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**STATUS OF INDIGENT DEFENSE IN NEW YORK:  
A Study for Chief Judge Kaye's Commission  
on the Future of Indigent Defense Services**

FINAL REPORT

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## **Executive Summary**

### **Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services**

In May 2004, Chief Judge Judith S. Kaye of the State of New York appointed the Commission on the Future of Indigent Defense Services (the Commission) to study the effectiveness of criminal indigent defense services in New York and to consider alternative methods of providing such services. Specifically, the Commission was charged with examining: (1) the funding of indigent defense services; (2) the effectiveness of the various indigent criminal defense systems in the state; (3) the quality of indigent defense representation provided and the adequacy of attorney training; and (4) the availability and quality of ancillary services such as expert, investigative and interpreter services. In addressing these important issues, the Commission sought the assistance from The Spangenberg Group to perform a large-scale statewide indigent defense study.

Formed in 1985, The Spangenberg Group (TSG) has conducted research in all 50 states and provides consultative services to developing and developed countries that are reforming their legal aid delivery programs. For over 20 years, TSG has been under contract with the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants to provide support and technical assistance to individuals and organizations working to improve their jurisdictions' indigent defense systems. Including New York, TSG has conducted comprehensive statewide studies of indigent defense systems in 40 states. In addition, since 1989, TSG has conducted six studies in New York City and one statewide civil legal needs study in New York State.

Initial work for this study took place between January and March 2005. During this time, TSG attended four public hearings held by the Commission and listened to testimony from over 85 interested persons across the state and met with key members of the New York State Association of Counties, the New York State Unified Court System and the New York State Defenders Association (NYSDA). We also compiled and reviewed existing data, reports and other information from the New York State Comptroller, the Indigent Legal Services Fund, and NYSDA.

The main phase of the study took place between September 2005 and March 2006. During this time, TSG conducted extensive reviews and analysis of relevant New York statutes and case law, indigent defense data, and transcripts of testimony from each of the Commission's public hearings. After creating a detailed site protocol, TSG staff and consultants conducted site work in 22 select counties, including all five New York City boroughs. We met with many key persons involved with the indigent defense systems in these counties, including: judges in the county, supreme, district, city, and town and village courts; attorneys and supervisors employed by the institutional providers (i.e., public defender, legal aid, or conflict defender); 18-B attorneys; 18-B administrators; private attorneys; prosecutors; and county personnel. In all, we conducted 78 days of site work and met with well over 350 people.

The result of our extensive statewide study is a highly comprehensive report that documents the issues facing New York's indigent defense system today. In the final chapter of

our report, we issue a total of 55 findings that - based on our experience - address these issues and the need for reform. Here we summarize the most salient findings:

## **Statewide System**

New York's indigent defense system is in a serious state of crisis. The "system" is a patchwork composite of multiple plans that provides inequitable services across the state to persons who are unable to afford counsel. Since 1965, sixty-two counties have created their own systems that suffer from a lack of uniformity, oversight and an acute and chronic lack of funding. The result is a fractured, inefficient and broken system. Every day – and for years – this dysfunctional system subjects indigent adults and children across the state to a severe and unacceptable risk of being denied meaningful and effective representation in violation of their state and federal right to counsel.

This crisis cannot be adequately addressed without a substantial increase in statewide indigent defense funding. The counties, which currently provide 64 percent (80 percent if the state's Law Guardian expenditures are excluded) of the indigent defense funding in New York State, cannot shoulder this burden. The state, having a constitutional responsibility to ensure the provision of indigent defense services, must relieve the counties of their burden and appropriate sufficient general funds to support the system. In doing so, New York would join 28 other states in the country that fully fund their indigent defense systems.

Unfortunately, creating a complete and accurate picture of New York's current indigent defense system, including caseloads and costs, is nearly impossible because there is no single source to provide reliable, statewide indigent defense data. Complete and accurate entry of relevant data into the state's criminal justice data system must occur. The counties' self-reported data is frequently incomplete, inaccurate, or missing. In the absence of complete, reliable and verifiable data, the state cannot fully and properly address the caseloads and funding needs of the counties.

At the conclusion of our comprehensive review of New York's indigent defense system, we found that it fails to comply with each of the American Bar Association's Ten Principles of a Public Defense Delivery System. In violation of the first of these principles, New York fails to ensure the independence of its indigent defense providers who are too often subject to undue interference from the counties that fund them. New York also lacks statewide enforceable standards to govern the performance of attorneys providing indigent defense representation, and in some areas, substandard practice has become the acceptable norm. Institutional providers lack both standards and sufficient resources to allow them to control workload and ensure quality representation. Providers are burdened with heavy caseloads, inadequate staff and salaries, poor technology and other support resources, and numerous court dockets to cover. In order to handle their numerous dockets and difficult workload, staff attorneys are often assigned to a court docket rather than to a client, causing a lack of continuity in representation that is difficult for public defender and legal aid clients.

Throughout the state, indigent defendants suffer from a serious lack of contact from their attorneys. Too often, the only attorney-client contact takes place in court. This lack of client

contact is made worse by inadequate access to interpreters, both in and out of court. Furthermore, the provision of investigative and expert services is sorely lacking throughout the state.

In many parts of New York State where minorities comprise a disproportionate share of indigent defendants and inmates, the effects of this indigent defense system in crisis are disproportionately felt by minorities.

Because New York lacks uniform standards and procedures in determining eligibility for appointed counsel, subjective and sometimes disparate eligibility determinations are made across the state, and competing concerns such as county funding and workload may become inappropriate factors in the determinations. Moreover, after the increase in 18-B attorney fees in 2003, many counties increased their focus on cost-saving measures. Some assigned counsel programs increased their focus on scrutinizing and cutting 18-B vouchers, and some counties created new conflict defender offices or shifted additional workload to existing providers but often without providing sufficient additional resources.

The problems facing New York's indigent defense providers – including inadequate resources, insufficient client contact, and inadequate provision of expert and investigative services – are made more troubling by discovery practices and other prosecutorial policies with which they are faced. Across the state, prosecutorial practices and policies contribute to severe injustices in New York's indigent defense system that, even if legal, raise serious ethical concerns. For instance, some prosecutors provide little or no discovery in many cases; others routinely fail to provide the defense with important discovery material until hours or minutes before a contested hearing or trial. This withholding of discovery not only tends to prolong the disposition of many cases, thus preventing efficient case processing, but it also severely impedes the quality of representation defense counsel is able to provide. The scales of justice are further tipped in favor of the prosecution in terms of funding, as the resources of the prosecution in New York State far outweigh indigent defense resources both in terms of dollars and in-kind resources that cannot be quantified.

Over the past decade, the climate of indigent defense in New York has changed significantly with the emergence of both collateral consequences and specialty court dockets that have increased the workload and responsibilities of providers. Unfortunately, while the collateral consequences of a conviction can in some cases be more damaging to a defendant than a criminal sentence, indigent defense attorneys are often unprepared or unable to inform the defendant of those collateral consequences. In addition, with the creation of more and more specialty courts, the providers must allocate staff to handle additional dockets and cases that usually take longer to reach a disposition.

Although not part of the Commission's charge, we found that family court matters are an integral and inextricable part of New York's indigent defense system. In many counties, the indigent criminal defense providers also provide representation to adults in family court. These family court cases often comprise a significant portion of a provider's workload, but they are not always tracked separately from criminal cases in terms of caseload and costs. Like the provision of indigent defense representation in criminal cases, the provision of representation in family



court is a severely fractured and under-funded system, and one that is quite disparate from the Law Guardian Program that provides for the representation of children in family court.

## **Upstate New York**

Across the state, institutional providers are sorely lacking in available resources. This lack of resources manifests itself in a number of ways. For example, due to a lack of funds and insufficient staff, attorneys often lack sufficient training and supervision. Many new attorneys described their training as essentially “trial by fire.” Furthermore, in order to address the inadequate salaries that are available to staff attorneys, many institutional providers are staffed with part-time or full-time defenders that, while handling a difficult indigent defense workload, have competing private practices.

Similarly, many assigned counsel are subject to few qualifications, training requirements or other rules for being on an 18-B panel, and little meaningful oversight once on the panel. Often, judges are the only the quality-control mechanism for the assigned counsel panels.

Despite the requirements of the County Law, some counties have neither a formal assigned counsel plan nor a formal assigned counsel administrator. In some cases, the institutional provider is charged with administering the assigned counsel plan which falls under the provider’s budget, creating serious ethical concerns in conflict of interest cases. In addition, although the law requires that “the services of assigned counsel be rotated and coordinated by an administrator,” many cases are simply assigned by judges on an ad hoc basis.

In city and district courts across the state, many defendants are not afforded counsel for violations and some minor misdemeanors in violation of their state and federal right to counsel. Some judges lack awareness or understanding of the law, and others do not follow the law. Clear and formal statewide standards and procedures on the requirements and appointment of counsel are strongly needed.

### *Town and Village Courts*

We believe that major reform is needed to remove the numerous barriers to justice suffered by many indigent defendants across the state in the locally-funded town and village court system. The role of the town and village or justice courts in New York’s criminal justice system cannot be overstated, as they hear and dispose of a large percentage of the state’s criminal and petty offenses. The part-time local courts are staffed by 2,000 elected justices who comprise 72 percent of all New York trial judges; yet they are not accountable to OCA in the same manner as other New York judges. The local justices are not subject to any enforceable statewide standards and goals or meaningful oversight, nor are justice court proceedings required to be on the record. In addition, 68 percent of the justices are non-lawyers. This lack of legal training and oversight creates a risk to the quality of justice rendered in the local courts. Many described these courts as “fiefdoms.”

Many indigent defendants are deprived of their state and federal right to counsel in the local justice courts, as counsel is either not present, not assigned in a timely manner, or not

assigned at all. Because the local courts are so numerous, it is frequently not possible for a county's indigent defense provider, which already has limited staff and resources, to staff the local court sessions. In some cases, counsel is not assigned because the local justices are either unaware of the right to counsel law, misconstrue it, or choose not to apply it because they do not feel counsel is necessary. In addition, many local justices are keenly aware of the fiscal burden that indigent defense services place on the county. Despite a recent order by the Chief Administrative Judge regarding the timely appointment of counsel for in-custody defendants, some courts are not complying with the order, and some were unaware of it. We are also concerned that many defendants in the local courts are held in custody for unpaid fines in violation of federal law. Furthermore, because town and village court proceedings are not required to be on the record, it is often difficult or impossible for a defendant to adequately exercise the right to appeal a matter decided by a local justice.

## **New York City**

In New York City, the criminal justice system has changed dramatically. In the last two decades, felonies and violent crime have dropped substantially; however, in the last decade, misdemeanors have vastly increased and "quality of life" offenses have exploded, causing an unbearable caseload on the courts. The campaign against the "quality of life" offenses established over the last decade or so has failed to consider the means and funds necessary to ensure that meaningful and effective representation is provided to all those entitled to appointed counsel under state and federal law. According to the limited available data, at least half of all the criminal, non-summons cases in New York City are pled at first appearance. Regrettably, we believe that a large number of New York City defendants are not receiving adequate and meaningful representation in compliance with their state and federal right to counsel.

Collateral consequences are of particular concern in New York City, where the practice of pleading out a high percentage of low-level cases at arraignment after only a few minutes of consultation with a client, has left defenders with little time to devote to each defendant to consider and to inform the client of potential collateral consequences (when counsel is aware of them). Furthermore, the proliferation of these "quality of life" offenses has resulted in minor charges being filed against a disproportionate number of young people, people of color, and people from the rapidly growing immigrant population.

The indigent defense providers in New York City suffer from inadequate resources due to a failure of the state and city government to sufficiently fund them. The creation by the City of seven additional institutional providers since 1996 has created an unhealthy competition for a limited amount of money and a lack of a unified voice to advocate for indigent defense reform. The unfortunate deficit suffered by the Legal Aid Society in 2004 heightened the problem and caused significant layoffs. Since then, Legal Aid has been prevented from hiring sufficient staff, including attorneys, supervisors and support staff to replace those lost by attrition and layoffs due to insufficient funding; this has created an overwhelming workload for many staff that remain. Similarly, funding for the alternate providers has barely increased over the last several years, despite increases in costs.

Finally, despite the fact that New York City has two assigned counsel plans, the 18-B attorneys are subject to no formal qualifications or written performance standards, and little oversight. Although attorneys should be recertified every three years to remain on the panels, they are not. Moreover, much like upstate New York, New York City provides no formal 18-B attorney training programs, and attorneys are subject to few training requirements.

## **Conclusion**

Based upon our experience in conducting similar statewide studies of indigent defense systems in 40 states across the country, it is our professional opinion that New York State is currently failing to provide a substantial number of indigent defendants with adequate and meaningful representation as required by the state and federal constitutions and the laws of New York State.

## CHAPTER 1: INTRODUCTION

During her February 2004 State of the Judiciary Speech, Chief Judge Judith S. Kaye of the State of New York first announced the formation of the Commission on the Future of Indigent Defense Services (the Commission). On May 17, 2004, Chief Judge Kaye stated, “The principle of equal justice under the law is bedrock to the functioning of a democratic society and behooves us to do everything possible to ensure that all citizens have access to quality representation.”<sup>1</sup> In that regard, Chief Judge Kaye charged the Commission with studying the effectiveness of criminal indigent defense services across New York and considering alternative methods of providing such services consistent with “New York’s constitutional obligations and fiscal realities.”<sup>2</sup> She appointed 31 members to the Commission, including Co-Chair Honorable Burton Roberts of Dreier LLP and Co-Chair Professor William Hellerstein of Brooklyn Law School.<sup>3</sup> Chief Administrative Judge Lippman emphasized the importance of the Commission’s task, noting the changing landscape of criminal law, including the burgeoning caseloads, and stating that despite the increase in assigned counsel rates of 2004, “there is much more work to be done to meet the staggering indigent defense needs” in New York.<sup>4</sup>

In her February State of the Judiciary Speech in 2006, Chief Judge Kaye endorsed the interim findings of the Commission that “convincingly concluded that the existing system needs overhaul – that it is indeed not a system at all but rather a ‘multiplicity of modalities, all of which are sanctioned by the statutory framework which New York State adopted in 1965 when it enacted Article 18-B of the County Law.’” She added, “I have not seen the word ‘crisis’ so often, or so uniformly, echoed by all sources” in referring to issues such as the lack of counsel in town and village courts, lack of eligibility standards, disparity with prosecutors, and the fiscal concerns of the counties.

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<sup>1</sup> New York State Unified Court System Press Release, “The Future of Indigent Defense Services in New York: Topic of New Commission’s Inquiry” (May 17, 2004).

<sup>2</sup> *Id.*

<sup>3</sup> The other members of the Commission are: Hon. Herbert Altman, Supreme Court, Ret. (New York County); Hon. Phylis Bamberger, Court of Claims, designated to the Supreme Court, Ret. (Bronx County); Christopher Chan, private practice (New York City); Hon. Penelope Clute, City Court (Plattsburgh); Paul Crotty, Verizon Communications (New York City) (former member); Janet DiFiore, District Attorney (Westchester County); Carey Dunne, Davis, Polk & Wardwell (New York City); John Dunne, Whiteman, Osterman & Hanna (Albany); John Elmore, private practice (Buffalo); Klaus Eppler, Proskauer Rose (New York City); Hon. Joseph Fahey, County Court (Onondaga County); Lawrence Goldman, private practice (New York City); Frederick Jacobs, Hodgson Russ (New York City); Barry Kamins, Flamhaft, Levy, Kamins, Hirsch, Rendeiro (Brooklyn); Anita Khashu, Vera Institute of Justice (New York City); Hon. Sally Manzanet, Supreme Court (Bronx County); Hon. Patricia Marks, County Court (Monroe County); Hon. Pauline Mullings, Criminal Court (Queens County); Hon. Martin Murphy, Criminal Court (New York County); Hon. Robert Russell, Jr., City Court (Buffalo); Fern Schair, American Arbitration Association (New York City); Prof. Laurie Shanks, Albany Law School (Albany); Hon. Martin Smith, County Court (Broome County); John Speranza, private practice (Rochester); Hon. Elaine Jackson Stack, Supreme Court (Nassau County); Hon. Charles Tejada, Supreme Court (New York County); Hon. Joseph Zayas, Criminal Court (Queens County); Prof. Steven Zeidman, CUNY Law School (Flushing); and Michele Zuflacht, private practice (Hauppauge). Counsels to the Commission are, from OCA, Paul Lewis, David Markus, John Amodeo, and Robert Mandelbaum.

<sup>4</sup> *Id.*

From its onset, the Commission was specifically charged with examining: (1) the current method of funding indigent defense services; (2) the effectiveness of the various types of criminal defense systems in use throughout the State; (3) the quality of representation afforded indigent criminal defendants and the adequacy of training received by the attorneys who provide such representation; and (4) the availability and quality of ancillary resources such as expert, investigative and interpreter services. In order to accomplish such a large study, the Commission sought the assistance of The Spangenberg Group.

Formed in 1985, The Spangenberg Group (TSG) has conducted research in all 50 states and provides consultative services to developing and developed countries that are reforming their legal aid delivery programs. For over 20 years, TSG has been under contract with the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants to provide support and technical assistance to individuals and organizations working to improve their jurisdictions' indigent defense systems. Including New York, TSG has conducted comprehensive statewide studies of indigent defense systems in 40 states.<sup>5</sup>

TSG also has significant prior experience studying indigent defense in New York State and in New York City. Since 1989, TSG has conducted six studies in New York City as well as one statewide civil legal needs study. Most recently, TSG worked with Davis, Polk & Wardwell on the lawsuit regarding the hourly rates for assigned counsel, *New York County Lawyers' Ass'n v. State of New York*, 745 N.Y.S. 2d 376 (2002). TSG conducted an analysis of over 500,000 computerized vouchers submitted by 18-B attorneys over a 10 year period and interviewed more than 150 individuals, including 18-B lawyers, judges and assigned counsel panel administrators. Bob Spangenberg submitted an expert affidavit, and both Bob Spangenberg and David Newhouse of TSG provided expert testimony at the trial which resulted in a permanent injunction ordering the State to pay assigned counsel in New York City \$90 an hour for in- and out-of-court work until the Legislature modified the statutes which set the rates. Several months after the court's decision, the New York State Legislature increased the rates throughout the state to \$60 per hour for misdemeanor cases and \$75 per hour in all other cases.<sup>6</sup>

Between 1996 and 1999, TSG conducted four studies for the New York Legal Aid Society: two for the Criminal Appeals Bureau; one for the Juvenile Rights Division; and one for the Criminal Defense Division. In 1989, TSG designed a workload measurement system and developed workload/caseload standards for the New York Legal Aid Society Criminal Defense Division in a joint effort with Maximus, Technical Consultants to Management. Finally, TSG conducted a statewide study of the legal needs of the poor in New York in 1989 for the New York State Bar Association.

The Spangenberg Group's work for the current study for Chief Judge Kaye's Commission was ultimately funded by the Office of Court Administration and the Open Society

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<sup>5</sup> TSG has conducted statewide indigent defense studies in Alabama, Alaska, Arkansas, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin.

<sup>6</sup> See County Law Article 18-B, §722-b.

Institute. Initial work began in January 2005 and resulted in a preliminary report, submitted to the Commission on March 29, 2005, that documented TSG's initial work and summarized some of the information TSG had learned to date. During this time, in February and March of 2005, the Commission held four public hearings - in New York City, Albany, Rochester, and Ithaca - at which it heard testimony from over 85 interested persons across the state. TSG staff attended each of these hearings. On May 10, 2005, TSG submitted another brief report to the Commission that documented some of our research regarding the collection of indigent defense data and information in New York. Once additional funding for TSG's work was in place, the Commission contracted with TSG for the second and largest phase of the study involving the New York site work, which took place between September 2005 and January 2006.

We have conducted a complete and comprehensive statewide study of New York's indigent defense system. Throughout this study, we have confirmed many of the disappointing failures of New York's indigent defense system that were well-described to the Commission by Michael Whiteman, former counsel to Governor Nelson Rockefeller who was an original supporter of the enabling legislation, Article 18-B of the New York County Law, over 40 years ago:

We had great faith and hope that the process we envisioned would breathe life into the guarantee of the right to counsel, that through our efforts, New York would be a vanguard state enforcing the rights of poor people. We sought to create a model for the nation that would provide the independence of defense lawyers and zealous representation of clients necessary to a fair criminal justice system. That was a long time ago. In the interim, New York State has neglected the public defense system that was created in 1965....

We now have an outdated system on the verge of collapse. Patches, fashioned and applied with no comprehensive look at the overall plan, have sometimes helped a little, and often made things worse. Year in and year out, the state has added to the responsibilities and workload of public defense lawyers, criminalizing more behavior, increasing penalties, without adding resources to meet those defense responsibilities. The state has increased funding for prosecution and law enforcement a great deal more than it has increased funding for those who enforce constitutional rights....

The crisis in public defense that led to the fee increase continues to deepen. Counties faced with increased assigned counsel fee costs scramble to put in place cheaper systems with little or no thought to quality. Public defense lacks sufficient funding. It also lacks standards, resources for recruitment, training, supervision and support services, statewide accountability, and most importantly, political and professional independence....<sup>7</sup>

We begin this report, in Chapters 2 and 3, by providing an overview of New York's system, from the New York Unified Court System and its structure, to the applicable law on the right to counsel, and relevant attorney performance standards. Chapter 4 discusses the history,

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<sup>7</sup> Albany Commission hearing transcript, pp. 250-252.

funding, and structure of New York's current indigent defense system. With the exception of the final chapter of this report, the remaining chapters focus on all counties outside of New York City. Chapter 5 discusses the institutional providers, while Chapter 6 discusses assigned counsel or 18-B plans. In Chapter 7, we address a number of important factors that are affecting indigent defense across the state, outside New York City. In Chapter 8, we discuss the town and village court system and a number of problems affecting indigent defense specifically in those courts. Finally, in Chapter 9, we separately address New York City's indigent defense system and issues arising there.

