get resources and training from the [UNC] School of Government, are major advantages of a public defender,” leading to better skills and more expertise.⁴² District Attorney Andy Womble noted, “When you are surrounded by an office and support, cases get resolved quicker and in the manner they should without having to reinvent the wheel.”⁴³ Offices can provide environments of *esprit de corps* to rally attorneys, and having “a place of refuge with colleagues who can understand, help, and give support is so important,” according to Tally.⁴⁴

In terms of administrative support, public defender offices can provide not only legal assistants, but also investigators and other staff that private attorneys would have to request (and not necessarily get) from the court. Public defender offices are able to supervise and mentor attorneys to ensure quality and to foster development, and, when needed, to provide remediation such as training or addressing problems with attorneys. Many also run internship programs that serve the dual purposes of assisting attorneys and of training and tapping future public defenders. Furthermore, public defender attorneys are available to each other for brainstorming and help on cases. Many offices offer opportunities for second-chairing. Public defenders often maintain repositories of information such as brief and

motion banks and collections of transcripts and research.

Public defender offices also support the private bar by answering questions, sharing resources, and hosting training. Through their institutional presence, they can provide an organized counterweight to district attorney offices, and thus can influence on a broad scale how cases are processed. Both Womble and Superior Court Judge Bryan Collins believe the advent of public defender offices in their districts elevated the overall level of criminal practice,⁴⁵ and Collins added that a public defender can be “the point person for the criminal defense perspective,” affording the defense a seat at the table with other court system institutions.⁴⁶

As the agency dedicated to keeping an eye on the overall local indigent defense system that has a constant presence in court, public defenders can recognize and address trends that negatively impact clients. Being courtroom mainstays also allows public defenders to achieve efficiency in handling cases, which can lead not only to expedited case resolution, but also to better case outcomes for clients. In fact, recent research by IDS’s Systems Evaluation Project suggests that, on average, the public defender system excels at certain key performance indicators such as avoiding felony convictions and convictions of the highest charged offenses.⁴⁷ Moreover, sheriffs have noticed positive impacts on the size of jail populations from having public defenders.⁴⁸

Aside from achieving good results in individual cases, public defender offices can concentrate efforts to improve clients’ overall situations. Offices have been laboratories of experimentation and innovation by creating job banks for clients, providing consistent representation at first appearance court, promoting institution of specialized courts, and leading in systemic reform efforts including the elimination of racial and ethnic inequities. Offices have engaged in community outreach like having staff serve on local criminal justice and other boards, making rights advisement cards, assisting with mock courts, participating in veteran stand down events, and volunteering for events serving the homeless and others in need. In their free time, individual public defender staffs have taken unique outreach paths such as leading yoga classes for jail detainees and assisting with local basic law enforcement training.

Communities may also benefit from public defenders’ subjection to scrutiny and the public’s ability to hold them accountable for uniform, quality services. Public defender offices maintain employee hierarchies, which provides a clear outlet for clients, their families, and other concerned citizens to voice concerns about the quality of services provided. Further, public defenders are uniquely positioned to safeguard ABA values. Under several national standards, defense attorneys should not assume excessive caseloads that would inhibit client representation.⁴⁹ While extremely high volume can at times humble a public defender office, its managing attorneys may be able to change their case and administrative assignment practices to accommodate fluctuating caseloads.

The ABA also calls for defenders to be “supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards,” and for “parity between defense counsel and the prosecution with respect to resources.”⁵⁰ Public defender offices are able to collect and analyze data and to advocate for appropriate funding of indigent defense in their communities, and may further capitalize on their community relations to expand their research capacity and to implement systemic change, such as by partnering with larger institutions and agencies.

Perhaps the highest praise for public defender offices was related by Womble. As he put it, when officials from the Second Judicial District were considering how to make their system run better, they realized “the missing piece of the fair and efficient administration of justice was a public defender office.”⁵¹ Womble continued, “When an office is operating well and [the attorneys] care about their work, every citizen can have faith in the outcome.”⁵²

The Future of Public Defender Offices

As noted above, the 1965 Legislative Council report envisioned a statewide public defender system. However, despite being a re-emerging topic of discussion over the years, statewide expansion of public defender offices has never been realized. In the late 1970s and in 1980, several state leaders expressed interest in an expanded public defender system.⁵³ As in the 1960s, the main arguments for this proposition were assumed cost savings and development of expertise. Accepting the call of Governor Jim Hunt,



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the Courts Commission looked into the issue and found that the five existing public defender offices were working satisfactorily,⁵⁴ but stopped short of endorsing statewide expansion, instead recommending that further study be made of extending public defender offices into 13 additional districts and limiting their caseloads to ensure the continued vitality of the private bar.⁵⁵ As recently as 2011, the North Carolina House of Representatives proposed a statewide defender system,⁵⁶ but this provision did not make it into the final budget bill.

Still, the idea is not dead. In May 2015, in one of his first acts as Supreme Court of North Carolina chief justice, Mark Martin convened a commission in the tradition of the Bell Commission in the 1950s and the

Medlin Commission in the 1990s to evaluate the court system and to make recommendations for improvement. The NCCALJ began meeting in September 2015 and established as one of its five committees the Criminal Investigation and Adjudication Committee, which further categorized its work and focused the assessment of the current indigent defense system in a subcommittee. The subcommittee issued a comprehensive, evidence-based report, which the committee largely adopted in October 2016. The report expressed a preference for public defender offices and recommended the establishment of a statewide public defender system for the reasons that public defender offices confer internal and external oversight, supervision, and support of counsel providing indigent representation; are supported by both local stakeholders and national standards; and, on average, can provide better, more efficient, and timelier services.⁵⁷

It remains to be seen whether the General Assembly will act on the committee's recommendation of a statewide public defender system, and whether sufficient funds will be allocated to make it practical. If so, it will mean a significant change for the state, its court system, and its indigent accused. In light of the experience in the state with public defender offices thus far, the evidence suggests that the change will be positive. ■

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Endnotes

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