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Division Autonomy Crucial in Defender Restructuring

By Robert C. Boruchowitz, John A. Strait and Phillip H. Ginsberg

Jon Ostlund's optimistic article in the September Bar Bulletin on King County's new public defense structure both underestimates the policy advocacy strength of the former nonprofit system and glosses over what he recognizes will be "the inevitable conflicts" that a large county public defender department faces, saying that large offices such as Los Angeles's have been able to manage the problem.

While it is true that "a place at the table" for a county employee defender is important in policy development, it also is true that since 1969 King County's nonprofit defenders have established a well-earned reputation for advocating for their clients and for policy change that improves the justice system. They often have initiated such changes by bringing together prosecutors, judges and law enforcement leaders.

LA Defender Is not a Model

Mr. Ostlund ignores the significant criticism of the LA Defender that has been documented by The Sixth Amendment Center. The Center noted that a 2009 report, by an experienced former project director for the National Study Commission on Defense Services, found that the lack of independence of the defense function in Los Angeles leads to many problems, including LACPD misdemeanor attorneys disposing of "1,200 cases per attorney per year, about three times the recommended national maximum."

Mr. Ostlund also fails to address the very substantial ethical and practical difficulties of merging four independent not-for-profit public defender entities that for decades have routinely represented adverse co-defendants - defendants who become witnesses adverse to other agency clients. This includes the ethical difficulties caused by imputed conflicts of interests and imputed confidentiality in taking decades of conflicted representation and combining them in the same legal entity under a single public defender agency.

These are extremely difficult ethical issues and the County's Memorandum of Understanding (MOU) with the four former nonprofit offices largely leaves unresolved how these issues will be resolved in the future. Having thousands of conflicts in four existing offices presents a far different situation than starting a brand new system with a county defender agency as Whatcom County did.

While the MOU is apparently based on an assumption that California conflicts rules (not the same as Washington's) will be followed here, with screening as an adequate solution to these complex conflict and confidentiality issues, there is no certainty that California standards will be adopted by the Washington Supreme Court. In other settings, the Washington Supreme Court has rejected California's approach to conflicts of interest and confidentiality under California's somewhat unique rules.

The difficulty of protecting the confidentiality of former clients' files and records from improper access in the new combined office by attorneys and/or adverse non-lawyer personnel working on adverse clients' cases is a substantial barrier to ethical and effective consolidation of the four former public defender agencies into a single agency or even two or three divisions of a county department. One troubling example among many is access to information in client files from one of the offices (now divisions) documenting negotiations on behalf of a former client to testify against a different agency's client in gang prosecutions. Such "snitch deals" present obvious risks to health and safety of the client or former client if that information is shared and or available in a single combined agency to others who might retaliate, but who need such information for impeachment.

Using the California experience, under California law, without detailed and correct analysis of Washington standards is an invitation to an ethical train wreck. Currently, no satisfactory solution post-MOU and following any consolidation has been established.

Conflation of four offices into three or two, which County Executive Dow Constantine originally proposed, raises significant challenges. There are law firms in King County that represent far fewer clients that when examining the multiplicity of conflicts of interest have decided not to complete mergers they had planned with other firms.

Defender Divisions Should Retain Autonomy of Hiring and Independence in Policy Advocacy

There is no reason to look to Los Angeles when we have 43 years of experience of a strong, independent model of public defense right here. What we should do is to preserve in the new structure the independence and autonomy that the County has recognized as important in the existing MOU that it signed with the four former nonprofit offices that now are divisions within the King County Department of Public Defense.

In particular, the division directors need to have autonomy in hiring their own staff and they need to be truly independent in their decisions about how to represent clients, even if that means bringing motions or advocating for policy changes that are inconsistent with the views of the County Executive or the County Council.

The MOU provides that the directors and deputy directors are "free to advocate for policy positions on public defense structure, independence, client representation and client population issues..." The County "will work to incorporate similar protections for Division Directors in the final structure" of public defense adopted by the County.

The proposed charter amendment has two important provisions that should be a foundation for implementing this independence. It states: "The department of public defense shall also foster and promote system improvements, efficiencies, access to justice and equity in the criminal justice system." Elected officials "shall not interfere with the exercise of these duties by the department."

As the County Council decides on an implementation ordinance, it should make sure that those protections for the division directors are maintained. And before the County eliminates one or more of the new divisions in an effort to be more "efficient," it needs to address the extraordinarily complex set of conflicts of interest that such a decision would create. The

impact on thousands of clients whose lives and liberties are at stake and on the court system itself could be devastating.

The County has addressed the pension issues as required by the state Supreme Court decision. It has in place a Memorandum of Understanding that can guide its ongoing defender system. While there is the opportunity to improve public defense as a new structure develops, the County should maintain the openness, caution and principles of independence that marked the MOU development. Interested citizens should contact their councilmembers and the County Executive to share their concerns.

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