## **1.1 Methodology**

Our methodology for the initial phase of the study, between January and March 2005, included:

- Meeting with key members of the New York State Association of Counties, the New York State Unified Court System and the New York State Defenders Association (NYSDA);
- Collection and review of key data, information and reports on New York indigent defense, including information from the New York State Comptroller, the Indigent Legal Services Fund, and NYSDA; and
- Attendance at the public hearings held by the Commission.

For the main phase of the study, between September 2005 and March 2006, our methodology included:

- Review of New York statutes and case law relating to New York indigent defense, including criminal jurisdiction, criminal law and procedure;
- Continued collection and analysis of data and information regarding New York indigent defense;
- Review of the transcripts of testimony at each of the Commission's public hearings;
- Creation of a detailed site protocol with additions and comments by members of the Commission; and
- On-site assessments of the indigent defense systems of 22 counties.

TSG staff and consultants performed site work in 22 selected counties, including the five counties or boroughs comprising New York City, between September 2005 and January 2006. The 22 counties are listed in Table 1-1 below. The table sets out the county selected, major city in that county, judicial district in which it falls, 2004 estimated population from the U.S. Census Bureau, county's net local expenditure for 2004, cost-per-capita for each of the counties visited and the form of delivery system(s) the county employs.

**Table 1.1: Counties Visited**

County	Major City	Judicial District	Population	2004 Net Local Expenditures	Cost-Per-Capita in 2004	Program Type <sup>8</sup>				
						PD	CD	AC	LA	
<b>Albany</b>	Albany	3	298,432	\$3,719,627	\$12.46	X	X			
<b>Broome</b>	Binghamton	6	197,696	\$2,999,403	\$15.17	X			X <sup>9</sup>	
<b>Chemung</b>	Elmira	6	89,984	\$1,414,522	\$15.72	X	X			
<b>Clinton</b>	Plattsburg	4	81,875	\$1,308,643	\$15.98			X		
<b>Erie</b>	Buffalo	8	936,318	\$9,289,477	\$9.92			X	X	
<b>Greene</b>	Catskill	3	49,195	\$523,487	\$10.64	X				
<b>Monroe</b>	Rochester	7	735,177	\$8,249,269	\$11.22	X	X	X		
<b>Nassau</b>	Hempstead, Minneola	10	1,339,641	\$7,840,340	\$5.85			X	X	
<b>Onondaga</b>	Syracuse	5	459,805	\$5,467,320	\$11.89			X	X	
<b>Orleans</b>	Albion	8	44,138	\$388,483	\$8.80	X				
<b>Oswego</b>	Oswego	5	123,776	\$924,215	\$7.47			X		
<b>Putnam</b>	Carmel	9	100,570	\$655,490	\$6.52				X	
<b>Schenectady</b>	Schenectady	4	148,042	\$2,143,266	\$14.48	X	X	X		
<b>Steuben</b>	Bath	7	98,814	\$1,041,914	\$10.54	X		X		
<b>Suffolk</b>	Central Islip, Riverhead	10	1,475,488	\$10,574,356	\$7.17			X	X	
<b>Tompkins</b>	Ithaca	6	100,135	\$1,348,119	\$13.46			X		
<b>Westchester</b>	White Plains	9	942,444	\$16,504,125	\$17.51			X	X	
<b>New York City</b>	<b>Bronx</b> <sup>10</sup>	12	8,104,079	\$166,132,905	\$20.50	X		X	X	
	<b>Kings</b>	(Brooklyn)				2	X		X	X
	<b>New York</b>	(Manhattan)				1	X		X	X
	<b>Queens</b>					11	X		X	X
	<b>Richmond</b>	(Staten Island)				2	X		X	
<b>Totals</b>			<b>15,325,609</b>	<b>\$240,524,961</b>	<b>\$15.69</b>					

\*Population estimates are for 2004. Available at <http://quickfacts.census.gov/qfd/states/36000.html>.

The sample was constructed by selecting two counties in each judicial district and all five counties or boroughs in the City of New York. Specifically, we chose the most populous county in each judicial district and selected a second smaller county in each district to produce a representative sample of the state as a whole. The methodology created a stratified random sample proportionate to population and to geographical distribution around the state. The sample includes 80 percent of the residents in the State of New York. When excluding New York City

<sup>8</sup> Program types are: public defender (PD); conflict defender (CD); assigned counsel (AC); and legal aid (LA).

<sup>9</sup> Broome’s Legal Aid Society handles family law cases only.

<sup>10</sup> What has been categorized as a “public defender office” in Bronx, Kings, New York, Richmond and Queens Counties are actually “alternate providers.” See New York City Chapter 9.4, *infra*, for further discussion.



from the census, the sample counties make up 65 percent of the total population of the state outside of New York City.

In each of the 22 counties visited, we met with many of the key persons involved in the counties' criminal justice and indigent defense systems, including, where applicable:

- County court judges;
- Supreme court judges;
- District court judges;
- City court judges;
- Town and village judges;
- Attorneys and supervisors from the indigent defense institutional providers;
- 18-B attorneys;
- Private attorneys;
- 18-B administrators;
- District Attorney and/or staff; and
- County personnel.

In some counties, we visited the jail and met with the sheriff, department of corrections, and the department of probation. We met with court clerks, court administrators, and county attorneys, as well as persons from additional organizations involved in the local indigent defense community. In total, we conducted 78 days of site work and met with approximately 366 persons.<sup>11</sup>

In addition, we conducted court observation in each county we visited. We observed court at all trial court levels and at a number of dockets, including arraignments (both in-custody and desk appearance tickets), all-purpose sessions, misdemeanor domestic violence court, integrated domestic violence court, and drug court.

The task of scheduling our site work in a total of 22 counties within 12 districts across the state was an arduous one. We are extremely grateful to those in the judicial districts and counties that gave their time and assistance in creating our local site schedules. We would also like to thank all persons with whom we met who were gracious of their time and showed a willingness to speak candidly about the issues facing their local indigent defense systems. Many persons also provided us with additional material that proved useful in our overall assessment. We were impressed by people at all levels and in all parts of the state who sincerely want the best for New York's indigent defense system.

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<sup>11</sup> During some of our interviews, the interviewee brought additional people to the meeting; therefore the total number of 366 interviewees may not include every individual we spoke with. Also, several of the people we met with have dual roles as either the chief public defender and 18-B administrator or the chief alternate defender and 18-B administrator. In addition, several people were both town or village justices and court clerks.

## **CHAPTER 2: NEW YORK COURT SYSTEM**

### **2.1 Unified Court System**

The Chief Judge of the State of New York is the State's chief judicial officer and is responsible, along with her colleagues on the Court of Appeals (New York's highest court), for providing general policy direction for the State's Judiciary, which is known collectively as the Unified Court System. The Chief Judge is also responsible, with the assistance of her deputy and Chief Administrator of the Courts, for the supervision and management of the State's trial courts. In discharge of this function, the Chief Judge and Chief Administrator are aided by a small corps of nonjudicial executives and regional administrative judges who, with their guidance and direction, oversee court operations on a day-to-day basis. They also are aided by the Presiding Justices of each of the four branches of the State's major intermediate appellate court, the Appellate Division, who, along with the Chief Judge, comprise a consultative body known as the Administrative Board of the Courts. In addition to their roles as members of the Administrative Board, the Presiding Justices are responsible for the supervision and management of their respective courts, and of the various court-related programs, including attorney discipline and law guardian services that have been placed under the aegis of the Appellate Divisions.

For purposes of court administration, the State is divided into 12 judicial districts, each headed by one or more administrative judges. Each of these districts is made up of one or more counties. Four of the districts are wholly located within New York City: the 1st (New York County); the 2nd (Richmond and Kings Counties); the 11th (Queens County); and the 12th (Bronx County). One district (the 10th) includes Nassau and Suffolk Counties on Long Island. The remaining districts, including between five and 11 counties each, are distributed throughout the rest of the State. Each of the 12 districts is situated in one of the State's four judicial departments. These departments correspond geographically to the jurisdiction of each of the four Appellate Divisions. Two of the judicial districts of New York City (the 1st and 12th) make up the 1st judicial department. The remaining two judicial districts of the City (the 2nd and 11th), along with the 10th judicial district, on Long Island, and the 9th judicial district, comprised of the five counties due north of the City, make up the 2nd judicial department. The 3rd judicial department covers much of eastern New York, along with the north country and part of the southern tier, while the 4th judicial department covers central and western New York.

### **2.2 Court Structure and Jurisdiction**

It is helpful to consider the structure and jurisdiction of the New York State Court System according to three geographic regions: New York City; Long Island; and upstate, which for the purposes of this report refers to all counties outside New York City and Long Island, including those with large populations (e.g., Westchester and Albany). Below we discuss the trial and intermediate appellate court structure in each of these three regions. The court of last resort for

all of New York State is the Court of Appeals. (For a table displaying the civil and criminal court structures for the New York State Courts, see *Appendix A*.<sup>12</sup>)

### **2.2.1 New York City**

New York City consists of five counties or boroughs. Bronx County and New York County (Manhattan) comprise the 1st judicial department; Richmond County (Staten Island), Kings County (Brooklyn) and Queens County fall within the 2nd judicial department. The counties of the City have a court structure that is different from the rest of the State.

The New York City Civil Court and Criminal Court are courts of original and limited jurisdiction. The Civil Court hears civil matters up to \$25,000, small claims up to \$5,000 and landlord and tenant disputes. The Criminal Court hears misdemeanors and violations, and felony charges through the preliminary hearing stage.

The Supreme Court in New York City is the trial court of unlimited jurisdiction in both civil and criminal matters. Generally, it hears only those cases that are beyond the jurisdiction of the Civil and Criminal Courts. For example, the Supreme Court is the felony trial court in New York City.

There are two intermediate appellate courts that serve New York City. The Appellate Division (in the 1st and 2nd judicial departments), which hears appeals from Supreme Court, Surrogate's Court and Family Court, and the Appellate Term (established in the 1st judicial department and, separately, in the 2nd and 11th judicial districts and in the 9th and 10th judicial districts), which hears appeals from the Civil and Criminal Courts.

### **2.2.2 Long Island**

Long Island is comprised of Nassau and Suffolk Counties and together form the 10<sup>th</sup> Judicial District, which falls within the 2<sup>nd</sup> Judicial Department.

In Nassau and Suffolk Counties, there are four distinct courts of original instance and limited jurisdiction: district court, city court, and town and village courts. First, the Long Island counties are home to the only two district courts in the state. The Nassau County District Court covers the entire county and pre-dates the enactment of Article 6, §16 of the New York Constitution in 1961 regarding the establishment of district courts<sup>13</sup> and the Uniform District Court Act (UDCA).<sup>14</sup> Following a vote in the 1962 general election,<sup>15</sup> the Suffolk County

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<sup>12</sup> Source: <http://www.courts.state.ny.us/courts/structure.shtml>.

<sup>13</sup> Article 6, §16, originally adopted in 1961, allows for the establishment of a district court for the entire county or a portion of a county (consisting of one or more contiguous cities or towns) by the legislature upon request by a county's board of supervisors or other elective governing body outside New York City. Under the article, the establishment of a district court must receive majority approval in a general election by the voters in the relevant cities or towns.

<sup>14</sup> Chapter 565 (Uniform District Court Act) was enacted in 1963 to "provide uniform jurisdiction, practice and procedure for the district courts in the state of New York and to implement the integration of the district courts into the unified court system for the state...."

<sup>15</sup> See Chapter 811 of 1982, Article XXVI, §2603 (vote on the creation of the district court system).

District Court was created to have jurisdiction over the five western towns in Suffolk County. The district courts have civil jurisdiction in matters up to \$15,000, in small claims up to \$5,000, and in landlord/tenant matters. In criminal matters, they have trial jurisdiction over misdemeanors, violations and traffic infractions, traffic tickets charging a crime, and preliminary jurisdiction over felonies. In addition, the district courts may hear non-penal matters including parking tickets and town ordinance offenses.

Second, Nassau County also has two city courts (Glen Cove and Long Beach) that have concurrent jurisdiction with the district court for matters occurring within the cities' limits.

Third, Long Island has a total of 92 town and village courts (61 in Nassau County, 31 in Suffolk County) that hear misdemeanors and petty offenses including violations, traffic infractions, and ordinance offenses. In Nassau County and the western part of Suffolk County where district courts are established, felony preliminary hearings, misdemeanor jury trials, and civil matters are heard in the district court; in the eastern part of Suffolk County, town and village courts hear these matters.

The county courts in Nassau and Suffolk Counties have jurisdiction to hear all criminal matters and are the trial court for felonies.<sup>16</sup> The county courts also hear civil matters up to \$25,000.

Like New York City, Long Island is served by two intermediate appellate courts. The Appellate Division, 2<sup>nd</sup> Department, hears civil and criminal appeals from Supreme Court, felony appeals from County Court, and appeals from Surrogate's and Family Court. The Appellate Term hears appeals from the District, City, Town and Village Courts, and civil appeals from the County Court.

### **2.2.3 Upstate New York**

Upstate New York is primarily comprised of the 3<sup>rd</sup> and 4<sup>th</sup> Judicial Departments. The 9<sup>th</sup> Judicial District, just north of New York City, is part of the 2<sup>nd</sup> Judicial Department. Fifty-five of New York's 62 counties are in upstate New York (outside New York City and Long Island) and are home to 43.3 percent of the state's residents.

There are 59 city courts in upstate New York. The city courts have trial jurisdiction over misdemeanors and lesser offenses and civil jurisdiction in matters up to \$15,000. Some city courts also handle small claims or landlord/tenant matters. As in the district courts, judges in the city courts may arraign felony defendants and conduct felony preliminary hearings. Twenty-one upstate counties do not have any city courts.

There are 1,189 town and village courts with original and limited jurisdiction in upstate New York.<sup>17</sup> These courts have trial jurisdiction over misdemeanors and petty offenses such as

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<sup>16</sup> However, under Criminal Procedure Law 230.10, in any county outside of New York City, an indictment filed in a county court may be removed to and heard in the county's supreme court, and indictments in the supreme court can be transferred to the county court. Such removals may be authorized and proscribed by the Appellate Divisions of the Second, Third, and Fourth Departments.

violations, ordinance offenses, and traffic infractions. They also have preliminary jurisdiction over felonies. In civil matters, they have jurisdiction in small claims up to \$3,000. Town and village courts in upstate New York may hold jury trials. In the town and village courts, which are part-time, proceedings are not required to be recorded, and judges need not be lawyers.

County courts have jurisdiction over all criminal matters within the county and civil jurisdiction in matters up to \$25,000. Felony cases are tried in the county courts. In the 3<sup>rd</sup> and 4<sup>th</sup> Departments, the county courts are also intermediate appellate courts for matters originating in the city, town and village courts.

In the 3<sup>rd</sup> and 4<sup>th</sup> Departments, the Appellate Divisions of the Supreme Court hear appeals of matters originating in the county courts. The Appellate Term of the 2<sup>nd</sup> Department in the 9<sup>th</sup> and 10<sup>th</sup> judicial districts hears appeals from matters originating in the city, town and village courts, and civil appeals from the county court; criminal appeals from county court are heard by the Appellate Divisions.

#### **2.2.4 Commencing a Criminal Action in Local Court**

A criminal action may be commenced in a local criminal court, such as a city court, district court, town or village court or the NYC Criminal Court, by the filing therewith of a local criminal court accusatory instrument (i.e., a misdemeanor or felony complaint, or an information, simplified information or prosecutor's information).<sup>18</sup> In addition, a criminal action may be commenced in a local criminal court by the filing of a local criminal court accusatory instrument with a superior court judge “sitting as a local criminal court judge” when an offense charged in the instrument was allegedly committed “in a county in which such judge is then present and in which he [or she]<sup>19</sup> either resides or is currently holding, or has been assigned to hold, a term of a superior court.”<sup>20</sup>

In general, under the Criminal Procedure Law, any local criminal court accusatory instrument may be filed with: (1) a district court of a particular county when an offense charged therein was allegedly committed in such county or that part of the county over which the district court has jurisdiction; (2) the NYC Criminal Court when an offense charged therein was allegedly committed in New York City; or (3) a city court of a particular city when an offense charged therein was allegedly committed in such city. In general, an information, simplified information, prosecutor's information or misdemeanor complaint may be filed in a village court when an offense charged therein was allegedly committed in such village, or in a town court when the offense was allegedly committed in such town (unless the offense was committed in a village located in such town where the village has a village court). A felony complaint, on the other hand, may be filed with any town court or village court of a particular county when a

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<sup>17</sup> Source: Education and Administration Office for Town and Village Courts. Note that this number is reportedly in flux.

<sup>18</sup> See Criminal Procedure Law (CPL) 100.05, 100.10.

<sup>19</sup> Please note that, for the purposes of this lengthy report, the pronouns of he and she - when not referring to a specific person - are used interchangeably with the intention of referring to “he or she” in each reference.

<sup>20</sup> CPL 100.55(7).

felony charged therein was allegedly committed in some town of such county. (Such court need not be that of the town or village in which the felony was allegedly committed.)

Finally, under certain circumstances specified in the Criminal Procedure Law, an accusatory instrument may be filed in an alternate local criminal court when the court that is the appropriate court for commencement of the particular criminal action is not available at the time.

### **2.2.5 Trial Court Restructuring Efforts**

In 2002, the Unified Court System proposed a restructuring of the nine state-funded trial courts to the New York Legislature.<sup>21</sup> The proposal sought to consolidate the many trial courts (civil and criminal) into three courts, a Supreme Court, a Surrogate's Court, and a District Court. The proposed restructuring was said to increase efficiency and result in a significant cost-savings to the state of over \$131 million. For a description of the budgetary impact of the proposal, see *Appendix B*. Significantly, OCA did not include the numerous locally funded town and village courts in its restructuring plan. However, it is our understanding that other efforts to reform New York's court system have included the local justice courts but have been faced with significant opposition and have been unsuccessful in the State Legislature. (For a discussion of such efforts, see Chapter 8, Town and Village Courts, New York Perspective.)

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<sup>21</sup> See New York State Unified Court System, *The Budgetary Impact of Trial Court Restructuring* (Feb. 2002).

## CHAPTER 3: RIGHT TO COUNSEL

### 3.1 Federal Right to Counsel

Since 1932, indigent defendants in state court have had a due process right to assistance of counsel within the meaning of the Fourteenth Amendment under *Powell v. Alabama*.<sup>22</sup> In *Powell*, the United States Supreme Court held that it was a violation of due process for a state court to fail to appoint counsel in a capital case. The Court reasoned:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible....He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>23</sup>

Thirty-one years after *Powell* established a due process right to counsel, in the seminal case of *Gideon v. Wainwright*,<sup>24</sup> the Court held that the Sixth Amendment right to counsel applied to indigent defendants in state court through the Fourteenth Amendment, placing the states under the obligation to furnish indigent defendants with counsel. While *Gideon* clearly established the right to counsel in felony cases, *In re Gault*<sup>25</sup> held that the right extended to juveniles detained for a delinquent act, and *Argersinger v. Hamlin*<sup>26</sup> held that the right extended to adults incarcerated for a misdemeanor offense.

Until 2002, the Court refused to extend the right to counsel to cases where imprisonment is authorized but not actually imposed;<sup>27</sup> but that year, the Court decided another seminal case that expanded the right to counsel in the United States. In *Alabama v. Shelton*,<sup>28</sup> the U.S. Supreme Court held that “a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged.”<sup>29</sup> The decision extended the right to counsel by holding that a defendant may not serve actual jail time unless the defendant was provided or offered the assistance of counsel for the underlying offense. In other words, if the defendant fails to comply with the terms of a suspended or probated sentence (e.g., commits a new offense, fails

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<sup>22</sup> 287 U.S. 45 (1932).

<sup>23</sup> *Id.* at 68-69.

<sup>24</sup> 372 U.S. 335 (1963).

<sup>25</sup> 387 U.S. 1 (1967).

<sup>26</sup> 407 U.S. 25 (1972).

<sup>27</sup> See *Scott v. Illinois*, 440 U.S. 367 (1979).

<sup>28</sup> 535 U.S. 654 (2002).

<sup>29</sup> *Alabama v. Shelton*, 535 U.S. 654 (2002) (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)).

to pay a fine, or fails to meet the terms of probation), that sentence may not be imposed nor probation revoked unless the defendant was afforded counsel or waived counsel on the underlying charge that resulted in the probated or suspended sentence.

### 3.2 Right to Counsel in New York

While federal law provides the minimal requirements that every state must meet regarding the provision of the right to counsel, states are free to create even broader protections and rights than the federal government requires, such as additional types of cases or proceedings in which indigent persons have a right to appointed counsel. Where state law provides fewer rights than the federal law, the federal law controls.

In New York, the Criminal Procedure Law (CPL) creates a greater right to counsel than federal law by applying the right to any offense, except traffic infractions (discussed separately, below), regardless of whether incarceration is authorized upon conviction. Under CPL 180.10(3)(c), CPL 170.10(3), and CPL 210.15(2)(c), the right to assigned counsel applies at arraignment upon an accusatory instrument and at every subsequent stage of the action when a defendant is charged with an offense other than a traffic infraction.

The right to assigned counsel under the Criminal Procedure Law therefore applies not only to felonies<sup>30</sup> and misdemeanors,<sup>31</sup> but also to other “offenses” that may be charged in an accusatory instrument filed with a criminal court. What then is an “offense”? New York Penal Law (PL) 10.00(1) defines “offense” as “conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state...”(emphasis added).<sup>32</sup> Therefore, the right to assigned counsel under the New York Criminal Procedure Law applies beyond criminal offenses, which are defined as misdemeanors and felonies under the Penal Law,<sup>33</sup> to violations<sup>34</sup> and even to fine-only ordinances and other non-penal local law violations regardless of whether imprisonment is authorized. In this respect, New York law exceeds the federal law which limits the right to assigned counsel to those indigent defendants facing actual or potential imprisonment.

