



## THE FAILURE OF THE NEWLY CREATED INDIGENT DEFENSE COMMISSION

On January 15, 2009, the West Virginia Indigent Defense Commission (“IDC”) issued its Report to the West Virginia Legislature. Created during the 2008 Legislative Session, the IDC was intended to oversee the Public Defender Services (“PDS”) and address problems associated with providing Constitutional representation to indigent individuals. At first blush, the voluminous size of the Report and the distinguished list of members appointed to the IDC were encouraging signs that the problems plaguing the payment of appointed private counsel might finally be addressed.

However, a closer reading of the Report, including the written objection to the Report from one of the IDC members, revealed that the IDC may unfortunately become

another political tool to promote continued malfunction of the Public Defender Services.

The Report, consisting mostly of appendices, was 339 pages long and offered the following five recommendations which, in the view of the IDC, were necessary to correct the problems of indigent representation: (1) activate four new public defender corporations; (2) increase compensation of appointed counsel; (3) require annual report from the State Bar and West Virginia Supreme Court of Appeals as to the hourly rate of pay; (4) notification of Judges in counties with higher than average private attorney billing; and (5) require additional CLE for all appointed counsel.

Despite overwhelming criticism and complaints from all across the

state about the inability of the PDS to pay private attorneys on time (i.e. average of 8 months in arrears), the recommendations from the IDC are at best failures, and reflect the true agenda of the PDS. However, I do not place blame with the IDC itself.

Indeed, as IDC member William Richardson, Jr., Esq., explained in his written objection to the Report, the IDC only met for the first time in November 2008. There has not been the necessary analysis, nor extensive consideration of the underlying premises which plague the problems of the PDS. Instead, as Mr. Richardson appropriately summarized, the majority of the IDC has been rushed to judgment in issuing this Report, and lacks sufficient information to form the basis of recommendations that will

provide indigent defense services throughout the state.

Mr. Richardson deserves commendation for staying true to his principles and doing the work for which he was appointed. He could have merely acquiesced to the will of the PDS, but instead he objected to the Report because it sought to promote, under the cover of the IDC, an unproven premise that public defender corporations are the solution to the problem.

Indeed, the establishment of public defender corporations has been an ongoing debate which has been fueled by the personal preference of the PDS. The inclusion of more corporations as the lead recommendation of the IDC (without any significant evaluation) reflects that the IDC has already been unknowingly subjected to the political objectives of the PDS. Rather than issue any recommendations, which was unnecessary under the statutory language, the IDC could have issued an initial Report reflecting the appointment of its members and the initial inquiries being pursued. Instead, the IDC made five significant recommendations that appear to be no more than a retread of positions that have undermined the use of appointed private attorneys.

To be clear, I am 100 percent in favor of the need to increase pay for private attorneys. However, increasing pay without correcting the insolvency and continuing debt of the PDS will only hinder the payment process. Given this clearly identifiable problem, the failure to include as a recommendation a request for more money to pay off the arrears signals a red flag as to the underlying motives of the IDC and the PDS.

It is a red flag that continues to be raised, and unfortunately disregarded by those charged with correcting the sinking ship that has become the PDS. The call for correction of the inability to pay private attorneys in a timely manner has been raised by attorneys and the judiciary alike. The solution is not found in requiring more CLE hours for

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an already over-worked and strained private panel of attorneys (Recommendation number 5 of the Report), but in paying the attorneys in a timely fashion. The solution is not found in creating more corporations, as reflected by the difficulties being experienced on the First Circuit which does have a private corporation (see letters of Judge Wilson and Attorney Nogay attached as Appendix B to the Report). More importantly, the solution to a solvency problem is not raising the hourly wages (even though they desperately need to be increased) when the PDS cannot pay what is already owed from last year.

Rather, the solution needs to be found through open discussion free of the preconceived notion that public defender corporations are the only solution to the problem. The overlooked fact is that even if private corporations exist in every county, there is still a need for the appointment of private attorneys – abuse/neglect matters require at least two appointed counsel in addition to a paid Public Defender.

The IDC is comprised of a remarkable collection of individuals that can achieve significant resolution to existing problems if given the time and appropriate deliberation. IDC member Richardson outlined this desire in his written objection to the Report, and it is hopeful that this body will heed the red flag being waved by Mr. Richardson and the appointed counsel throughout this state. **WVL**