However, while the Criminal Procedure Law creates the right to assigned counsel for any offense other than a traffic infraction, the County Law appears to limit the right to assigned counsel at county expense to only those offenses for which a defendant is subject to incarceration upon conviction. Section 722 of the County Law requires each county to establish a plan for providing representation “to persons charged with a crime” who are financially unable to obtain counsel; “crime” is defined under §722-a of the County Law as a felony, misdemeanor or the

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<sup>30</sup> A “felony” is an offense for which a sentence of imprisonment may exceed one year in jail. Penal Law (PL) 10.00(5).

<sup>31</sup> A “misdemeanor” is an offense, other than a “traffic infraction,” for which a sentence of imprisonment greater than 15 days, but no greater than one year, may be imposed. PL 10.00(4).

<sup>32</sup> The term definitions of Penal Law 10.00 apply to the Criminal Procedure Law under CPL 1.20.

<sup>33</sup> See PL 100.00(6).

<sup>34</sup> A “violation” is an offense, other than a “traffic infraction,” for which a sentence of imprisonment of up to 15 days may be imposed. PL 100.00(3).



breach of any state law, local law or ordinance other than a traffic infraction “for which a sentence to a term of imprisonment is authorized upon conviction thereof.”

### 3.2.1 Traffic Infractions

Although the Criminal Procedure Law provides the right to counsel for many offenses beyond the scope of the federal law, it specifically states that the right to assigned counsel “does not apply where the accusatory instrument charges a traffic infraction or infractions only.”<sup>35</sup> A “traffic infraction” is a violation of the vehicle and traffic law or “other law, ordinance, order, rule or regulation regulating traffic” that is not specifically declared by law to be a misdemeanor or a felony.<sup>36</sup>

Generally, in addition to a fine, imprisonment of up to 15 days is authorized for a first offense traffic infraction, up to 45 days for a second infraction, and up to 90 days for a third or subsequent infraction within an eighteen-month period.<sup>37</sup> Although imprisonment is authorized, “an offense which is defined as a ‘traffic infraction’ shall not be deemed a violation or misdemeanor by virtue of the sentence prescribed therefore.”<sup>38</sup> Thus, New York statutory law specifically does not provide for the right to assigned counsel for a traffic infraction even when faced with the possibility of incarceration. Article 18-B of the County Law, §722-a, also specifically excludes traffic infractions from the category of cases for which counties must provide appointed counsel. However, since 1972, any period of incarceration imposed for a traffic infraction without the provision of counsel violates the Sixth Amendment under *Argersinger* (and later *Shelton*). Thus, New York case law post-*Argersinger* modified the statutory law in order to comply with the federal right to counsel. In *People v. Weinstock*,<sup>39</sup> the Appellate Term of the Supreme Court, Second Department, citing *Argersinger*, held that “hereinafter the local criminal courts are on notice that defendants charged with traffic violations and subject to possible imprisonment, must be advised of their right to counsel and to have counsel assigned where the defendant is financially unable to obtain same.” Unfortunately, we found that many local courts in New York are not complying with this requirement (see Chapter 7, Right to Counsel discussion).

### 3.2.2 Unpaid Fines and Surcharges

Under New York CPL 420.10(1)(a), a court may direct a defendant to pay a fine, restitution or reparation in full at the time of a sentence, in full at some later date, or in partial payments at periodic intervals. CPL 420.10(3) provides an incentive for timely payment, as it gives the court authority to imprison a defendant in the event that he fails to pay the fine, restitution or reparation (collectively, “fine”) until the fine is paid. The court may add to a

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<sup>35</sup> CPL 170.10(3)(c). Since all infractions in New York are traffic infractions (i.e., there is no such offense as a non-traffic infraction), the term “traffic infraction or infractions only” can be interpreted as one or more traffic infractions.

<sup>36</sup> CPL 10.00(2) (defining “traffic infraction”) and Vehicle and Traffic Law (VTL) 155 (creating “traffic infractions” and excluding VTL 47, Registration of snowmobiles, and VTL 48, Registration of vessels).

<sup>37</sup> VTL 1800(b).

<sup>38</sup> PL 55.10(4).

<sup>39</sup> 80 Misc.2d 510 (1974).

sentence a provision for imprisonment for failure to pay, either at the time of the original sentence or at some later date as long as the defendant is present when the provision is added. If the defendant fails to pay the fine as directed by the court, the court may issue a warrant directing an officer to take the defendant into custody and bring him or her before the court.<sup>40</sup>

CPL 420.10(4) sets forth the periods of imprisonment that may be authorized for an unpaid fine: up to one year for a felony; up to one-third of the maximum authorized sentence for a misdemeanor; and up to 15 days for a petty offense such as a violation or traffic infraction.<sup>41</sup> Under subdivisions (3) and (5) of CPL 420.10, the court must inform the defendant that if he cannot pay the fine, he has the right to apply to be resentenced at any time, and the court may adjust the terms of payment or lower the fine amount. However, subdivision (5) also allows the court to “revoke the portion of the sentence imposing the fine” if such sentence also involved probation or imprisonment or to “[r]evoke the entire sentence imposed and resentence the defendant” to “any sentence it originally could have imposed.”

Under CPL 420.35(1), a court may direct that a defendant be imprisoned until a mandatory surcharge, sex offender registration fee or DNA databank fee imposed at sentence has been satisfied. It must, however, specify a maximum period of imprisonment not to exceed 15 days, and must make “a contemporaneous finding on the record, after according defendant notice and an opportunity to be heard, that the payment of ... [such surcharge and/or fees] will not work an unreasonable hardship upon him or her or his or her immediate family.”

The Criminal Procedure Law provisions on unpaid fines, surcharges and fees must be construed within the requirements of the federal constitution. First, in *Bearden v. Georgia*,<sup>42</sup> the United States Supreme Court held that when a defendant is facing imprisonment for failure to pay a fine or restitution, the court “must inquire into the reasons for the failure to pay.” Thus, there must be a hearing on the defendant’s ability to pay. The Supreme Court held, “Only if alternative measures are not adequate to meet the State’s interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. ... [Otherwise] such a deprivation [of liberty] would be contrary to the fundamental fairness required by the Fourteenth Amendment.”<sup>43</sup> In this regard, in *People v. Montero*, the Appellate Division, 2<sup>nd</sup> Department, upheld the constitutionality of CPL 420.10 “inasmuch as subdivision 4 of CPL 420.10<sup>44</sup> permits the court to consider available sentencing alternatives and does not mandate imprisonment, [and is] construed within the limits set by *Bearden*.”<sup>45</sup>

Second, although the defendant may be appointed counsel upon the return of the warrant for the unpaid fine, under *Alabama v. Shelton*, counsel must also have been provided on the underlying offense from which the incarceration resulted. However, CPL 420.10 and CPL 420.35 allow the court to convert an unpaid fine, surcharge or fee to a term of imprisonment but

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<sup>40</sup> CPL 420.10(3).

<sup>41</sup> See also CPL 430.20(1) (“When a sentence of imprisonment is pronounced, or when the sentence consists of a fine and the court has directed that the defendant be imprisoned until it is satisfied, the defendant must forthwith be committed to the custody of the appropriate public servant and detained until the sentence is complied with.”)

<sup>42</sup> 461 U.S. 660 (1983).

<sup>43</sup> 461 U.S. at 672-3.

<sup>44</sup> Note that subsection (5) of CPL 420.10 was formerly subsection (4).

<sup>45</sup> 124 Misc.2d 1020, 1023 (Sup.Ct., App. Term, 2d Dept.1984).

do not address the issue of whether the defendant was afforded counsel during the prosecution of the offense for which he received the fine, surcharge or fee.<sup>46</sup> Under the plain terms of CPL 420.10(3) and CPL 420.10(5), defendants may be arrested and detained for failing to pay a fine on an offense for which they were not afforded counsel in violation of the Sixth Amendment and *Alabama v. Shelton*. Indeed, we learned during our site work that, while not frequent, this does occur (see Chapter 7, Right to Counsel discussion). Like the suspended jail sentence that the defendant Shelton received, the unconstitutional incarceration occurs at some future date after the uncounseled conviction.

### 3.2.3 Family Court Proceedings

While criminal cases were the focus of this study, we did encounter many overlapping issues between criminal and family law cases. Therefore, we provide here a listing of the cases for which the right to assigned counsel is provided in New York Family Court and Surrogate's Court. The counties must provide representation in these two courts to adults who are entitled to, but financially unable to obtain, counsel.<sup>47</sup> In contrast, all children in these courts are presumptively eligible for counsel and are appointed law guardians at state expense.<sup>48</sup>

In Family Court and Surrogate's Court, the state affords the right to assigned counsel to: the parent or party being sued in child protective proceedings (when the state seeks an initial removal of the child from the home);<sup>49</sup> the defendant and complaining witness in a family offense or domestic violence proceeding;<sup>50</sup> the parent or other custodial person in termination of parental rights, adoption, guardianship and custody proceedings;<sup>51</sup> the noncustodial parent or grandparent in a matter involving the transfer of child's care and custody;<sup>52</sup> the parent in a child custody matter; any person facing an order of contempt or facing potential punishment for a willful violation of a court order; the parent opposing an adoption; the person being sued in a paternity proceeding; and whenever such assignment is mandated by the state or federal constitution.<sup>53</sup>

In addition, New York law provides that a law guardian be appointed and paid for by the state to represent minors in a number of Family Court matters,<sup>54</sup> including juvenile delinquency,<sup>55</sup> persons in need of supervision (PINS),<sup>56</sup> surrender and termination of parental rights proceedings,<sup>57</sup> child protective proceedings,<sup>58</sup> and dependency and foster care

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<sup>46</sup> CPL 420.10(4) sets forth the maximum terms of imprisonment that may be imposed for failure to pay a fine according to the gravity of the underlying offense. The terms are as follows: (a) one year for a felony; (b) one-third the maximum authorized term for a misdemeanor; and (c) 15 days for a petty offense.

<sup>47</sup> County Law §722; *see also* Surrogate's Court's Procedure Act §407 and Family Court Act §262.

<sup>48</sup> Family Court Act §249.

<sup>49</sup> Family Court Act, Art. 10.

<sup>50</sup> Family Court Act, Art. 8.

<sup>51</sup> Family Court Act, Art. 6; Social Services Law §§358-a, 384, 384-b, and 394.

<sup>52</sup> Social Services Law §384-a(2)(e).

<sup>53</sup> Family Court Act §262(a)-(b); Surrogate's Court Procedure Act §407(1).

<sup>54</sup> *See* Family Court Act §249.

<sup>55</sup> Family Court Act, Article 3.

<sup>56</sup> Family Court Act, Article 7.

<sup>57</sup> Family Court Act §249, Social Services Law §§383-c, 384, 384-b, et al.

<sup>58</sup> Family Court Act, Article 10.

proceedings.<sup>59</sup> Appointment of a law guardian in all other cases, such as custody and visitation proceedings, is discretionary. In addition, law guardians may be appointed in Supreme Court proceedings where children would otherwise be eligible for them in Family Court; this generally occurs in custody and visitation matters that are part of matrimonial proceedings or integrated domestic violence court hearings in Supreme Court.<sup>60</sup>

### 3.3 Standards and Guidelines for Mandated Legal Representation in Criminal Cases

#### 3.3.1 National Standards

In providing mandated legal representation to clients, criminal defense lawyers must practice under various constitutional and statutory requirements as well as their particular state's rules of professional responsibility. In addition, criminal defense attorneys are urged to follow accepted national standards. In the past 15 years, the adoption of standards and guidelines has been one of the most notable developments in the delivery of indigent defense services. Standards and guidelines pertaining to attorney performance, attorney eligibility, caseloads, conflict of interest, indigency screening, and administration of indigent defense systems have been adopted by: state and local legislation; state supreme court rule; national, state and local public defender organizations, indigent defense commissions and other entities.

At the national level, the clear leader in this effort has been the American Bar Association (ABA). The ABA has promulgated standards for criminal justice involving all the components of the justice system including indigent defense. Chapter 4 of those standards addresses the criminal defense function. Chapter 5 addresses the delivery of indigent defense services. The ABA has promulgated standards that address the processing of death penalty,<sup>61</sup> juvenile delinquency<sup>62</sup> and juvenile abuse and neglect cases.<sup>63</sup> In addition, the ABA has developed the Ten Principles of a Public Defense Delivery System (see *Appendix C*). Another national leader in promulgating thorough standards has been the National Legal Aid and Defender Association (NLADA), which has published guidelines for awarding contracts to contract defenders,<sup>64</sup> standards for the administration of assigned counsel systems<sup>65</sup> and performance standards that set out minimum requirements of practice for lawyers representing indigent defendants.<sup>66</sup>

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<sup>59</sup> Social Services Law §§358-a, 392.

<sup>60</sup> Judiciary Law 35(7).

<sup>61</sup> ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (Rev Ed. Feb. 2003).

<sup>62</sup> Robert B. Shepherd, Jr., Editor, *Juvenile Justice Standards Annotated: A Balanced Approach*, ABA INST. OF JUDICIAL ADMIN. (1996).

<sup>63</sup> ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996).

<sup>64</sup> National Legal Aid and Defender Association, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* (1984).

<sup>65</sup> National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems* (1989).

<sup>66</sup> National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation* (1995).

National standards and guidelines serve a number of important purposes. While neither ABA nor NLADA standards are expressly binding on state or local programs, they do serve as a benchmark for judging the quality indigent defense services provided. In addition, the national standards give meaning to the Sixth Amendment right to counsel. In capital cases, for instance, the United States Supreme Court has said that the ABA Standards and Guidelines concerning capital representation are “well-defined norms” which have “long [been] referred [to] as ‘guides to determining what is reasonable’” when evaluating effective assistance of counsel.<sup>67</sup>

The national standards include requirements that counsel should follow in *all* cases as well as those that apply whenever necessary and appropriate. Those considered absolutely necessary according to the NLADA Performance Guidelines include:

Defense counsel is to provide zealous and quality representation to his or her clients at all stages of the criminal process.

To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.

Before agreeing to accept an appointment by the court, counsel has an obligation to make sure that he or she has available sufficient time, resources, knowledge and experience to offer quality representation to each client.

Counsel has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client.

Counsel has a duty to inform the accused of his or her rights at the earliest opportunity and act promptly to take all necessary procedural steps to protect the defendant’s rights.

Counsel should conduct a full and complete interview with the client as soon as possible after appointment.

Counsel must be familiar with the elements of the offense charged and the potential punishment for the charge.

Counsel should obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by all bail agencies concerning pretrial release, and law enforcement reports that might be available.

Counsel has a duty to conduct an independent investigation, regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as soon as possible.

Counsel has the duty to pursue, as soon as practicable, discovery procedures provided by the rules of the jurisdiction and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case.

Counsel has an obligation to prepare the case and develop a theory of the case.

Counsel has the obligation to keep the client informed of the progress of the case and all available options.

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<sup>67</sup> See *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984) and *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

Counsel should explore with the client the possibility and desirability of reaching a negotiated plea rather than proceeding to trial. Counsel should fully explain the rights that are waived by entering a plea rather than proceeding to trial.

The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

Counsel should be fully prepared for all hearings and for trial.

Counsel should not accept excessive workloads that will interfere with quality representation.

Counsel should be alert to all potential and actual conflicts of interest that would impair counsel's ability to properly represent the client.

Where the client is entitled to a preliminary hearing, counsel should take steps to see that the hearing is conducted in a timely manner unless there are strategic reasons for not doing so.

Counsel should develop a sentencing plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions and other information pertinent to the sentencing decision.

Counsel should be familiar with the procedure concerning the preparation, submission and verification of the pre-sentence investigation report or similar documents.

Counsel should inform the defendant of his or her right to appeal the judgment of the court and the action that must be taken to perfect the appeal.

Counsel should be familiar with direct and collateral consequences of the sentence and judgment.

### **3.3.2 New York Standards**

In New York State, attorneys providing mandated legal representation may be guided by at least three sets of standards: the New York State Bar Association (NYSBA) Lawyer's Code of Professional Responsibility,<sup>68</sup> the New York State Defenders Association (NYSDA) *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation*,<sup>69</sup> and the New York State Bar Association's *Standards for Providing Mandated Representation*.<sup>70</sup>

The Lawyer's Code of Professional Responsibility applies to all lawyers in the state and addresses a number of areas related to attorney performance, including attorney competence and preparation (Canon 6) and zealous advocacy (Canon 7). Each of these canons consists of Ethical Considerations (EC) which are "aspirational" and Disciplinary Rules (DR) which are mandatory and form the basis for disciplinary action by the State Bar.<sup>71</sup>

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<sup>68</sup> Adopted January 1, 1970; amended January 1, 2002.

<sup>69</sup> Adopted by the Board of Directors and Approved by the Chief Defenders of New York State, July 25, 2004.

<sup>70</sup> Established by a Special Committee to Ensure Quality Mandated Representation, October 29, 2004.

<sup>71</sup> Code of Professional Responsibility, Preliminary Statement (p. 1).

*NYSDA Standards for Providing Constitutionally and Statutorily Mandated Legal Representation* were established in 2004 after consultation with defenders from all areas of the state and in all different types of defender programs. According to NYSDA, the standards “contain what those in the best position to know agree is required of public defense programs and practitioners.”<sup>72</sup> Similar to national standards, the NYSDA standards are broad in scope, covering topics from the independence and funding of the indigent defense providers, eligibility of clients, workload, training and supervision, and the duties or performance of counsel.

The duties of criminal defense counsel under NYSDA standards include the following:

Before handling a criminal matter, counsel should have sufficient experience and training to provide high-quality representation. Standard VIII-A(2).

Before accepting a public defense matter, counsel should make sure that counsel has available sufficient time, resources, skill, knowledge and experience to offer high-quality representation to the defendant. If it later appears that counsel is unable to offer high-quality representation, counsel should seek to withdraw.

Required resources include but are not limited to: the office facilities and support staff necessary to an efficient legal practice; interview facilities that promote and protect client confidentiality and trust; and access to legal information such as an adequate law library and computerized research tools. Standard VIII-A(3).

Counsel should keep the client informed of the progress of the case. Standard VIII-A(5).

Unless inconsistent with the best interest of the client, counsel should conduct an independent investigation regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible. Counsel should secure the assistance of investigators and/or other experts...whenever needed for preparing any aspect of the defense....”

Standard VIII-A(6).

Counsel should meet with the client to discuss plea negotiations and “should be fully aware of, and make sure the client is fully aware of, all direct and potential collateral consequences of a conviction by plea.” Standard A(7).

Obtain experts whenever needed for case preparation. Standard A(8).

Also in 2004, the Special Committee to Ensure Quality of Mandated Representation of the New York State Bar Association issued a report and *Standards for Providing Mandated Representation*.<sup>73</sup> In April 2005, NYSBA endorsed the Committee’s standards which cover a

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<sup>72</sup> NYSDA Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State, Introduction (p. vii).

<sup>73</sup> The task of the Special Committee, whose members represented different provider systems and different parts of the state, was to study the issues that arose from the 2004 state increase in 18-B assigned counsel fees and the counties’ response to the increase, and to recommend ways to ensure that mandated representation would meet constitutional standards. The Committee decided that “the most effective measure the State Bar could take in the short term to ensure the quality of mandated representation would be the promulgation of standards....” The Special Committee agreed that the counties should be allowed to choose their provider system, and that any of the systems of choice may succeed or fail in providing quality representation. “The type of provider system is not the determining factor; it is the time, effort and resources devoted to setting up and running the provider system that

number of areas including the independence of counsel, early representation, eligibility determinations (including partial contribution), attorney qualifications and written qualifications for institutional providers, training, workload, attorney performance and compensation (parity).<sup>74</sup>

While New York has three sets of standards that relate to attorney performance and mandated legal representation, except for the general disciplinary rules of the professional code, they are largely unenforceable. The more meaningful and specific standards of NYSDA and NYSBA for criminal and mandated representation are largely aspirational; for these standards, there is no oversight or enforcement mechanism.

A measure of an adequately functioning indigent defense system is an evaluation of whether indigent defense counsel are able to follow the national and state performance standards in all indigent cases. Unfortunately, as discussed in the chapters that follow, during the course of our study it was apparent that many providers of mandated legal representation, as well as the local systems themselves, fell far short of meeting these standards. The resulting conclusion is that the right to counsel of indigent defendants is being placed at serious risk throughout New York State.

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determines the quality of the representation it provides.” *Report of the Special Committee to Ensure Quality of Mandated Representation*, p. 4 (October 29, 2004).

<sup>74</sup> Recently, on January 27, 2006, NYSBA endorsed the Committee’s report and called “for the creation of an independent public defense oversight mechanism in this state empowered to provide oversight, quality assurance, support, and resources to providers of mandated representation and to advocate for funding and reform when appropriate.”



## CHAPTER 4: NEW YORK INDIGENT DEFENSE SYSTEM

### 4.1 National Perspective

In the decades since *Gideon v. Wainwright* was decided, states have adopted varying approaches to fulfill the United States Supreme Court's mandate to provide counsel at government expense to indigent persons in criminal (and various other) proceedings. Still, the Supreme Court has never directly ruled that a state government must establish and fund the right to counsel. While states have an obligation to establish a system of indigent defense representation, that responsibility may be placed upon or shared with local government. In some states, the responsibility for indigent defense services is entirely a state responsibility: both funding and oversight operate at a state level. In other states, indigent defense services remain primarily a county responsibility. In still other states, indigent defense is a shared responsibility between state and local governments.

Over time, the clear trend across the country is towards full state funding or increasing the state's share of funding. As of 2006, 28 states provide 100 percent of the indigent defense expenditures through state funds. Three other states provide more than 50 percent of the expenditures through state funds. Seventeen states provide at least 50 percent of the expenditures through county funds. Finally, only two states (Pennsylvania and Utah) fund their indigent defense systems entirely through county funds.

There is also a clear trend among states to develop some sort of statewide oversight. In many states, both those with a statewide public defender program and those without, oversight is provided exclusively through a state commission or oversight board. The oversight board is charged with setting policy for indigent defense services and advocating for state resources.<sup>75</sup> In other states, the oversight is provided by the chief public defender, and there is no commission. Still, in several states, the commission provides some statewide oversight but lacks full authority over indigent defense services; for example, some states have commissions that oversee appellate cases only.

Currently, 42 states, including the District of Columbia, have some sort of statewide body providing oversight for indigent defense services, whether that body is some type of commission or a public defender agency. (For an overview of the 50 states' systems, see *Appendix D*.) Seven states have no commission or body providing such oversight. Two states (Tennessee and Florida) are unique in that their indigent defense system is headed by elected public defenders in each of the state's judicial districts.<sup>76</sup> Due to the independent nature of elected officials, there is no statewide oversight body governing these public defenders; but in both states, the public defenders belong to a membership organization.

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<sup>75</sup> For detailed information on state oversight bodies, see *Statewide Indigent Defense Systems: 2005* at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.pdf>.

<sup>76</sup> While Tennessee has a publicly elected public defender, there is a state post-conviction death penalty commission.

## 4.2 New York Historical Background

The importance of representing indigent defendants was first recognized in New York State in the late 19<sup>th</sup> century, with the enactment of a statute authorizing courts to appoint counsel in felony cases.<sup>77</sup> However, compensation was only required in capital cases.<sup>78</sup> In the mid-20<sup>th</sup> century, counties were authorized by the Legislature to fund legal aid societies<sup>79</sup> and were eventually permitted, but not required, to contract with legal aid societies for the representation of indigent defendants, or to establish public defender offices.<sup>80</sup>

After the *Gideon v. Wainwright*<sup>81</sup> decision in 1963, and a similar ruling by the New York Court of Appeals in *People v. Witek*,<sup>82</sup> the Legislature enacted Article 18-B of the County Laws,<sup>83</sup> signed into law by Governor Rockefeller in July 1965, to address the financial responsibilities of the State to fund indigent defense. Article 18-B shifted the responsibility of ensuring the provision of counsel in criminal matters from the State to the local governments, including the responsibility of funding and selecting the type of indigent defense system to employ.<sup>84</sup>

Article 18-B, §722 of the County Law set out several mechanisms for each county and the City of New York to use in establishing a plan for providing counsel to indigent defendants. Representation may be provided by: (1) a public defender appointed by the county; (2) a private legal aid bureau or society; (3) a bar association plan that uses and rotates the services of private counsel; or (4) a combination of the three. Under the law, the counties must “provide for investigative, expert and other services necessary for an adequate defense.” The law also set the hourly rates of compensation for assigned counsel (18-B attorneys) – at that time, \$10 an hour for out-of-court work and \$15 an hour for in-court work.<sup>85</sup> However, the new 18-B law created no mechanism or standards for ensuring the quality of defense representation and did not prevent the quality of services provided from being directly dependent upon the wealth of a particular county.

The unfortunate result of the law, over 40 years later, is an ill-funded, fractured system of indigent defense. Although a number of organizations set out to study and change elements of this struggling system over the years (see *Appendix E*), the counties’ provision of mandated legal services has largely been left to operate without any meaningful oversight through the county law or any other means.

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<sup>77</sup> L. 1881, c. 442, Code Crim. Proc. § 308.

<sup>78</sup> L. 1892, c. 521, Code Crim. Proc. § 308.

<sup>79</sup> L. 1951, c. 798, County Law § 224(10).

<sup>80</sup> L. 1961, c. 365.

<sup>81</sup> 372 U.S. 335 (1963) (holding the Sixth Amendment right to counsel applies to state court proceedings for indigent defendants accused of serious crimes, through the Due Process Clause of the Fourteenth Amendment).

<sup>82</sup> 15 N.Y.2d 391 (1965) (holding that indigent defendants in all criminal cases, and not merely felony prosecutions, are entitled to representation by appointed counsel). The court observed that the “right and the duty of our courts, to assign counsel for the defense of destitute persons, indicted for crime, has been, by long and uniform practice, as firmly incorporated into the law of the State, as if it were made imperative by express enactment.” *Id.* at 397.

<sup>83</sup> L. 1965, c. 878.

<sup>84</sup> County Law § 722.

<sup>85</sup> County Law § 722-c.

#### 4.2.1 New York State Defenders Association

By 1981, the New York State Legislature recognized the need for additional assistance for individual defenders and defender agencies and funded the already-established New York State Defenders Association (NYSDA). NYSDA, a not-for-profit, membership organization founded in 1967, is responsible for administering a Public Defense Backup Center that assists defenders with their cases, secures experts and provides training. In addition, NYSDA was charged with reviewing, assessing and analyzing the indigent defense system to make specific recommendations for improvement to the Governor, state legislature and judiciary. To this end, NYSDA has filed over 20 reports since 1981 covering a variety of problems with New York's indigent defense system and has held a number of public hearings to address these problems.<sup>86</sup>

According to the Executive Director of NYSDA, the office has handled more than 30,000 requests for assistance through its direct defender services program over the last 24 years.<sup>87</sup> NYSDA provides low-cost or free training across the state for defenders.<sup>88</sup> We heard a number of times in our site work that defenders rely on this training course as virtually their sole means of defense training. The Director of the Conflict Defender Office and Assigned Counsel Administrator in one upstate county said that the Public Defense Backup Center “fosters well-trained defense attorneys that reduce delay, unnecessary incarceration and claims of ineffective representation that can result in costly reversals and retrials” and provides “excellent support.”<sup>89</sup>

NYSDA has also developed an automated Public Defender Case Management System for defender agencies and provides the only means of support for the system that is being used in 19 offices across 16 counties, oftentimes without any funding from the counties; an additional 15 requests for the system are pending.<sup>90</sup> In addition, NYSDA has authored local and statewide studies on indigent defense, assessed problems, produced recommendations, developed tools for county governments, and analyzed budgetary deficiencies.<sup>91</sup>

Throughout this study, one of the most positive themes we heard was the consistent help and encouragement that many of the indigent defense providers have received over the last two decades from NYSDA staff.

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<sup>86</sup> See *Appendix E* for a list of these reports and hearings.

<sup>87</sup> See Jonathan E. Gradess, *The Tragic Condition of Defense Services in New York State: Testimony Before The New York State Commission on the Future of Indigent Defense Services*, 4, n. 1 (Feb. 11, 2005).

<sup>88</sup> See *id.* at n. 2. According to Mr. Gradess “there are still many offices and many lawyers who cannot take advantage of [the training] because of travel cost, logistics, or heavy dockets.” *Id.* In some instances NYSDA must wholly subsidize new defenders’ attendance at their Basic Trial Skills Program, which was cited by many defenders during our site work as an excellent program that should be mandatory for defenders. *Id.*

<sup>89</sup> Rochester Hearing Commission Transcript, pages 136-137.

<sup>90</sup> See *id.* at n. 3. “The idea that a private non-for-profit agency, whose funding is annually threatened, is the sole support for the information infrastructure in nearly a third of the state’s counties is ludicrous.”

<sup>91</sup> See *id.* at 5, n. 4-9; see also, *Appendix E*.

## 4.2.2 History of Assigned Counsel Compensation Rates

The first hourly rates of compensation for court-appointed counsel, \$10 for out-of-court work and \$15 for in-court work, created in 1965 under Article 18-B, remained unchanged for 12 years. In 1977, the Legislature raised the respective rates to \$15 and \$25 an hour. Another nine years passed before the rates were raised again to \$25 and \$40 an hour in 1986. Seventeen years passed after 1986 before another rate increase was approved by the Legislature.

In order to address the systemic problems of poor compensation rates for court-appointed counsel and the quality of indigent defense representation during this period of inaction, public hearings were held, studies were conducted, and task forces and working groups were formed (see *Appendix E*). Attorneys began leaving the 18-B panel in large numbers in the late 1990's, causing major problems in the criminal and family courts. Chief Administrative Judge Jonathan Lippman described the situation: "There is chaos, there are delays, there are adjournments. Family Court judges are walking the halls looking for people to take cases.... We just cannot continue at those rates or there will be no one left on the panels."<sup>92</sup>

In February 2000, the New York County Lawyers Association filed a lawsuit in Manhattan Supreme Court alleging that the inadequacy of the 18-B rates was a systemic violation of the rights of children and indigent adults under the state and federal constitutions. On February 5, 2003, Manhattan Supreme Court Justice Lucindo Suarez found that the State of New York's failure to increase the rates of compensation for court-appointed lawyers in New York City violated the constitutional and statutory rights to meaningful and effective representation and obstructed the judiciary's ability to function.<sup>93</sup> Judge Suarez declared that the rate-setting portions of the statutes were unconstitutional as applied in New York City and issued a permanent injunction directing the State and City to compensate assigned counsel at \$90 per hour for both in- and out-of-court work until the Legislature modified the statutes or upon further order of the Court.

While Justice Suarez's decision was on appeal, the Legislature raised the hourly rates to their current level of \$60 for all work in misdemeanor cases and \$75 an hour in all other cases, including appeals. These rates are above the national average for states in which court-appointed rates are set by statute.<sup>94</sup> Fee caps per case were also raised from \$800 to \$2,400 in misdemeanor cases, and from \$1,200 to \$4,400 in all other cases. In addition, the fee caps for experts and investigators were raised from \$300 per case to \$1,000 per expert or investigator. However, a court may exceed the caps in extraordinary circumstances. At the same time that it increased the rates, the Legislature also called for the creation of a task force "to review the sufficiency" of the rates and their limits.<sup>95</sup> The task force, which sunsets on June 30, 2006, was to report to the Governor and Legislature by January 15, 2006; however, it is our understanding that the task force was never formed.

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<sup>92</sup> John Caher, *Lippman Addresses Worsening 18-B Crisis*, NYLJ, Feb. 26, 2002 (quoting Judge Lippman).

<sup>93</sup> *New York County Lawyers Association v. New York State, et al.*, 763 N.Y.S.2d 397 (Sup. Ct. N.Y. Co. 2003).

<sup>94</sup> See ABA Bar Information Program, *Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview* (August 2003, with selected updates as of August 2005), prepared by The Spangenberg Group, available at <http://www.abanet.org/legalservices/sclaid/defender/research.html>.

<sup>95</sup> L. 2003, c. 62, §13.

### 4.3 New York State and County Funding

In FY 2004, New York State and the counties provided a combined total of \$436,070,914 in funding for indigent defense. This funding can be broken out as follows:<sup>96</sup>

**Table 4.3: FY 2004 New York State and County Indigent Defense Funds**

Law Guardian - General Fund	\$ 59,261,788
Law Guardian - Indigent Legal Services Fund	25,000,000
Indigent Legal Services Fund (ILSF) to counties	51,551,710
State Aid to Defense (ATD)	11,474,000
Capital Defender Office (CDO)	3,603,100
Indigent Parolee Program	1,233,000
NYSDA Public Defense Backup Center	1,165,000
Correction Law Sec. 606 Reimbursement	384,272
Neighborhood Defender Service of Harlem	294,000
<i>Doe v. Pataki</i> , one-time defense funding	900,000
NYS Division of Probation and Correctional Alternatives	615,446
Total State Expenditures	155,482,316
Total County Expenditures	280,588,598
<b>Total State and County Expenditures</b>	<b>\$436,070,914</b>
% State Expenditures	36%
% County Expenditures	64%

The total statewide county expenditure for indigent defense was determined by adding together the net local expenditures reported by each individual county in its UCS 195 form. The UCS 195 form is used to assist counties in reporting statutorily required expenditure and caseload information to OCA annually (see section 4.4.1, UCS 195 and ILSF reports for further discussion). However, because the UCS 195 forms do not require the counties to separate their family court expenditures from their criminal court expenditures, the statewide total for county expenditures includes the cost of representation of indigent adults in family court.

As displayed in the table above, the counties provided 64 percent (\$280,588,598)<sup>97</sup> of the overall indigent defense funding in New York, while the state provided 36 percent (\$155,482,316). Approximately half of the total state expenditures was appropriated from the state's general fund, while the other half was appropriated from the four new revenue sources created by the legislature through the Indigent Legal Services Fund (further discussed below).

<sup>96</sup> State funding data and information on individual funding sources provided by NYSDA, OCA and the Office of the State Comptroller. This data is our best estimate at this time.

<sup>97</sup> This figure is a best estimate based on the total county expenditures certified to the Office of the State Comptroller for 2004.

Fifty-four percent of the state expenditures, or \$84,261,788, was for the state's Law Guardian Program, which provides representation to children in family and surrogate's court through both the state general fund and ILSF (see also Chapter 3, Family Court Proceedings, and Chapter 7, Family Court). However, since the Commission was not charged with examining family court, if the state expenditures for the Law Guardian Program are excluded, then state expenditures account for only 20 percent of the total indigent defense expenditures, and county expenditures account for a sizeable 80 percent. Still, as stated above, because many programs provide both criminal and family court representation and these expenditures are inseparable, both state and local expenditures contain monies used to provide representation to adults in family court.

It is important to note that the state ILSF distribution amount of \$51,551,710 represents 72 percent of all state funds provided to the counties in 2004, but none of this was provided by a state general fund appropriation. Rather, the entire amount of the ILSF distribution was provided through alternative revenue sources. In fact, the data shows that only slightly more than six percent of the total state and local expenditures for indigent defense services, excluding state expenditures for the Law Guardian Program, was attributable to the state general fund appropriation for fiscal year 2004.

The second largest state fund, comprising one-third of state funding, is the Indigent Legal Services Fund (ILSF) for the counties. ILSF was created by the state after the increase in 18-B rates to be distributed to the counties on March 31 of each year (see ILSF discussion below). The State Aid to Defense (ATD) program was created as a counterpart to the Aid to Prosecution funding. ATD funding has declined dramatically. The New York State Defenders Association (NYSDA) informs us that in 1988, for example, ATD was approximately \$20 million, 79% greater than it is today. While the state has funded the Capital Defender Office (CDO) at \$3,603,100, unless death penalty legislation is enacted by June 30, 2006, this figure will be reduced to \$1,200,000.<sup>98</sup>

Created in 1978, the Indigent Parolee Program (IPP) helps the counties fund the representation of parolees at revocation hearings and appeals. Institutional providers in four counties receive a set reimbursement amount, while the remaining providers receive an allocated share of IPP funds that is reportedly insufficient to cover the cost of vouchers submitted. In 1998, a statewide survey of IPP funding needs conducted by NYSDA found that if all eligible vouchers were submitted for reimbursement, the actual IPP cost would be approximately \$5.4 million, four-and-a-half times the current funding. NYSDA has received state funding since 1981 for the Public Defense Backup Center which provides statewide support to providers of indigent defense services, including trainings, publications and technical assistance. Correction Law §606 reimbursement refers to the state's obligation to reimburse the counties for the cost of prosecuting and defending criminal cases arising out of state correctional facilities. The New

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<sup>98</sup> By early 2005, defense counsel across the state were called upon to provide assistance in a new class of cases, Rockefeller resentencing cases, for which no additional funding was provided by the state or the counties. This is an example, much like the specialty courts, in which a new state law creates an added burden on defenders without additional funding. Defense counsel are now being called upon to assist defendants in applying to the courts for a reduction in a mandatory minimum sentence imposed under the Rockefeller drug laws without any additional appropriation from the state.

York State Division of Probation and Correction Alternatives also provides funds to 12 programs that operate defender-based advocacy or alternatives to incarceration programs in 11 counties.<sup>99</sup>

The table below displays a breakdown of county and state expenditures between New York City and upstate New York (counties outside of New York City) for fiscal year 2004, excluding state expenditures for the Law Guardian Program.

**Table 4.4: County and State Expenditures For FY 2004  
New York City and Upstate**

	New York City	Upstate	Total
Total County Expenditures	\$166,132,905	\$114,455,693	\$280,588,598
Total State Expenditures	\$44,181,272	\$27,039,256	\$71,220,528
Total State and County Expenditures	\$201,314,177	\$141,494,949	\$351,809,126

Table 4.4 discloses that New York City accounted for 60 percent of the total state and county expenditures and all other counties accounted for 40 percent. In addition, the new ILSF fund, which accounted for \$51,551,710 of the total state expenditures of \$71,220,528, was similarly allocated. Of the total state ILSF monies, \$30,523,111, or 59 percent, was distributed to New York City, and \$21,028,599, or 41 percent, was distributed to the upstate counties. At the same time, in terms of the total caseload that The Spangenberg Group was able to verify, 66 percent of the state's indigent defense caseload, including adult representation in family court, in FY 2004 was from New York City, and 34 percent was from upstate New York. See *Appendix F* for FY 2004 caseload and funding data.

#### 4.3.1 Cost-Per-Capita and Cost-Per-Case

For over a decade, The Spangenberg Group has undertaken several extensive efforts to compare the total cost of indigent defense among the 50 states. Several of the efforts have been undertaken through the American Bar Association's Bar Information Program, a source of much of our work over the last 20 years. The most important lesson we have learned over the years is how difficult a cost comparison can be. One of the measures we have used to date to compare state expenditures is to compute the cost-per-capita for each state. However, a number of variables must be considered in attempting this comparison. Some of the most important variables to consider are:

Whether there is a reliable central statewide database in existence that assembles cost data county by county in the state;

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<sup>99</sup> There is a fear that a proposed sex offender civil commitment law, which is on the verge of being enacted, will create serious fiscal and policy constraints on the public defense system. Governor Pataki has proposed construction of a 500-bed sex offender confinement facility and a civil commitment schedule that would authorize possible lifetime confinement of sex offenders. The hope is that, unlike the Rockefeller resentencing cases, additional funding for defense counsel will be provided in these cases.

Whether there is a uniform and consistently-applied statewide definition of a case for case-counting purposes (e.g., by charge, by defendant, by incident);  
The expansiveness of the state's right to counsel laws beyond the Sixth Amendment;  
The hourly rates for court-appointed counsel in each state, which might vary from \$25 to \$40/hour, or \$70 to \$90. In addition, whether the state has established caps or maximum amounts of compensation per case;  
Whether the state has a well-funded public defender program or is under-funded and over-burdened with cases. Also, the salary scale for lawyers in the program could include a starting salary of \$30,000 or \$60,000, depending on the state;  
Whether the system is predominantly state-funded or county-funded. With the exception of California, states that are funded completely or predominately by state funds normally achieve a higher cost per capita;  
Whether a state's reported expenditures match those of other states. For example, some states report expenditures only for criminal and juvenile delinquency cases; others report child welfare cases (i.e., abuse and neglect and termination of parental rights);  
Whether the state has a high volume of death penalty cases or is a non-death state; and  
Whether the state is predominantly rural or contains some major metropolitan areas.

A number of factors distinguish New York State from many other states. New York has one of the most expansive rights to assigned counsel in the country. The volume of cases for which counsel is appointed is also one of the highest in the country. This is particularly true when it comes to minor misdemeanors, infractions, and violations. Particularly in New York City, counsel is routinely appointed in these minor cases. Significantly, the cost of the right to appointed counsel for children and adults is considered part of the total cost for indigent defense in New York State, unlike several other states. In addition, a substantial increase in hourly fees for assigned counsel became effective at the beginning of 2004.

With a total of \$436,070,914 in state and county funding, the average cost-per-capita for indigent defense in New York State in 2004 was \$22.97.<sup>100</sup> When the state expenditures for the Law Guardian Program are excluded, the average cost-per-capita was \$18.54. While the cost-per-capita in New York State appears to be high, our estimate of the cost-per-case appears to be substantially lower than a number of other states.

### **4.3.2 Governor's FY 2006 Proposed Budget and LSAA**

Filed on January 17, 2006, Governor Pataki's proposed FY 2006 Executive Budget provides for the same level of funding for the State Aid to Defense (ATD) as in the previous year (\$11,174,000).<sup>101</sup> However, while in past years ATD was fully funded through state general funds, this year, for the first time, \$6 million of ATD funding will come through a special revenue fund called the Legal Services Assistance Account (LSAA). LSAA was created along with ILSF in 2003 when the assigned counsel rates were raised.<sup>102</sup> The enabling legislation calls for LSAA funds to assist the "local government agencies and not for profit providers or their

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<sup>100</sup> The most recent census places New York's population at 18,976,457 (2000 U.S. Census).

<sup>101</sup> Source: NYSDA Memorandum to NYS Chief Defenders (January 25, 2006).

<sup>102</sup> L. 2003, c. 62, Part J, §19.



employees [in the provision of] criminal or civil legal services.” Despite this requirement, a matching \$6 million in LSAA are used for state aid to prosecutorial services, which was also funded with \$11,090,000 in general funds. For the first time, a total of \$12 million from LSAA replaces general fund appropriations for aid to defense and prosecution. The future effect of these changes is uncertain.

Finally, the Governor’s proposed budget increases the OCA criminal search fee that is used to fund ILSF from \$52 to \$60, and the LSAA share of that fee from \$9 to \$12. The remaining \$5 of the increase is to go into the Criminal Justice Improvement Account to support the recruitment and retention of district attorneys.

### 4.3.3 Indigent Legal Services Fund

Although the counties are primarily responsible for funding indigent defense services, the state legislature recently created the Indigent Legal Services Fund (ILSF) under State Finance Law<sup>103</sup> after the increase in assigned counsel fees. ILSF was created to help the state pay for indigent defense expenditures in Family Court and to help the counties pay for all other indigent defense costs. ILSF is funded by four revenue sources created by the state to help fund the new assigned counsel fees which took effect January 1, 2004. The funding sources are: a \$35 DMV fee for lifting a license suspension; \$27 of a \$52 OCA fee for county-based criminal history checks; a \$50 increase in attorney registration fees; and a \$10 increase in mandatory surcharges for parking violations. By statute, the first \$25 million in collected revenue each year goes to the state to reimburse the Law Guardian Program, and the remainder is distributed by the State Comptroller to the counties to reimburse the counties for a portion of their cost. A county’s ILSF distribution amount is determined by calculating the total amount of statewide county expenditures, divided by the percentage of the individual county’s total share. In the first year of ILSF, state revenue sources brought in \$76.5 million, which left \$51.5 million to be distributed to the counties. This distribution amount was slightly short of the \$51.9 million increase in county expenditures between 2003 to 2004. In the second year, the state revenue brought in \$79.2 million. After subtracting the first \$25 million for the Law Guardian Program, the remaining \$54,221,048 was distributed to the counties in March 2006. See table 4.3.3 below.

**Table 4.3.3: Collections for ILSF Distribution by Source**

	<b>2004</b>	<b>2005</b>	<b>Percent Change</b>
<b>Attorney Registration Fee</b>	\$6,186,870	\$3,606,320	-42%
<b>Criminal History Search</b>	\$27,360,226	\$26,042,871	-5%
<b>License Suspension</b>	\$11,606,909	\$14,551,482	25%
<b>Parking Violation Surcharge</b>	\$30,980,827	\$33,790,467	9%
<b>STIP<sup>104</sup></b>	\$416,688	\$1,230,108	195%
<b>TOTAL</b>	<b>\$76,551,320</b>	<b>\$79,221,048</b>	<b>3%</b>

<sup>103</sup> State Finance Law, §98-b.

<sup>104</sup> STIP is New York State’s short-term investment pool. Therefore, the STIP amount is interest earned on the money collected for the ILSF distribution, which is counted towards the money distributed to the counties.

Using the financial data reported by each county in the ILSF 2004 Annual Report, we charted each county's net local expenditures for 2003-2005, as well as the distribution amounts to the counties in the first two years of ILSF distribution, 2005 and 2006 (see *Appendix G.*)

#### **4.3.4 County Requirements for Use of State Funds**

In order to receive their distribution of state ILSF funds, the counties must demonstrate compliance with one of two conditions under the ILSF statute. First, a county must show that the total amount of local expenditures for indigent defense for a calendar year did not decrease from the amount spent in the previous calendar year; however, for the 2005 ILSF reports (see below) filed in 2006, "such maintenance of effort" must be demonstrated by showing that the 2005 total local expenditures did not decrease from 2002 local expenditures.<sup>105</sup> According to the Office of the State Comptroller's report for 2005, every county falls within the latter part of this requirement, as every county's 2005 expenditures exceeded its 2002 expenditures.

Second, in the event that a county is unable to show such "maintenance of effort" by an increase in expenditures, then a county must show that all state funds that were received were "used to assure an improvement in the quality of services provided...and have not been used to supplant local funds." Such improvements may be shown by considering certain factors such as the availability of certain resources for attorneys, access to attorneys, investigators and experts, and attorney caseloads.<sup>106</sup>

Anticipating that some counties might fall within the second requirement under the ILSF statute by spending less on indigent defense in 2005 than in 2002, for the March 2006 ILSF county submissions, the Comptroller sent out an 11-page form to be completed by such counties. The form requires these counties to specifically provide assurance that supplemental funds were

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<sup>105</sup> Finance Law, Article VI, § 98-b (4)(c)(i) ("That the total amount of local funds expended for services and expenses pursuant to article eighteen-B of the county law during the applicable calendar year reporting period did not decrease from the amount of such local funds expended during the previous calendar year provided, however, that with respect to the report filed in two thousand six regarding calendar year two thousand five, such maintenance of effort shall be shown by demonstrating with specificity that the total amount of local funds expended for services and expenses pursuant to article eighteen-B of the county law during the two thousand five calendar year did not decrease from the amount of such local funds expended during calendar year two thousand two.")

<sup>106</sup> Finance Law, Article VI, § 98-b, (4)(c)(ii) ("Where the amount of local funds expended for such services decreased over such period, that all state funds received during the most recent state fiscal year pursuant to subdivision three of this section were used to assure an improvement in the quality of services provided in accordance with article eighteen-B of the county law and have not been used to supplant local funds. For purposes of this subparagraph, whether there has been an improvement in the quality of such services shall be determined by considering the expertise, training and resources made available to attorneys, experts and investigators providing such services; the total caseload handled by such attorneys, experts and investigators as such relates to the time expended in each case and the quality of services provided; the system by which attorneys were matched to cases with a degree of complexity suitable to each attorney's training and experience; the provision of timely and confidential access to such attorneys and expert and investigative services; and any other similar factors related to the delivery of quality public defense services.")

used to improve the quality of Article 18-B services in accordance with the language of the law. Because no county fell within the category of the second requirement, the form has not yet been used. However, because the form relies solely on the counties' self-reporting responses, serious questions must be raised about the accuracy of any county's future responses claiming an improvement in services.

Despite the explicit mandates of the statute regarding the use of state funds, so far there has been virtually no oversight as to how the counties are employing the funds. During this study, we learned that while some counties were indeed using the funds to supplement their own funds and to improve services, other counties did not appear to be in compliance with the ILSF requirements.

In Erie County, we were told that although the Legal Aid Bureau received none of the 2005 ILSF funds for improving its misdemeanor representation program, the Assigned Counsel Program received some of the funds to hire a senior deputy administrator, who is now performing a key training function for new panel attorneys. In Orleans County, \$27,500 of the \$71,000 in ILSF funds paid for an additional part-time public defender position; however, the county remains without an assigned counsel administrator or plan.

In Tompkins County, where all representation is provided by assigned counsel, we were told that although the ILSF distribution initially went into the assigned counsel plan's budget, it was then removed by the county and put into its general fund, and the assigned counsel administrator does not rely on receiving all of the ILSF funds. In Monroe County, which received \$1.5 million in ILSF funds, we were told that the county had \$200,000 to spare after funding the added costs of the conflict defender and assigned counsel fees. However, when the public defender sought use of the extra funds, the county reportedly refused unless the public defender could show that he had a budget deficit.

## **4.4 Statewide Indigent Defense Data**

### **4.4.1 UCS 195 and ILSF Reports**

Since 1966, Article 18-B of the County Law has required each county's indigent defense provider to file an annual report with "the judicial conference," or OCA;<sup>107</sup> such reports are filed on a UCS 195 form. Since 2003, Article 18-B has also required each county's chief executive officer to file an annual ILSF report with the state comptroller that certifies and provides the detail of the county's local indigent defense expenditures for the calendar year and any funds received from other sources, such as state, federal or private grants.<sup>108</sup> Under the new ILSF legislation, the UCS 195 form and the annual report must be filed by March 1<sup>st</sup> of each succeeding year. The local indigent defense providers normally complete the UCS 195 form with or on behalf of the county's executive or budget office. While these forms purport to detail the number of cases assigned to each provider in a county, some counties combine all caseload

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<sup>107</sup> County Law Article 18-B, §722-f(1).

<sup>108</sup> County Law Article 18-B, §722-f(2).

information onto one form and do not break it out according to each provider. Often, the UCS 195 forms are prepared inconsistently, incompletely, or not at all.

A number of issues affect the ability of the providers to complete the UCS 195 forms accurately. Indigent defense providers do not have uniform case management systems, and as such, may count cases differently. For example, some providers may count cases that are assigned and later conflict out, while others may not. Some providers may count a case handled only for arraignment purposes, while others may only count cases that are handled beyond that stage. The UCS 195 form provides no guidance on which cases to count. In addition, for many of the providers, the compilation of this information is a time-consuming process and further stretches the organization's limited resources.

The UCS 195 form is a single-page document that requests data on caseloads, attorneys, and costs. Section I of the form requires providers to group together Violations, Misdemeanors and Other case types. Family Court cases are not broken out by case type at all. If these forms are to be used to measure workload of the various providers, a much more detailed breakout of case types is necessary. Section II asks for information regarding case dispositions. Again, more detail regarding case types as well as more detail regarding the stage of disposition is required. Cases that are disposed of at arraignment, which make up a large percentage of misdemeanor dispositions and virtually all violations, take significantly less time to dispose of than do cases that plea at a later stage. Section III asks respondents for the number of defendants that were not represented after referral or for whom representation was discontinued, but does not ask what types of cases were discontinued or not represented after referral. Similarly, section IV requests the number of defendants pending at the end of the calendar year, but does not specify the case type.

Section V requests the number of attorneys on each panel for the Bar Association Plan or employed by each institutional provider. In our experience, the number of attorneys on each panel is misleading, as inclusion on a panel does not indicate whether the attorney is actively accepting cases or to what degree. The Assigned Counsel Programs for each county, as part of their payment vouchering systems, should be capable of reporting the number of cases assigned and hours devoted to representing each case retained, and would be a much better measure of workload and productivity.<sup>109</sup> Section VI requests information on the cost of each plan, with specifics on salaries, expenses and fees.

Prior to the creation of ILSF, the counties had no incentive to submit accurate data on the UCS 195 form. Now, the UCS 195 form must be filed with the ILSF report with the Comptroller by March 1<sup>st</sup> of each succeeding year. However, after examining each county's ILSF 2004 Annual Report, we found that only 14 counties had fully completed the UCS forms. Sixteen counties failed to submit one or more UCS forms and others submitted incomplete forms. In at least five counties, we were unable to determine from their annual reports what type of delivery system they actually employ. For a full display of 2004 local expenditures and what information, if any, appeared to be missing from the UCS 195 forms, see *Appendix H*. In comparing the

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<sup>109</sup> County Law Article 18-B, §722-b(4) requires “[e]ach claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.”

2004 net local expenditures from the ILSF reports with the 2004 net local expenditures reported by the Comptroller,<sup>110</sup> we found that in several counties, the net local expenditures reported on the ILSF forms were off in some instances by thousands of dollars from those reported by the Comptroller. The Comptroller informed us that some of the counties' ILSF forms contained errors and some were filled out incorrectly; in addition, some counties filed an addendum to their report, and the revenues of other counties were modified upon further review by the Comptroller. This same comparison has briefly been done for the 2005 ILSF reports, which were released in early March 2006, and the same problems appear as they did for the 2004 reports.

In the absence of an integrated statewide data system, these reports that the counties are required to submit are currently the only source of indigent defense caseload and expenditure data from the counties except for New York City; their importance cannot be overstated. If the annual reports were accurate and complete for each county, they could be very helpful in creating a better picture of New York's indigent defense system. Still, the current forms could be improved and even if completed fully, there is currently no method for verifying the accuracy of the information reported.

#### **4.4.2 Other Data Sources**

Over the course of several months, The Spangenberg Group attempted to collect data from various additional sources to draw conclusions for this report. We gathered criminal case appointment information from the Department of Criminal Justice Service (DCJS), OCA, various assigned counsel plan administrators and institutional providers, individual courts, and annual reports and budgets from New York City and State Chief Administrator of the Courts. While there are a number of sources regarding appointment of indigent defense counsel, there is no single source for reliable information. In spite of the existence of very advanced and interconnected criminal justice data systems throughout the state, gathering detailed and reliable information for criminal and family court appointments to indigent defense providers is virtually impossible.

Family Court appointment information regarding representation of children in Family Court was gathered from the Judiciary Annual Budget Requests, the Law Guardian Programs for each of the Appellate Departments, and OCA. The Law Guardian Program case management systems were not able to output data in an electronic format, and had to be scanned and processed to analyze the data. Law Guardians from the First and Fourth Departments reported only the number of vouchers submitted, while the Second and Third Departments reported both vouchers and filings. The data for the institutional providers included only filings. Family Court representation of adults, a responsibility of each locality, had no central source of information, and we were unable to gather any reliable data in that area.

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<sup>110</sup> See New York State Office of the State Comptroller online at <http://www.osc.state.ny.us/localgov/finreporting/ilsf.htm>.

### 4.4.3 OCA Data Systems

New York Courts have a number of different methods of collecting information about cases appointed to providers, but very little analysis of that information is performed. In those circumstances where analysis takes place, the reliability of that information suffers because some of the most important elements of information are either entered incorrectly or not entered at all.

In most courts in the state, court personnel enter case data in a case management system. In New York City and in many courts in Nassau, Suffolk, Erie, Dutchess, Orange, Putnam, Rockland and Westchester counties, the courts use the Criminal Records Information Management System (CRIMS). In all other counties, where cases are entered electronically, the information is entered in the Advanced DB Master (ADBAM) system. About half of the town and village courts do not report their cases electronically, and instead submit paper reports to the Department of Criminal Justice Services (DCJS) which then enters the information electronically.

While the courts appear to have sufficient data entry systems throughout the state, and relevant information is making its way to a centralized data storage facility, very little is being done to make use of that information statistically. DCJS was able to provide us with arraignments for fingerprintable offenses in the lower courts throughout the state, but the information was not readily available, and the accuracy of the indigent defense provider element is questionable at best. They were not able to provide us with information for non-fingerprintable offenses. However, we believe that there are a very large number of court appointments made, particularly in New York City, for non-fingerprintable offenses.

The various data entry systems in the courts are able to capture the provider type (Legal Aid Society, Public Defender, 18B, Private, Pro Se) but it is not a required data element; data entry personnel can leave the field blank. While it appears that some courts do enter the information accurately, other courts do not enter the information or do so incorrectly. For example, there are a number of counties with no Legal Aid Society that indicate that a large number of assignments go to that provider. A number of counties show a very high percentage of private counsel as the provider type, when the provider type is more likely 18-B. Counties that show a high percentage of “Null Value” (i.e., empty field) as the provider type are simply not entering information regarding the type of provider (see *Appendix I*).

The Criminal History Information Reconciliation Project (CHIRP) is currently in the process of working with the town and village courts to train personnel in reporting case information electronically through the OCA website and to reconcile missing information for the 1990 – 1999 period. They are also training personnel to properly enter information regarding the assignment of counsel. There were almost one million records missing some or all information at the beginning of the project, and that number has been reduced by two-thirds; just over 300,000 records have yet to be reconciled. The information being reconciled, however, is primarily arrest, fingerprint and disposition information, and does not include correction of data regarding the appointment of counsel.

A special effort was made to gather information for the indigent defense providers in the five boroughs of New York City. The Office of the Criminal Justice Coordinator was able,

through much effort, to provide a good deal of the information we requested, but did not have detailed records regarding appointments or dispositions for the providers, had to reconstruct the data by approaching each of the providers, and was only able to provide information dating back to 2001. Some of the providers could provide information regarding the number of: (a) dispositions at arraignment by case type; (b) appointments made after arraignment; and (c) cases where representation was discontinued after referral. However, other providers could not provide these numbers, thus making it impossible to provide a comprehensive picture of case assignment and disposition information.

## 4.5 Current Indigent Defense System

A criminal defense attorney testifying before the Commission said of New York State's indigent defense system, "I wanted to say it is a poorly designed system, and then I realized that's not a good way to describe it because it is not a system and it doesn't have any design."<sup>111</sup>

County Law §722 allows each county to choose its own system for providing indigent defense services. A county may choose to employ a public defender office, a private legal aid bureau or society, a plan of a bar association employing the services of private counsel, or any combination of the three.

A public defender office is a county governmental office and its staff are county employees that provide representation to "each indigent defendant who is charged with a crime."<sup>112</sup> The public defender is appointed by a county board that determines the public defender's terms of employment and salary. A public defender may, with the approval of the county board, hire additional attorneys and/or support staff and may determine their terms and salaries. While a public defender director has authority over staff and staff salaries, public defenders are employed by the county. Conflict defenders usually fall within the public defender provider-type and handle only cases that are a conflict of interest for the public defender or primary provider.

A legal aid bureau or society (LAS) is a private and usually non-profit organization that contracts with the county to provide indigent defense services.<sup>113</sup> While dependent on the county for funding, LAS employees are not county employees. Most legal aid societies are governed by a board of directors. The director or attorney in charge is usually hired by the board and is responsible for hiring all other staff. In addition, the alternate defenders in New York City fall within the legal aid bureau category of institutional providers as they are private non-profit organizations (except for Queens Law Associates which permits its attorneys to have a private retained practice). The alternate providers are smaller than the legal aid society or primary providers, but they are not limited to conflict cases.

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<sup>111</sup> Albany Commission hearing, transcript p. 119.

<sup>112</sup> County Law, Article 18-A.

<sup>113</sup> For representation under the Family Court Act, services are provided by either a private legal aid society or "by any corporation, voluntary association, or organization permitted to practice law...." County Law, Article 18-B, §722(2).

Assigned counsel or 18-B plans provide representation through private attorneys. By statute, the plans are created by the county's bar association and consist of private counsel services that "are rotated and coordinated by an administrator" who may be compensated.<sup>114</sup> As discussed later in Chapter 6, we found that in some counties, the institutional provider acts as the assigned counsel administrator, and in a few counties, there is no assigned counsel administrator or formal plan at all. County Law also requires each county's 18-B plan to be approved by "the state administrator,"<sup>115</sup> who is the Chief Administrative Judge. However, it is unclear how many, if any, counties have actually sought such approval, as OCA was unable to locate a collection of the counties' written plans or requests for their approval.

Most New York counties have chosen to establish one or more institutional provider in addition to employing assigned counsel. Although a number of counties' systems are or have been in flux, our best information indicates that, among the 62 counties, the following institutional provider programs exist: 51 public defenders (or alternate defenders in New York City); 10 conflict defenders; and 14 legal aid societies.<sup>116</sup> Only nine counties provide representation through assigned counsel only. *Appendix J* provides information on the combination of indigent defense systems established within each New York county.

#### 4.5.1 New York State Crime Statistics

Crime trends affect a state's criminal justice and indigent defense systems in terms of total caseload, types of cases, and costs. At the national level, the Bureau of Justice Statistics (BJS), U.S. Department of Justice, annually publishes a national crime victimization survey. The survey is based on in-person interviews conducted by United States Bureau of the Census which measure the incidents of non-lethal violent crime and property crime reported by households across the country, including crimes not reported to the police. The 2003 BJS survey indicates that the percentage of households that experienced crime dropped from 25 percent in 1994 to 14.7 percent in 2003. For the same period, the percentage of households experiencing violent crime dropped from seven percent in 1994 to three percent in 2004. These figures fell despite 14 million more households being surveyed in 2003 than in 1994.

In New York State, some clear crime trends have appeared. Crime in New York State has gone down, both in recent years and over the last decade. According to the New York State Division of Criminal Justice Services (DCJS), which collects and reports information to the Federal Bureau of Investigation as part of an annual state reporting requirement, crime in recent years is down overall in New York State, and particularly in New York City.<sup>117</sup> To standardize

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<sup>114</sup> County Law, Article 18-B, §722(3).

<sup>115</sup> *Id.*

<sup>116</sup> There is one legal aid society that covers Broome, Cattaraugus and Wayne Counties. Franklin County has three separate public defender offices, one of which does only family court work. Tioga County contracts with one attorney to provide representation in all conflict cases, he has been counted as a "conflict defender." Finally, the legal aid office in Wyoming handles only prison cases including parole, article 78 petitions and habeas corpus filings. See *Appendix J* for a detailed breakout of the types of systems employed in each county.

<sup>117</sup> See "Index of Crimes Reported: 2000-2004, New York State by Region," available at <http://criminaljustice.state.ny.us/crimnet/ojsa/indexcrimes/index.htm>. The FBI compiles this data from each state and publishes them annually in the national Uniform Crime Report (UCR). The Uniform Crime/Incident-Based



for national reporting requirements, DCJS reports data in the categories of violent crimes (murder, rape, robbery and aggravated assault) and property crimes (burglary, larceny and motor vehicle theft). According to the DCJS data, between 2000 and 2004, preliminary estimates show that the overall crime index for offenses in these categories was down 16 percent in New York State. In New York City, this number was down by 21 percent. During the same period, violent crime declined in New York State by 20 percent and in New York City by 27 percent. Property crime was also down by 15 percent statewide and 19 percent in New York City.

In addition, DCJS reports data on adult felony and misdemeanor arrests in New York State, by county.<sup>118</sup> According to the data, between 1994 and 2004, total statewide adult arrests fell by almost five percent. Statewide, total felony arrests dropped by 21 percent, felony drug arrests dropped by 34 percent, and violent felony arrests dropped by 37 percent. As discussed in Chapter 9 of this report, these trends are more striking in New York City. Total arrests in New York City fell by 8.7 percent. Total New York City felony arrests fell by 49 percent, felony drug arrests fell by 43 percent, and violent felony arrests fell by 47 percent. During the same time period, total misdemeanor arrests statewide increased by only five percent, while in New York City, misdemeanor arrests increased by 12 percent. It is in this changing climate that New York's indigent defense system has been operating.

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Reporting system uses general offense categories to standardize reporting across states. *See also* Chapter 9, Section 9.6.1, Criminal Case Trends for New York City.

<sup>118</sup> *See* "Adult Arrests by County and Region," available at <http://criminaljustice.state.ny.us/crimnet/ojsa/stats.htm>.

## CHAPTER 5: INSTITUTIONAL PROVIDERS

Fifty-three of the 62 counties of New York State have chosen to establish one or more institutional providers with salaried staff. Forty-five of these counties have established one or more public defender or alternate defender offices, 10 have established a conflict defender office, and 13 have contracted with a legal aid society.<sup>119</sup> The institutional providers are usually created to be the main providers of indigent defense services in the county, although in several counties they are limited to handling certain case types, such as felonies or misdemeanors only.

Below we discuss the common problems and issues among the institutional providers outside of New York City. One of the biggest overall problems these programs face is a lack of independence from the counties that fund them. As a result, many providers feel pressure to limit their budget requests and to prove their efficiency to the funding source. Further, in the wake of the new 18-B rates, some counties have chosen to shift more of the indigent defense workload onto the institutional providers as a cost-saving effort. In some counties, while the burden on the providers has increased, the funding and resources have not. During this study, it became apparent that the defender offices in New York suffer greatly from insufficient funding and resources. All these factors lead to inadequate staffing and high caseloads that hamper an attorney's ability to provide quality representation to each client. This problem is frequently exacerbated by a lack of meaningful performance standards and oversight of the public defender and legal aid attorneys.

The Genesee County Public Defender described the situation to the Commission:

The basic flaw in our system is that each of the 62 counties in the State independently decide what shape their public defense system will take and how well or how poorly it will be funded.... We need enforceable, statewide standards that deal with issues such as adequate staffing to meet caseload, adequate training opportunities, adequate support staff such as investigators, paralegals and social workers. We need an independent agency to provide oversight of both the appropriation of funds and the delivery of services.<sup>120</sup>

### 5.1 Lack of Independence from the Counties

The importance of the professional and political independence of indigent defense providers has been recognized by both the American Bar Association and the New York State Bar Association. The NYSBA standard regarding the provision of mandated representation echoes the ABA standards<sup>121</sup> and states:

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<sup>119</sup> Each of the five counties comprising of New York City have one trial-level alternate defender organization providing indigent defense services, and each county is included in the total number of counties having one or more public defender office. On the other hand, while four of the five counties in New York City have a Legal Aid Society office, since the legal aid offices all fall within one administration, it is only counted once.

<sup>120</sup> Rochester Commission hearing transcript, pp. 20-22.

<sup>121</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (3d ed. 1992) [hereinafter ABA PROVIDING DEFENSE SERVICES], Standards 5-1.3, 5-1.6.

To guarantee the integrity of the attorney-client relationship, the function of providing mandated representation, including the selection, funding, and payment of counsel, shall be independent. Providers of mandated representation should therefore be free from political influence or any other influences in the performance of their legal duties, other than the interest of the client, and should be subject to judicial supervision only in the same manner and to the same extent as all other practicing lawyers. Providers of mandated representation shall have an independent board or other entity to protect professional independence.<sup>122</sup>

NYSBA standards also state that the selection of an institutional provider “shall be made solely on the basis of merit.”<sup>123</sup> ABA standards further urge: “Under no circumstances should the funding power interfere with or retaliate against professional judgments made in the proper performance of defense services.”<sup>124</sup> NYSDA standards also mirror this.<sup>125</sup>

County Law §722 requires the counties not only to provide for counsel, but also to “provide for investigative, expert and other services *necessary for an adequate defense*” (emphasis added). However, what constitutes an “adequate defense” has largely been open to interpretation by the counties who fund the services. Not surprisingly, this is the source of many ongoing problems surrounding the influence of the counties on the quality of indigent defense services.

While a lack of independence from the counties exists with all providers, it is perhaps most true for the public defenders who are appointed and serve at the pleasure of the counties.<sup>126</sup> In a few counties, we were told that the selection of the public defender for appointment is a “political process” in which the public defender must be from a particular political party and in some cases must have paid “political dues” in order to be appointed. For example, in one of the larger counties we visited, we were told that a person could not get appointed to a county position unless they had been involved in the local Democratic party, such as campaigning for Democratic candidates in the county government. In one of the smaller counties we visited, we were told that you had to be a Republican to get appointed to a county position. While we could not verify such comments, they are nonetheless disconcerting.<sup>127</sup>

In one upstate county, we were told that the District Attorney played a major role in the selection of the public defender. A judge in the same county noted that because the local legislature does not like spending money on public defense and is responsible for approving the public defender’s budget, “a zealous advocate is not as likely to get approved.” A court-appointed attorney agreed, saying that the need to obtain additional funding has “created a group

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<sup>122</sup> NYSBA Standard A-1.

<sup>123</sup> NYSBA Standard A-2.

<sup>124</sup> ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, Standard 5-1.6.

<sup>125</sup> See NYSDA Standard III-A.

<sup>126</sup> This runs contrary to the ABA standards, which state “Neither the chief defender nor staff should be removed except upon a showing of good cause.” ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, Standard 5-4.1.

<sup>127</sup> In a case hailing from Rockland County, New York, the United States Supreme Court held that conditioning the public employment of public defenders on the basis of their political affiliation violates the First and Fourteenth Amendments. *Branti v. Finkel*, 445 U.S. 507 (1980).

of non-boat rockers.” He told us, for example, that the public defender office is not the primary advocate for defense services and has admitted in the past that it cannot take up issues for fear of losing funding. The current public defender of this county is said to have such a difficult time getting additional funding from a primarily Republican legislature that he asks judges to meet with county executives on his behalf to ask for money for new attorney positions. The judges have been unsuccessful as well.

A number of public defenders testified before the Commission regarding the political pressure they receive in their jobs, a pressure that has created a conflict between a desire to keep their jobs and their often unpopular role as an advocate for indigent defense. As the Rensselaer County Public Defender told the Commission, “[t]he best way to be independent is not to have to depend upon politics for the continuation of your tenure.”<sup>128</sup> The Saratoga County Public Defender agreed. He is appointed to a two-year term, but believes the term should be longer in order to help insulate him “from the political decisions, because there are things that occur even within a two-year window that are controversial and the Public Defender sometimes has to take controversial stands and promote certain things.”<sup>129</sup> The former Essex County Public Defender described the difficulty he had in getting the county’s permission to hire a full-time assistant; he was told by one county supervisor “that ‘these defendants don’t need to have Johnny Cochran, you know.’” After obtaining approval to hire the assistant, the former public defender then received “political pressure” to fire him: “I was encouraged to relieve my newly hired assistant because none of the local judges liked the way he did business.” He was further told by a county supervisor that he “should join the District Attorney in his effort to keep the streets of Essex County safe.”<sup>130</sup>

On his last day in the job after over 27 years, the Greene County Public Defender testified before the Commission to what he described as a “brutal political battle” in which members of the county legislature “fired” him by changing his part-time position into a full-time position at \$72,000, a position “they knew [he] could not afford to take,” and appointing a person with no administrative or trial experience. He believes that the new legislative majority leader in the county led the efforts to oust him based on her ties to a former legislator who previously criticized him and his office for providing “‘Cadillac defenses.’” The Public Defender told the Commission:

Politicians must stay out of making decisions on funding, on how we do our job. During the search committee’s interviews [for a full-time Public Defender], it has been reported to me, and I have verified it with two people, that one legislator actually asked a potential candidate if they would continue to provide ‘Cadillac defenses.’ Talk about your attempt at political intimidation.<sup>131</sup>

The Steuben County Public Defender spoke of the conflict between his role as an advocate for indigent defense services and the county’s desire to save money. He testified that although he has ideas for improving the services, “I’m handicapped because at this point I can

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<sup>128</sup> Albany Commission hearing transcript, p. 4.

<sup>129</sup> Albany Commission hearing transcript, p. 160.

<sup>130</sup> Albany Commission hearing transcript, pp. 24-25.

<sup>131</sup> New York City Commission hearing transcript, pp. 96-98.

make no responsible recommendation to my committee or to the legislature as a whole that will save money. And if my proposal doesn't save money, it will not be adopted. That's where we are in Steuben County right now."<sup>132</sup>

The need for independence from the county funding source also exists with legal aid societies. The Director of the Hiscock Legal Aid Society in Onondaga County described to the Commission the following exchange that took place in 2004 when the county was reviewing its plan for providing mandated legal representation:

A legislative committee member asked me the following series of questions in a hostile tone of voice, starting with, isn't it true that the legal aid society has a policy of not disposing of cases at arraignment? I answered that that was in fact our policy because we were never given adequate resources to be able to meet our clients in jail before arraignment or to have staff present to discuss cases with them before arraignment. Therefore, it would be a violation of an ethical [obligation] to our clients to do so. The next question was, isn't it true that you make motions in every case? The answer unfortunately was no. We don't have the resources to do that.... The next question was, isn't it true that you served demands to produce in every case? The answer was yes. That is the statutory requirement to preserve our client's rights to discovery. And, finally, I was asked, isn't it true that you require a written response from the DA's office to those demands? ... These questions were very troubling because they imply that we were doing something wrong by fulfilling our legal and ethical responsibility to our clients and that we were subjected to criticism for providing vigorous representation to our clients... I was subsequently told by a member of the judiciary...that the word on the street was that we lost the city court program because we delayed cases. My response then and my response [now] is, one person's delay is another person's due process.<sup>133</sup>

In another county with a legal aid society, a high-level county official reportedly took the position that the provision of "adequate counsel" meant that the county government "only had the responsibility of seeing that counsel for poor people was not so poor as to result in reversal for ineffective assistance of counsel."

The Director of the Legal Aid Society in Westchester County told the Commission, "I have had on more than one occasion been threatened with the language, 'if you don't do what we want, if you don't accept the budget terms, we will find another provider to replace you.' ... I have heard this at least three times in the last six years. ...[Y]ou never have the security or stability. ... In many ways it's terrible for staff morale." He further told the Commission that a few years ago the county added a provision to the legal aid contract that required attorneys to advise clients to waive certain statutory rights. He told the county that this was unconstitutional and unethical and refused to sign. While the county ultimately capitulated, the legal aid budget

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<sup>132</sup> Ithaca Commission hearing transcript, p.37.

<sup>133</sup> Ithaca Commission hearing transcript, pp. 230-232.

for that year was reduced by \$300,000. “And this is why there is a need for some kind of an independent body, to insulate us from that type of thing.”<sup>134</sup>

## 5.2 The Drive to Show Efficiency

Both public defenders and legal aid societies are often under pressure to show the county how efficient they can be with the use of county funds. Unfortunately, this drive to show efficiency sometimes runs contrary to the interests of the client. This problem occurs when providers feel they cannot request sufficient funding for resources and similarly, when they continue to handle caseloads beyond their means (see also Caseloads, below).

One public defender candidly told us, “You can’t get too aggressive requesting resources.” In another county, a legal aid director told us that he “want[s] to show we are spending less and less each year.” In that regard, he has never asked for more than a five percent increase in the LAS budget. In still another county, we were told that although the county approves the public defender’s original budget, each year the public defender is required to submit an alternate budget to the county illustrating how the office would operate with a 10-12% reduction in funding.

The need to be efficient sometimes also results in an institutional provider turning a blind eye to potential conflicts of interest. One legal aid director commented that “some conflicts are only potential conflicts;” that is, only if the witness testifies at a trial. Although not many cases in this county are tried, should a case with a potential conflict get to that point, LAS would need to withdraw on the eve of trial. Further, although the agency was given two part-time attorney positions to handle drug court and family court cases, the director does not supervise them “in their day-to-day case management” because he does not want to learn anything about the clients that would cause LAS to have to conflict out of other cases. Similarly, one public defender office that we visited has a policy to handle misdemeanor conflict cases, including co-defendants, as long as they can resolve cases without a trial. This policy exists despite the reported disagreement of some judges in the county.<sup>135</sup>

## 5.3 Caseloads

Given the funding problems and the need to show efficiency, it is not surprising that institutional providers throughout the state are burdened with heavy caseloads. While the providers themselves lack their own specific caseload standards, we are able to judge their caseloads against our experience in many jurisdictions across the country, as well as the national standards.

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<sup>134</sup> New York City Commission hearing transcript, pp. 161, 163-164.

<sup>135</sup> According to the ABA Criminal Justice Standards, “[e]xcept for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another.” ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, Standard 4-3.5.

The only national source that has attempted to quantify a maximum annual public defender caseload is the National Advisory Commission (NAC) on Criminal Justice Standards and Goals, which published its standards in 1973. In its report, NAC set the following maximum annual caseload standards per *full-time* public defender attorney: 150 felonies; 400 misdemeanors (excluding traffic); 200 juvenile court cases; 200 mental health cases; or 25 appeals.<sup>136</sup> These standards refer to the maximum number of cases an attorney should handle if handling only that one case type. If, as is often the case, an attorney is handling a combined caseload, the percentage of the maximum caseload for each category should be assessed and the combined total should not exceed 100 percent. Open caseloads per attorney should be far fewer than these annual standards.

The NAC standards are now over thirty years old and are not specific to the practice in a particular jurisdiction; however, a number of states and counties have developed public defender caseload standards that are specifically tailored to their jurisdiction's practice. The Spangenberg Group has conducted studies to develop weighted caseload standards for public defender and contract attorney programs in five states and four counties,<sup>137</sup> including a 1989 study for the New York Legal Aid Society.<sup>138</sup> A table with caseload standards from 14 states and one city can be found at *Appendix K*. The standards address the maximum number of cases that a full-time lawyer should handle in a 12-month period.

In New York, we did not encounter any institutional provider that had its own meaningful, written caseload standards. In 1996, the Indigent Defense Organization Oversight Committee in New York City essentially adopted the NAC standards, but we know from our work in New York City that these standards are not followed. NYSDA and NYSBA standards for lawyers providing mandated representation do not provide quantitative caseload standards but do state that lawyers should not accept a matter unless she has sufficient time and resources to provide quality representation.<sup>139</sup> NYSBA standards further require institutional providers and assigned counsel plans to “develop local numerical workload standards,” and “[i]n no event shall the national caseload standards established in criminal cases be exceeded.”<sup>140</sup> Unfortunately, defenders are not developing their own specific standards and across the state, they are handling heavy caseloads that are well in excess of the national standards.

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<sup>136</sup> National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts* at 186 (Washington, D.C. 1973), Standard 13.12 on courts.

<sup>137</sup> The case-weighting model employed by TSG requires public defenders or contract attorneys to keep detailed time records of their work over a given period of time, typically ranging from ten to thirteen weeks, on specially designed time sheets. The time records provide a means by which caseload (the number of cases handled) can be translated into workload (the amount of effort, measured in units of time, for the lawyer to complete work on the caseload). The ability to weight cases allows thorough consideration of not just the raw number of cases assigned to a criminal justice agency annually, but also the severity of various case types handled by the program. In the broadest context, weights can be given to the total annual caseload of a defender organization to compare to the next year's anticipated volume of cases. Assuming that accurate records are kept of attorney time expended in each case during the study period, the development of workload standards and the determination of staffing needs for the projected caseload can be accomplished with some assurance of precision.

<sup>138</sup> *Design a Workload Measurement System and Develop Workload/Caseload Standards*, prepared for the Criminal Division of the New York Legal Aid Society by The Spangenberg Group in a joint effort with Maximus, Technical Consultants to Management (1989).

<sup>139</sup> See NYSDA Standard VIII-A(3), NYSBA Standard I-1.

<sup>140</sup> NYSBA Standard G-2.

In Monroe County, the least experienced public defenders who practice in the town and village courts are each handling approximately 1,000 cases a year. In the city court, one public defender reported an open caseload of 800 misdemeanors; she has so many clients that her voice mail cannot hold all of their messages. Another reported 800-850 open cases in the arraignment part in that court. We were told that the city court cases are “triaged” and not all are fully investigated. The Monroe County Public Defender described the situation to the Commission as “outrageous.”<sup>141</sup> Felony attorneys are also overwhelmed. One attorney had an open caseload of 66 felonies within one month of practicing in the county court. A supervisor in the office reported an open caseload of 50 serious felonies, including murder, high-level drug cases, and multi-count indictments. Eight appellate attorneys handle about 250 cases annually, of which 100-125 are appeals of trials. The office is so overwhelmed with appellate cases that there is a backlog of over two years in non-capital appeals. In addition, the office is also responsible for filing capital appeals, which deepens the backlog.<sup>142</sup>

In Erie County, we were told that legal aid attorneys who provide representation in misdemeanors and felonies at the city court level dispose of about 700 cases a year, although one attorney reported an open caseload of 200 and an annual caseload of 1,000. These caseloads are made worse by the fact that some of the legal aid attorneys have private practices, even though they are full-time employees.

In Orleans County, two part-time public defenders reportedly handle approximately 800 criminal cases a year.<sup>143</sup> In Steuben County, one new public defender reportedly had around 100 open felony cases after 10 weeks at the office. Still, the attorney was hesitant to ask for help.

In Broome County, 11 assistant public defenders handled about 4,100 cases in 2004, an average of 372 cases each. Thirty percent of these cases were felonies (including fugitive and parole matters). At the time of his Commission testimony, the Public Defender estimated that his attorneys were handling an average of 420 cases a year, and that felony attorneys were handling about 220 cases a year.<sup>144</sup> In Steuben County, five full-time and six part-time attorneys handled 4,046 cases in 2004, including family court cases.<sup>145</sup> Assuming the part-time positions as 0.5 full-time equivalent positions, the average annual caseload for one full-time equivalent attorney in the office was 506 cases.

In 2004 in Suffolk County, the average criminal trial caseload per attorney in the office was 300 cases. This is in addition to parole hearings and appeals. In the district courts, 35 attorneys handled 18,567 cases, for an average district court caseload per attorney of 530 cases. One town justice in the county noted that on the day of our visit, four LAS attorneys were present to handle 120 cases on the docket, so that each attorney was handling an average of 30 cases on one docket. An 18-B attorney in the county told us that while LAS has good attorneys, because of their high caseloads, they are not able to spend enough time with clients and they talk clients into pleas. He reported that some LAS clients end up hiring private counsel because they

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<sup>141</sup> Rochester Commission hearing transcript, pp. 15-16.

<sup>142</sup> Rochester Commission hearing transcript, pp. 7-8.

<sup>143</sup> Rochester Commission hearing transcript, p. 58.

<sup>144</sup> Albany Commission hearing transcript, pp. 114, 122-123.

<sup>145</sup> Albany Commission hearing transcript, p. 39.



want to go to trial. Meanwhile, Suffolk County reports on its website that “[t]o date, LAS has never declined a case due to an inability to handle their caseload.” In neighboring Nassau County, LAS attorneys in the district court are handling approximately 100 open cases at any one time. Not surprisingly, some judges were concerned about the level of attorney-client contact from these attorneys (see Chapter 7, Client Contact).

The Public Defender Office in Monroe County has been called “one of the finest.” However, we were told the staff attorneys are incredibly overwhelmed and that in order to handle the crushing caseload, most attorneys in the office reportedly average 60-70 hours a week, working nights and weekends.

Despite the overwhelming caseloads of many institutional providers, we are not aware of any efforts in the state to seek relief from a trial court; such efforts have been successful in several jurisdictions across the country.

## 5.4 Part-time Defenders

The burden of heavy caseloads is exacerbated in some counties by the use of part-time attorney positions. During our site work, 12 of the 15 upstate counties we visited had institutional providers staffed either completely or partially with part-time attorneys: eight with public defender programs (Albany, Broome, Chemung, Greene, Monroe, Orleans, Schenectady, and Steuben), and four with legal aid programs (Erie, Onondaga, Putnam, and Westchester).

In some counties, the part-time attorneys are paid part-time salaries but are expected to handle full-time caseloads; this arrangement is reportedly accepted by the part-time defenders so they can keep their private practices.<sup>146</sup> One part-time chief public defender candidly said, “You can’t run a public defender with a part-time chief.” In addition to his role as Public Defender, he has a “sizeable” private practice, teaches at a law school, and was running for town justice. The Steuben County Public Defender told the Commission that his two part-time public defenders who handle A and B felonies have had to reduce their private practice in order to handle the caseload. Although the positions are no longer part-time, the county has not funded full-time positions for them.<sup>147</sup> In another county, a part-time legal aid attorney told us that he has “two full-time jobs.” In yet another county, a judge referred to the Public Defender Office in this county as a “welfare agency for lawyers” as lawyers will join the office part-time in order to get health insurance.

While part-time positions are usually poorly funded, they are easier to fill than poorly-funded full-time positions. However, some counties also allow their full-time defenders to retain private practices so that attorneys will be more willing to accept low-paying positions. The Schuyler County Public Defender, for example, said that she could not afford to be the full-time defender if she were not permitted to also have a limited private practice.<sup>148</sup> In Chemung County, we were told that public defender salaries are so low that it is difficult to attract competent attorneys; as a result, even full-time attorneys are allowed to retain private practices. While three

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<sup>146</sup> See, e.g., Albany Commission hearing transcript, pp.84-85 (testimony of Capital Region NYCLU Director).

<sup>147</sup> Ithaca Commission hearing transcript, p.38.

<sup>148</sup> Ithaca Commission hearing transcript, p. 278.

staff attorneys are part-time, the Public Defender and three other staff attorneys are full-time, and all have part-time private practices. Another small upstate county recently hired its first full-time public defender who is relatively inexperienced but who was reportedly the only person of 15 applicants willing to accept the position for a salary of \$72,000.

## **5.5 Court Coverage Problems**

Institutional providers in most counties across the state are not staffed sufficiently to cover all of the numerous dockets in their counties, including specialty court dockets and town and village court dockets. For instance, Nassau County has 61 town and village courts - the greatest number for any county with an institutional provider - and the Legal Aid Society simply cannot adequately staff all of these courts. (For a full discussion, see Chapter 7 - Specialty Courts, and Chapter 8 - Town and Village Courts). At many local court dockets, there are often no defense attorneys present at all.

In large rural counties, institutional providers have an additional challenge of covering a large geographical area, which is often not factored into their staffing and resource needs. In Essex County, a former public defender who testified before the Commission had to cover a large territory, first by himself, and then with one assistant. One witness described the dilemma: “He has Saranac. He has Lake Placid. Vast distances. Mountains, snow, you name it. And for a long time he is in this all by himself... [H]e has a little, tiny closet of an office. What on earth is he supposed to do? ... It’s impossible.”<sup>149</sup> In Steuben County, the Public Defender must cover an area about the size of the State of Rhode Island. In this geographical area, four part-time misdemeanor public defenders are responsible for covering a total of 48 courts.<sup>150</sup>

Coverage problems exist in suburban counties as well. In Westchester County, the Legal Aid Society handles only felony cases, while 18-B attorneys handle misdemeanors and conflicts. Because of staffing limitations, LAS is not present every day in court. This results in some felony defendants waiting in custody to be arraigned. Even in one of the busiest courts, White Plains City Court, LAS is present only on Tuesdays and Fridays; if a defendant is arrested on a felony on a Wednesday, she must wait until Friday to be arraigned.

## **5.6 Lack of Vertical Representation**

In order to handle the high caseloads and numerous dockets, many institutional providers provide “horizontal” rather than “vertical” representation. Rather than assigning one staff attorney to handle a case from assignment through disposition (vertical representation), any number of attorneys may handle the case at different stages or dockets (horizontal representation). For example, attorneys are assigned to a particular docket such as arraignment or an all-purpose session and will handle all of the public defender or legal aid cases on the docket that day. Some of these duty assignments, such as jail interviews, are also out of court.

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<sup>149</sup> Albany Commission hearing transcript, p. 136.

<sup>150</sup> Ithaca Commission hearing transcript, pp. 40-41.

In this manner, a defendant may be represented by any number of different attorneys during the life of the case. In addition, when a defendant's case is between court appearances, it sometimes also remains between attorneys with no investigation or work performed on the case.

While horizontal representation is usually employed for the sake of efficiency, it can be difficult and confusing for a client; it may create a barrier to forming a meaningful attorney-client relationship and developing a client's trust. Such representation is also contrary to NYSBA standards.<sup>151</sup> One attorney in Erie County said that having two different lawyers on a case makes the client "jaded and on edge."

In Erie County, indigent defense representation is split in felony cases between two providers. The Legal Aid Bureau of Buffalo provides initial representation in the Buffalo City Court, but once a felony leaves that court, the defendant is assigned an 18-B attorney. No factual investigation is performed by Legal Aid, even in serious felonies, at the preliminary hearing stage. Additionally, although a Legal Aid client may be visited by an investigator in jail before a preliminary hearing, she will not see her attorney and cannot make a collect call to the Legal Aid office.<sup>152</sup> We were told that a Legal Aid proposal to provide vertical representation in felonies failed because of the powerful lobby of the Erie County Bar Association, which did not want the private attorneys to lose work in a depressed economy.<sup>153</sup> However, the 18-B attorneys who we interviewed also disapproved of the two-tier system. Another criticism of the system is that Legal Aid attorneys sometimes advise defendants to reject misdemeanor plea offers in City Court, and when the 18-B attorneys get the case, they disagree with the assessment of the Legal Aid attorney (who lacks experience in trying felonies) but by then the misdemeanor offer is withdrawn. A district attorney agreed that this practice hurts the defendants. One judge described it as a "cockamamie system of dual representation [that is the single] biggest impediment to the timely representation [of indigent defendants in Buffalo]." In 2003, the District Attorney's office moved to vertical representation.

In Westchester County, the Legal Aid Society, which handles only felony cases, is responsible in any given week for covering up to 115 court operating sessions. To cover the local courts, it assigns its 34 trial attorneys to work in teams. Until a case is going to the grand jury, it will be handled by whichever team member is assigned to that court session on that day. Thus, felony defendants may be represented by several different attorneys during the course of their case. An 18-B attorney in the county told us that the one complaint he hears from LAS clients is that they "never see the same face."

In Albany County, the Public Defender does not assign a felony case to an attorney until it receives a notice that it is going to the grand jury, leaving defendants with no assigned attorney case until they are facing indictment. The Public Defender admitted that after a preliminary hearing is waived in the lower court, "We forget about it; it goes to the DA." During this time,

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<sup>151</sup> See NYSBA Standard I-5 ("Providers of mandated representation shall ensure that the same counsel will represent the client continuously from the inception of the representation until the initiation of the appellate proceeding, if any...").

<sup>152</sup> Rochester Commission hearing transcript, pp. 173, 174-175.

<sup>153</sup> However, we were told that there is potential for a compromise proposal whereby Legal Aid will keep all E-level felonies and drug felonies.

there is no one working on the case, requesting investigation, or interviewing with the defendant. At the Alternate Public Defender, while representation continues with the same attorney in most cases, in the Albany City Court, attorneys handle all the cases on the docket on the day of their court assignment.

In Suffolk County, the Legal Aid Society is unable to provide vertical representation in felony cases before and after indictment “because of the geography that’s involved.”<sup>154</sup> In Putnam County, some legal aid attorneys are assigned to the local courts, while others are assigned to the county court; thus, felony defendants are represented by different attorneys in these courts. The office also rotates a weekly jail assignment during which the duty attorney will meet all new clients in custody. In Orleans County, which has a small public defender office, there appears to be no attempt to provide vertical representation, and coverage of the local courts is haphazard.

## **5.7 Lack of Resources**

Inadequate funding of the institutional providers creates difficult working conditions for existing staff, including not only heavy workloads, but also insufficient support staff, inadequate office conditions and a lack of technological resources. During our site work, we found these conditions throughout New York’s upstate counties.

### **5.7.1 Investigators and Support Staff**

Some institutional providers have no staff investigators or an insufficient number of them. The lack of staff investigators is an important issue and its effects are discussed more thoroughly in Chapter 7 of this report. We also learned that some providers lack sufficient clerical staff.

Many public defender and legal aid offices have no staff investigators and must contract out for these services. As the Saratoga Public Defender testified before the Commission, there is a big difference between having an investigator on staff who you can consult and make quick requests to every day, and having to contact an outside investigator to schedule an appointment before making a request.<sup>155</sup>

In addition, public defenders with limited funds can feel pressure not to spend money on outside contractors. In Steuben County, the Public Defender has no staff investigators, but “can make no reasonable proposal, such as a full-time investigator, unless it saves the county money.”<sup>156</sup> One attorney who has been a legal aid defender for 15 years said that although the office has a budget for investigators and experts, he has “not used it in a long time.” The Putnam County Legal Aid Society has no staff investigators and in 2004, according to its UCS 195 report, spent only \$1,345 on investigators in disposing of 1,128 criminal and family court cases.

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<sup>154</sup> New York City Commission hearing transcript, pp. 268-269.

<sup>155</sup> Albany Commission hearing transcript pp. 167-168.

<sup>156</sup> Ithaca Commission hearing transcript, p.53.

Even when an office has investigators on staff, often there are not enough of them or they are assigned to perform work other than investigations, such as eligibility screening and meeting with clients at the jail (see Chapter 7, Client Contact and Eligibility Determinations). In the Monroe County Public Defender Office, there are seven investigators for 53 attorneys, or one for every 7.5 attorneys. As a result, the investigators do not have sufficient time to spend on cases. One attorney reported that she conducts her own investigations because it takes too long for the investigators to respond to requests. In addition, some complained about the quality of the staff investigators who are part of the civil service system and lack proper training in criminal investigations. The Legal Aid Bureau of Buffalo in Erie County has no staff investigators, and other support staff reportedly spend much of their time interviewing clients.

Clerical support staff is also insufficient in some offices. When clerical staff is lacking, attorneys must not only handle their difficult caseload, but also perform non-legal work such as typing, copying and filing. For example, the Monroe County Public Defender has two secretaries to support the city court public defenders who handle approximately 12,000 cases a year. One public defender reported to perform a significant amount of administrative work, including typing client letters and tracking cases. In addition, due to inadequate support staff at the provider's office, some part-time public defenders or legal aid attorneys were said to use their support staff in their private practices on indigent cases.

### **5.7.2 Office Space, Technology and Resources**

Many institutional providers are practicing under inadequate conditions regarding office space, technology and overall resources. Some part-time programs have little or no office space. In Orleans County, the only office space is in the basement of the courthouse for a secretary; the part-time director and three part-time assistant public defenders each work out of their own offices. Similarly, in Schenectady County, where the public defender has six full-time attorneys and seven part-time attorneys, most of the part-time public defenders work out of their own offices. The office space for the Public Defender in Chemung County, the Legal Aid Bureau in Erie County, and the Legal Aid Society in Suffolk County are also inadequate for the needs of the offices.

The Monroe County Public Defender's office facilities were described as "a joke." The office has broken chairs and desks, and last year ran out of money for toner for the printers. Public defenders have to bring in their own pens from home, and some have to buy their own business cards. One senior level attorney uses the cards of another attorney who left the office and just crosses out his name and writes in his own.

The full-time Schuyler County Public Defender operates out of her own private office. "There's no provision of office space, library, computer, copy machines, any equipment whatsoever provided by the county." Although the county pays her \$2,000 a month to cover overhead, it covers only about two-thirds of her overhead expenses.<sup>157</sup>

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<sup>157</sup> Ithaca Commission hearing transcript, p. 278.

Many institutional defender offices have scarce technological resources for computerized case-tracking, conducting conflict checks, and conducting legal research. In Orleans County, the public defender has no case-tracking system and no reliable or systematic way for checking for conflicts. One 18-B attorney told us that conflict screening in the public defender office does not happen at all. In Albany County, one of the largest public defender counties, neither the Public Defender nor the Alternate Public Defender have adequate automated case tracking systems. The APD relies on a manual system. The PD has a system described as “awful,” and we were told that although the PD was to get NYSDA’s system for \$31,000, the county gave away the server it needed for the system to another agency.

With the lack of technological resources, access to legal research tools is also lacking in defender offices. Some offices have little or no access to online research tools such as Westlaw or Lexis. We were even told of one large public defender office who does not even receive an updated penal law “gray book” every year. In Nassau County, a legal aid attorney described the computers as old with an “awful operating system.” We were told that only a few trial attorneys in the office have internet access, and except for the appellate attorneys who have limited access to Lexis, the staff attorneys must “use the books” for legal research. In addition, the office reportedly does not have e-mail.

The Steuben County Public Defender was burdened with a number of resource problems. Until May 2004, after the 18-B rates were increased, the chief public defender position and all assistant defender positions were part-time. The former part-time chief public defender reportedly worked out of his own office and in addition to his private practice, covered one of the largest village courts in the county, handled approximately 210 cases a year and some felony assignments, and was responsible for the administration of the assigned counsel plan, reviewing vouchers and processing payments. In addition, there was no budget for legal research (e.g., Westlaw) or supplies. Not all resource problems have been solved since the office became full-time. One attorney said, “Everything we have, we scrounge for or buy ourselves.” One attorney reported to use a sibling’s password in order to access to online legal research tools.

## **5.8 Standards, Oversight and Training**

New York professional standards regarding attorney competence suggest the importance of standards, oversight and training of attorneys in order to ensure the quality of the representation provided. The Lawyer’s Code of Professional Responsibility, Disciplinary Rule 6-101, forbids a lawyer from handling a matter “which the lawyer knows or should know that he or she is not competent to handle” unless the lawyer associates with another lawyer who has such competence, while Ethical Considerations 6-1 and 6-2 speak to the importance of legal training and staying abreast of the law. Unfortunately, other than Disciplinary Rule 6-101, public defender and legal aid lawyers in many New York counties are subject to few mandatory standards of practice, inadequate training, and little or no oversight. While some programs provide in-house training, the only training requirements in other programs are the state’s minimum continuing legal education (CLE) requirements.<sup>158</sup> Even where programs provide training and supervision, supervisors are often hampered by heavy caseloads and lack of time.

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<sup>158</sup> New York CLE requirements are 32 credit hours for a newly admitted attorney’s first two years of practice, and 24 credit hours every two years for all other attorneys.

NYSDA has been the one organization that has provided training for the past 20 years for defenders across the state.<sup>159</sup>

In Albany County, the Alternate Public Defender reported to have minimum standards regarding client visitation, discovery, jail visits, and working hours. The Public Defender, however, has no equivalent performance standards, and we received a number of comments about a lack of client contact from the public defender attorneys. The Albany Public Defender also suffers from a lack of formal training; we were told that some public defenders do not even attend CLE trainings. A former public defender described the training as “baptism by fire.”

In Orleans County, new public defenders receive no training, although we were told it is sorely needed. In Greene County, the Public Defender receives minimal funding for training. In 2003, the office reportedly spent a mere \$90 on training. In 2005, the office had a \$1,000 training budget, and we were told that a three-day New York State Defender Association (NYSDA) training was cost-prohibitive. The Schenectady County Public Defender candidly said of a two-week training recently received by two new attorneys in his office, “I guess I am embarrassed to even call it training.”<sup>160</sup>

The Legal Aid Society of Suffolk County was one of the few providers with a dedicated in-house training director and comprehensive attorney evaluations. The training director, who is certified to give CLE trainings, conducts attorney performance evaluations on an annual basis. The attorney evaluations consist of three very comprehensive evaluation forms regarding the attorney’s work ethic, courtroom performance, and file maintenance.

In the Legal Aid Society of Nassau County, 26 of the 47 attorneys have three years of experience or less. LAS reports to provide a fair amount of training and oversight of new attorneys in the form of a lecture, training memos and guides, direct supervision, and co-counseling cases. However, after receiving this training and practicing largely at the district court level, most of these attorneys leave the program; the program’s policy is to let attorneys go after three years unless a position becomes available for them in the county court division. LAS reports to perform formal evaluations of its attorneys twice a year and to “try to abide by NYSDA standards;” however, the program does not have any written performance standards. For example, they have an unofficial policy to “see [clients] sufficiently.” Notably, some judges expressed concern about insufficient contact between LAS attorneys and clients.

The Monroe County Public Defender reports to provide attorney supervision by placing attorneys into groups or “pods” that work together and share a supervisor who reviews cases and written motions. While supervisors are said to be receptive to questions, all but one supervisor carries a full caseload and therefore their time spent supervising and mentoring is limited. Training for new attorneys in the office includes an office manual and a NYSDA training manual, and handouts on substantive law are periodically distributed. Still, despite these efforts by the office, caseloads are high and most attorneys characterized the training as “trial by fire.”

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<sup>159</sup> In early February 2006, NYSDA completed their twentieth annual New York Metropolitan Training for over 370 court-appointed attorneys in New York City.

<sup>160</sup> Albany Commission hearing transcript, p. 223.

The Steuben County Public Defender has no money in the budget for training. It was reported to us that there have not been any public defenders that have really needed training, but that if someone does need training, it is done informally in the office. One new attorney in the office had only been practicing law for three months and already had a felony caseload. Although this attorney had taken a trial practice class in law school, as a public defender, the training was “trial by fire.” The office reportedly has no supervisors and no hierarchy of staff. The lack of training in the office is exacerbated by the fact that no criminal CLE trainings are offered in Steuben County; attorneys must travel to Monroe County for relevant trainings.

In Cattaraugus County, public defenders travel for their CLE trainings and need the county administrator’s approval for their travel expenses to be paid. The Public Defender said that when he submits these requests, the county “invariably” rejects them or seeks more information, such as “why it is essential for [public defenders] to be trained on how to handle Family Court cases or criminal cases. And the fact that they have to have their minimum hours of CLEs sometimes is not even considered.”<sup>161</sup>

## 5.9 Shifting Workload to Institutional Providers

Across the state, according to our best information, 22 counties, including New York City, responded to the 2004 increase in 18-B rates by shifting more of the indigent defense workload to institutional providers.<sup>162</sup> There were an additional seven counties that considered shifting more work to an institutional provider.<sup>163</sup> See *Appendix L* for a detailed display of changes by county. The raise in rates increased the focus of most counties and providers on efficiency and cost-saving efforts. In some counties, existing providers were given additional attorney positions or part-time positions were made full-time so that they could handle more cases or additional case types. Other counties created a conflict defender office to reduce the number of conflict cases being handled by assigned counsel.

During our site work, we visited a number of counties that created conflict defender offices as a cost-saving measure. Albany County created the Alternate Public Defender (APD) after the rate increases in 2004 to handle criminal, family and surrogate’s court cases that are public defender conflicts.<sup>164</sup> Albany County reported that it has saved \$250,000 for every two attorneys added to the APD staff. In Chemung County, the conflict defender, known as the Public Advocate, was hired in March 2004 in response to the increased 18-B rates. In September 2004, the office became fully staffed with three full-time attorneys, one of whom primarily handles family law cases. Similarly, in Monroe County, the Conflict Defender was created in April 2003 to handle misdemeanor, family court and some appellate conflict cases (but did not

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<sup>161</sup> Rochester Commission hearing transcript, p. 197.

<sup>162</sup> Information obtained from NYSDA’s *Public Defense System Changes by County 2003-2006* chart and memo (last updated March 2006). Those counties included: Albany, Broome, Cattaraugus, Chemung, Clinton, Columbia, Cortland, Essex, Greene, Lewis, Monroe, Nassau, Oneida, Rensselaer, St. Lawrence, Schenectady, Schuyler, Steuben, Sullivan, Warren and the City of New York. TSG found one additional county that made a change to its system: Wayne.

<sup>163</sup> See *id.* They were: Cayuga, Erie, Genesee, Niagara, Ontario, Orange and Oswego Counties.

<sup>164</sup> The APD office was created without any changes to the county’s written indigent defense plan because we were told that the County Attorney issued an opinion that the use of the APD was the same as the PD in the existing plan.



receive the necessary approval of the local bar association to handle felonies). In Schenectady County, the Conflict Defender was created in 2004 with two part-time defenders in response to the rate increase; since then, it has added a third part-time defender to handle family law cases. In Rensselaer County, the Conflict Defender testified before the Commission that since the creation of his office, cases going to the 18-B panel have decreased by about 95%; he reported that last year, only seven cases were assigned to private counsel.<sup>165</sup>

Since the 18-B rates were increased, Nassau County has wanted the Legal Aid Society to absorb more cases. The county increased LAS funding by \$600,000 “not because they were looking really to increase the quality of defense services in Nassau County, but they were looking to offset some of the additional costs” caused by the increased 18-B rates. As a result, LAS funded four new attorneys and raised its starting salary.<sup>166</sup> Although the county has discussed creating its own public defender office, the county believes that such an office with salary parity and fringe benefits would likely cost more than the current LAS plan.

In some cases, the rate increase created additional pressure on the institutional providers to handle more cases, without an accompanying increase in resources. In Albany County, we were told that the part-time Public Defender receives pressure from the County Executive to dispose of appellate cases without using 18-B attorneys at the higher rates. However, the Public Defender is already overloaded with cases; part-time felony attorneys carry 60-65 open cases at any given time. Because of the overload, appeals receive the lowest priority, and we were told that the PD has a practice of using young attorneys outside the office to prepare the appeals for a low fee of \$500-\$600 and then submitting the appeal with the Public Defender’s signature. This practice, which is referred to as “ghost-writing appeals,” has been documented in the court records of at least one case on appeal.<sup>167</sup>

In Schuyler County, the Public Defender, whose secretary is the assigned counsel administrator, received pressure from the county to limit the number of cases that go to assigned counsel. The Public Defender told the Commission:

I was required to go before the legislature and explain why I was over budget on the assigned counsel. ...[O]ne legislature [sic] said to me, we don’t understand why you need so much money for assigned counsel. That’s why we hired you. So, I have explained repeatedly that if you have multiple defendants in a criminal case, I can’t represent them all and neither can the assistant public defender.... So we just sort of plowed along and from time to time the legislature will take money out of a contingency fund and put it into the public defender budget. That’s how we’ve been doing it.<sup>168</sup>

The fact that half of the counties in the state considered shifting some of its 18-B costs to an institutional provider following the increase in 18-B fees is understandable in many counties,

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<sup>165</sup> Albany Commission hearing transcript, p. 206-207.

<sup>166</sup> New York City Commission hearing transcript, p. 129.

<sup>167</sup> *People v. Michael Beverly*, Albany County, Ind. No. 29-3355, on appeal to the Supreme Court, Appellate Division, 3<sup>rd</sup> Department.

<sup>168</sup> Ithaca Commission hearing transcript, pp. 304-305.

given the state of the county's finances. According to the National Conference of the State Legislatures, in FY 2005, state finances improved across the country, surpassing expectations and "reliev[ing] some of the pressure lawmakers faced in crafting FY 2006 budgets."<sup>169</sup> Unfortunately, this fiscal optimism does not apply to the counties of New York, which have carried the major burden of funding indigent defense services for the last 40 years.

New York's counties not only face a financial hardship in funding indigent defense, but they face additional funding problems as well. Medicaid is one fiscal burden that far surpasses indigent defense, particularly in upstate New York. Medicaid is also an area in which the burden on the counties in New York State exceeds that of other states. For instance, New York requires the localities to pay a greater portion of the cost of Medicaid than any other state – 15 percent, or \$6.6 billion, is paid by the New York counties – while over half of the states require no local contribution to Medicaid at all.<sup>170</sup> "This year the 57 counties outside New York City will spend more than \$2 billion on Medicaid – twice as much as in the late 1990's, when they were in much better financial shape. The upstate counties this year will have to spend on average of 17% of the budget on Medicaid."<sup>171</sup> *The New York Times* highlighted the serious burden of Medicaid in Chemung County:

Chemung County's Medicaid spending has nearly doubled since 2000, to \$18.5 million this year, a crushing burden on a county that has had factories and businesses leave in droves, crippling its tax bar. The county raised property taxes 15% in 2003 and 6% last year; it also increased the sales tax to 8%, from 7% in 2002.<sup>172</sup>

Several times during our site work, we heard county officials complain about the fiscal effects of the increased 18-B rates and how the growing burden of Medicaid costs were another unfunded mandate placed on the counties. One county executive told us that when the increased rates were passed by the state legislature, projections were that the counties would have to pay for half of the increase. He added that these predictions came to pass, as the state's share of the increase did not come from state general fund appropriations, but rather from alternative revenue sources in the form of surcharges and user fees.

After the rates of compensation for 18-B attorneys increased, nine counties in New York State - mostly the less-populated counties - saw their annual indigent defense expenditures increase by 75 percent or more. Such fiscal burdens should give us pause when considering the actions of some counties that have created or expanded an institutional provider program as a cost-saving measure.

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<sup>169</sup> National Conference of State Legislatures, *State Budget and Tax Actions 2005: Preliminary Report* (Feb. 15, 2006). ("There were two significant factors affecting state budgets in fiscal year 2005: the federal fiscal assistance money that bolstered previous year budgets and unexpectedly strong revenue performance in the latter half of the fiscal year.")

<sup>170</sup> Richard Perez-Pena and Michael Luo, *As Medicaid Rolls Grows, Costs Take Local Toll*, N.Y. TIMES (Dec. 23 2005).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

## CHAPTER 6: ASSIGNED COUNSEL

Each New York county must have some system in place for the appointment of private counsel at 18-B rates. Even in counties with a conflict defender office, there will be times when private counsel needs to be appointed, such as in cases with multiple co-defendants. New York County Law 722(3) requires 18-B representation to be pursuant to a plan of the county's bar association "whereby the services of private counsel are rotated and coordinated by an administrator" who may be paid for such services.<sup>173</sup> During our study, we learned that although a few counties have well-established and well-run assigned counsel plans, some have little or no formal assigned counsel plan at all.

### 6.1 Plans with Staff

The best-run assigned counsel plans that we visited employed full-time administrators and support staff. Erie County provides such an example. While a Legal Aid Bureau handles misdemeanor cases, Erie County has a well-structured assigned counsel plan for providing representation in felony and conflict cases. The plan started over 40 years ago by the county's bar association and is now an independent, non-profit corporation with a 20-member board of directors. The program has two full-time attorneys and twelve additional staff members, most of whom are full-time. It is one of the better assigned counsel programs that we visited. Nassau County, which employs one full-time assigned counsel administrator and two full-time and one part-time support staff, also has an organized and well-run assigned counsel plan.

In a number of counties with institutional providers, the provider is also tasked with administering the assigned counsel system, which can raise serious ethical concerns regarding conflict of interest cases. In Schuyler County, the Public Defender's secretary is paid \$26,000 by the county to be the assigned counsel administrator. Although the Public Defender tried to convince the county that the administrator should not be in the Public Defender's Office for conflict reasons, "that got shot down because that would be too expensive." So the Public Defender has tried to "create a Chinese wall" between herself and her secretary in an attempt to avoid conflicts between assigned counsel and public defender cases.<sup>174</sup> In Steuben County, the Chief Public Defender is also the assigned counsel administrator. In Monroe County, the Conflict Defender is the assigned counsel administrator, and caseload and budgetary information of the defender office and 18-B are combined in annual reports.

In Westchester County, the Legal Aid Society contracts with the county to receive \$399,000 to administer the assigned counsel plan which consists of a tripartite contract between itself, the county, and the Westchester County Bar Association. LAS, with the assistance of four

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<sup>173</sup> The statute also requires every bar association's plan to "receive approval of the state administrator before the plan is placed in operation," but as previously noted, we are unclear whether this requirement is indeed followed. Although we were told that the "state administrator" is the Chief Administrative Judge, the Office of Court Administration was unsure unable to locate a collection of the counties' plans or proposed plans.

<sup>174</sup> Ithaca Commission hearing transcript, pp. 290-291.

support staff positions, is responsible for keeping the assigned counsel data and submitting the assigned counsel budget request.

Tompkins County, which provides representation solely through assigned counsel, has an administrator and a coordinator position for its assigned counsel plan. In addition, the plan has an indigent defense advisory board that communicates with the county legislature and must approve changes to the system. Clinton County, which also has no institutional providers, employs an administrator at \$19,000 to run an assigned counsel system that is entirely independent from the county's bar association; however, this administrator neither assigns cases nor oversees the panel. Oswego County, which also uses only assigned counsel, lacked a real assigned counsel plan until 2005, when it hired a part-time administrator who submitted a written plan for county approval. The current administrator, a part-time county employee, is an attorney with a largely civil practice who has focused much of his work as administrator on cost-saving efforts. For example, since the rate increase, they are now scrutinizing vouchers for over-billing, cutting down time spent talking to clients' family members, not paying for travel time, and reducing reimbursement for the cost of copies from fifteen cents to five cents.

Onondaga County uses assigned counsel to provide representation in most indigent criminal cases, including felonies. The assigned counsel program is run by a full-time executive director and two or three nonlawyer staff members. The program has a board of directors and a voucher subcommittee whose primary goal, according to a board member, is to cut costs. Indeed, we observed a meeting of the board in which members reviewed and cut vouchers. Like Oswego County, since the 18-B rates were increased, Onondaga County has focused on cost-saving measures with the assigned counsel plan, including scrutinizing vouchers and ending payment for travel time and expenses within the county as well as payment for "routine letters" to clients (e.g., reminding a client of a court date). We were told that 18-B attorneys constantly feel pressure from the assigned counsel board, county and judges to keep their vouchers down. The assigned counsel plan noted that "any quality improvement argument has to be couched and sold to the county as cost savings to get it through." Eligibility is being scrutinized more closely. We were told that the plan has reduced the number of cases it takes by ten percent.

## **6.2 Counties with No Separate Plan or Administrator**

Some counties have no separate administrator for their assigned counsel plan, and a few counties have no assigned counsel plan at all. In Greene County, there is no formal assigned counsel plan. Instead, the assigned counsel budget falls under the public defender's budget, and the public defender reviews the assigned counsel vouchers (after a court review) before the county issues payment. In Albany County, with the creation of the Alternate Public Defender (APD) in 2004, the 18-B budget became part of the APD budget; the APD director essentially became the 18-B administrator and was given the role of voucher review, which raises some concerns in conflict of interest cases.

In Orleans County, an assigned counsel plan used to be administered by an attorney who maintained an 18-B list on a pro bono basis, but now there is no plan. No one is responsible for maintaining an 18-B panel or tracking cases that need assignment. As one attorney described it,

“Whatever happens, happens.” We were told that defendants charged with misdemeanors are regularly held in the county jail for days and weeks before receiving counsel. As far as we know, this issue has yet to be addressed by the public defender, who is the closest person the county has to an 18-B administrator as he is responsible for paying (but not auditing) the 18-B vouchers.

Putnam County has no written assigned counsel plan. We were told that the only written indigent defense plan for the county is the contract that it holds with the Legal Aid Society (LAS). The county has a fund for 18-B expenses, but no one is assigned to oversee or administer that fund other than the Commissioner of Finance who tracks the vouchers. The director of LAS is responsible for advocating for both his budget and the 18-B budget. Similarly, Broome and Chemung counties have no assigned counsel plan or administrator. In Broome County, attorneys are approved by a committee of the county’s bar association who then sends the names to the judges; vouchers are submitted directly to the comptroller’s office.

Finally, although County Law §722 does not appear to provide any authority for the practice, we learned of at least two counties that use a contract attorney rather than assigned counsel. Tioga County reportedly has a four-year contract with a single private attorney to handle all family court matters and those criminal matters that cannot be handled by the public defender. This system has been in place for over ten years. The contract attorney was recently awarded another contract term with an annual compensation of \$108,500. The use of one contract attorney rather than assigned counsel was reported to save the county between \$400,000 and \$500,000 a year. According to its UCS 195 form, Tioga County only uses assigned counsel when the contract attorney has a conflict. Clinton County also contracts with a few attorneys to provide representation in family court. These attorneys receive a flat fee for handling a certain number of cases each month. We have not been informed whether either contract system has been approved by the Chief Administrative Judge.

### **6.3 Qualifications, Oversight, and Training**

In addition to the professional responsibility rules requiring attorney competence,<sup>175</sup> both NYSDA and NYSBA standards state that attorneys providing mandated representation should have sufficient knowledge, experience and training to provide high quality representation.<sup>176</sup> The onus for competence is not only on the individual attorneys, but also on the provider or plan that is charged with overseeing them. NYSBA Standard E-2 reflects this and calls for both institutional providers and assigned counsel plans to have written minimum qualifications for attorneys according to the various case types they handle. However, other than Disciplinary Rule 6-101 which generally requires a lawyer’s competence, assigned counsel in New York are in many counties subject to few requirements in order to be admitted to and remain on a panel, and are rarely subject to any mandatory rules or oversight regarding their performance.

Too often, the only oversight of attorney performance is by the judges. For instance, one county court judge told us that he will only assign an 18-B attorney if the attorney agrees to visit an in-custody defendant the same day they are assigned. He commented that this requirement is

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<sup>175</sup> See Lawyer’s Code of Professional Responsibility, DR 6-101, EC 6-1, EC 6-2.

<sup>176</sup> See NYSDA Standard VIII-A(2), A(3), NYSBA Standard I-1.

“nothing but Band-Aids administered to the system to make it work,” but that the system should work without a judge having to take such extra steps to ensure adequate representation.

In Orleans County, a superior court judge has created his own “complicated list” of attorneys available for assignment in felony cases with varying degrees of seriousness. The judge said that new 18-B attorneys “have no training” and he will remove attorneys assigned at the lower court level if he feels that they are not competent to handle the case. He has taken on this role in the absence of any formal assigned counsel plan or an administrator. One 18-B attorney with little experience said that he simply sent a letter of interest to the local court judges and began receiving assignments. He has reportedly received an unfavorable reputation in the county and said that he would be happy to pay for some training if it were made available to him.

In Tompkins County, which relies solely on 18-B attorneys to provide indigent defense representation, the assigned counsel plan lacks any written qualifications or standards for its 18-B attorneys. Screening is entirely in the discretion of the assigned counsel administrator. We were told that since it is a small county, the two people that run the assigned counsel plan know each of the 18-B attorneys and their limitations, and that they assign cases appropriately. Although there is reportedly a mentoring program, it is informal and depends on the dedication and availability of the attorneys involved. Some judges in the county reported a “massive” problem with the quality of representation in criminal court. First, there are reportedly not enough quality and experienced attorneys to handle B felonies. One judge noted that he had an attorney conduct his first-ever trial in his courtroom on a felony case. Second, we were told that the training of court-appointed counsel has been non-existent. There are no CLE trainings initiated by the assigned counsel program, and there is no discernable impact from the mentoring program (e.g., attorneys do not second chair cases or observe in court). Third, there is little supervision or oversight of the panel, and there is reportedly little-to-no response by the assigned counsel plan when complaints are made about attorneys on the panel. Instead, judges are left to manage the problem themselves. For example, two judges reported to have a list of attorneys who they will not allow to practice in their courtroom, either because they “milk the system” or plead all their cases; one judge held an attorney in contempt for not showing up to court on a consistent basis.

In Clinton County, which provides all representation through assigned counsel, there are no qualifications or applications to get onto the 18-B panel, and no attorney performance standards. We were told that attorneys simply send a letter to the local judges in order to begin to receive assignments. In addition, attorneys receive no training, but can begin to receive felony assignments within a few months of being on the panel. We spoke with one new attorney who passed the bar in 2004 and, when no other lawyer in the county appeared willing, provided representation at a preliminary hearing in a case of attempted murder of a police officer. The Greene County Public Defender described to the Commission a similar process in his county: “[A] new lawyer will...send a letter to a judge and say, ‘Hello, judge, I’m a lawyer. I’d like to get assignments,’” and the lawyer will get assignments; no training; ...no experience, that’s the way.”<sup>177</sup> Similarly, in Wyoming County, there are no qualifications and no oversight except by the judges.<sup>178</sup>

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<sup>177</sup> New York City Commission hearing transcript, p. 105.

<sup>178</sup> Rochester Commission hearing transcript, pp. 128-129.

In Onondaga County, where criminal representation is provided by assigned counsel, there is no formal process for lodging a complaint about a specific attorney. Rather, the plan relies on the judges who appoint the attorneys to act as the quality control mechanism. An assigned counsel board member said that they do not want to “micromanage” the attorneys and will never set rules such as “appointed counsel must visit incarcerated client within three days.” One judge told us that although rare, when he has had to dismiss a lawyer from a case, he will try to educate them by telling them “what you should do in this type of case.” In addition, we were told that the board of directors of the assigned counsel plan does not like to remove attorneys from the list unless they have committed outright fraud. A district attorney told us that bad attorneys are appointed regularly in Onondaga County.

In Oswego County which also has no institutional provider, other than the requirement of a law license, there are no qualifications to get on the panel. In addition, new attorneys are not limited to low-level cases and routinely receive felony appointments. There are no separate lists according to case type and attorney experience, nor are there caseload limits. We were told that the best criminal defense lawyers in the county are not on the panel. There are no written standards nor training requirements for assigned counsel other than CLE requirements. There is reportedly no procedure for receiving attorney complaints, which are either ignored or referred to the bar association, and we were told that no attorney has ever been removed from the list. The District Attorney’s Office noted an inability or unwillingness on the part of many assigned counsel to perform research and learn basic constitutional law or criminal procedure.

The process for getting on 18-B panels in both Albany County and Putnam County is very informal. In Albany County, the Alternate Public Defender maintains the 18-B panel and adds the name of any attorney who sends in a letter of interest and a resume. The APD will note an attorney’s experience level so that cases may be assigned to match that experience level, but he does not otherwise oversee the panel. While not a formal requirement, 18-B attorneys are strongly encouraged to attend minimal CLE training in criminal law. In Putnam County, in the absence of a real assigned counsel plan or administrator, there are no qualifications, screening committee or performance standards. We were told that the judges create their own panels; attorneys introduce themselves to the court, provide some background information, and hope to get on the court’s panel.

Both Long Island counties have assigned counsel administrators who oversee the 18-B panels, but performance and oversight problems still exist. In Suffolk County, the only requirement for handling misdemeanors is a license to practice law; the felony and homicide panels reportedly require either five years of criminal law experience or significant trial experience. We received comments that the screening process could be better. One attorney said that a lot of 18-B attorneys are too inexperienced and afraid to go to trial; some of them are handling felonies. This sentiment was echoed by a town court justice who said that a couple times a year, he will pull aside an inexperienced attorney in a particular case and tell the attorney to withdraw. The Suffolk County program does not evaluate the performance of the 18-B attorneys nor does it require re-certification.

The Nassau County assigned counsel plan posts attorney applications, general qualifications, motions, and other information and material on its website and distributes a packet of such material to new attorneys.<sup>179</sup> Attorneys are required to have one year of practice for admission to the district court panel, four years of practice for the county court panel, and five years of practice for the major felony panel; these requirements may be waived by a majority vote of an assigned counsel screening committee. Specific additional qualifications are set out according to the different panels. However, there are no specific attorney performance standards, and attorneys do not have to be re-certified in order to remain on the panel. As in Erie County (see below), a well-run assigned counsel plan does not necessarily equate to quality 18-B representation across-the-board. Attorneys are not often removed from the panels for poor quality. As one county court judge said of the Nassau County 18-B attorneys, there are “some stars, some clunkers.” Another said, “Some 18Bs don’t know how to try cases.” Similarly, an attorney commented that some 18-B attorneys should not be qualified to take cases.

The Erie County assigned counsel plan has a screening process, a training and mentoring program, and some oversight. In order to get on the assigned counsel list, attorneys complete a written application that seeks detailed information on experience with misdemeanors, felonies and appeals, and requires attorney references. A total of four panels exist for major felonies, felonies, misdemeanors and appeals, with various qualifications for each panel. Applicants are required to attend an orientation meeting with the administrator. Each year, the program offers eight or nine free CLE trainings a year, which by all accounts are excellent. Three “tiers” of formal CLE training requirements exist, depending on the experience level of the attorneys. Periodically, “brown bag” lunches and other group meetings are offered in which attorneys conference areas of the law. The program also provides mentoring, both through the senior deputy administrator to the program, and through pro bono pairings with more experienced attorneys. Recently, newer attorneys have been asked to present cases to a group of experienced attorneys and receive feedback and support during the process. The program has a professional standards committee that imposes minimal written standards of professional conduct, and the administrator reportedly conducts random client satisfaction surveys. The Erie County Assigned Counsel Program is unique among the other programs we visited in having a four-page written and formal complaint process for the screening of complaints filed against assigned counsel. Finally, it is also reportedly the only program in the 4<sup>th</sup> Department that requires the approval of a review committee to be on the appellate panel.

However, problems can exist even with a well-staffed and organized program. One attorney told us in Erie County, “More than a handful of attorneys shouldn’t be on the panel; [they are] lazy and don’t communicate with clients.” Another said that there are too many unqualified attorneys handling cases in the town and village courts who are just “rolling” cases. Further, assigned counsel are reportedly not removed from the panel for problems, except for ethical violations, and therefore the “judges have become the quality control system.” Similarly, in Monroe County, where an advisory committee of the local bar association has created minimum qualifications for 18-B attorneys, there is reportedly no serious quality review performed and no process for removing someone from the panel. One judge in the county reported that some 18-B attorneys fail to show up for court and plead cases that should not be pled.

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<sup>179</sup> See [www.Nassau18B.org](http://www.Nassau18B.org).



In Westchester County, assigned counsel qualifications and standards were created in 1990 through an effort by the assigned counsel administrator (who is also the legal aid director), and with support from the Presiding Judge of the Appellate Division, Second Department. In order to get on one or more panels (misdemeanor, felony, A felony, Family Court, or appeals), applicants are screened by a bar committee and approved for a three-year period, after which attorneys must get re-certified. The administrator has no authority over the makeup of the panel. Attorneys are asked to provide information on their specific experience in criminal cases as well as references. However, the qualifications are very general<sup>180</sup> and do not exist for misdemeanor cases other than general competency, and the only written standards are those of the Second Department prohibiting private retainers from assigned clients and stating the duties of counsel regarding appeals. As in other counties, the qualifications and screening process of this assigned counsel plan has not solved all problems of quality and oversight. One local court judge in the county commented that he was concerned about the performance of about one-third of the eight or ten 18-B attorneys in his court; but rather than seeking to have a problem attorney removed from the panel, he speaks to other judges and together they effectively remove the attorney from the panel by not assigning him cases. Another local court judge said that while most of the 18-B attorneys are excellent, a couple “are really poor” and she is “careful about the cases [she] give[s] them.”

## 6.4 Assignment of Cases

ABA standards regarding the assignment of cases to court-appointed counsel provide:

Except where there is a need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made. A lawyer should never be assigned for reasons personal to the person making assignments. Administration of the assignment counsel program should be by a competent staff able to advise and assist the private attorneys who provide defense services.<sup>181</sup>

As nearly as possible, assignments should be made in an orderly way to avoid patronage and its appearance, and to assure fair distribution of assignments among all whose names appear on the roster of eligible lawyers.<sup>182</sup>

These standards were promulgated to ensure fairness and the independence of the attorneys assigned to represent indigent defendants. In addition, New York County Law 18-B provides

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<sup>180</sup> In order to be on the felony panel, an attorney must have “substantial experience in the trial of criminal cases” and be a member of the Bar for three years. To be on the Class A felony panel, an attorney must have “substantial experience in the trial of felony cases” and be a member of the Bar for five years. To be on the appellate panel, an attorney must be admitted for two years, have “substantial criminal law experience,” and submit writing samples.

<sup>181</sup> ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, Standard 5-2.1 *See also* NYSBA Standard A-3.

<sup>182</sup> ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, Standard 5-2.3.

that “the services of private counsel [be] rotated and coordinated by an administrator.”<sup>183</sup> Regrettably, the assignment of 18-B attorneys throughout the state frequently fails to meet these requirements.

The assignment of cases to 18-B attorneys in New York is often performed by judges on an ad hoc basis. Even in counties with formal assigned counsel plans and paid administrators, individual case assignments frequently occur in court according to the judge’s own procedure. This lack of uniform assignment procedures among New York’s counties and courts leaves the assigned counsel systems open for abuse; sometimes the unfortunate result is an unfair allocation of cases and a lack of independence of the attorney from the judge making the assignments. When assignments are made by the court without the guidance of clear and fair assignment procedures, there is an increased risk that the assignments will be based on favoritism or a bias of the court. As suggested by the ABA standards, such a system is open to be attacked for, at the very least, an appearance of a conflict between the interests of the defendants in receiving the quality representation and the interests of the court.<sup>184</sup> The interests of the court may be personal, political, or merely the desire to handle a large number of cases with the greatest efficiency. Each of these conflicting interests appear to be at play somewhere in New York.

In most counties we visited, where the assignment of 18-B attorneys is left to the courts, people spoke of problems with the process. In Orleans County, where there is no assigned counsel administrator or plan, we were told by one 18-B attorney that judges give cases to a small group of preferred attorneys, and an attorney who contributes to a judge’s reelection campaign is more likely to receive assignments. An 18-B attorney in Westchester County reported that in one local village court in that county, when an 18-B attorney asked for a trial on a disorderly conduct case, the judge threatened that if the attorney went to trial, the judge would not assign the attorney any more cases. The assigned counsel administrator confirmed that he regularly receives calls from attorneys regarding one large local court in Westchester County where the judge has taken them off the panel “because they stood up and demanded a trial, [and] the judge told them that was the last assignment they are ever going to get.”<sup>185</sup> (For further discussion on such issues in the local justice courts, see Chapter 8.)

Although Suffolk County has an assigned counsel administrator, the assignments are made by the judges, and we were told that some attorneys are appointed because of their reputation for pleading or not litigating cases. One judge in neighboring Nassau County said that there’s “a lot of incest” in the assignment of cases; in other words, judges assign their favorite attorneys, some of whom do not or cannot try cases.

In Monroe County, the assigned counsel administrator reportedly assigns attorneys on a wheel system, and he will only skip an attorney if he or she is unavailable. Nonetheless, a number of assignments are still made by the court, as we received comments from several 18-B attorneys questioning the fairness of court assignments. One attorney told us that a lot of the A felony assignments come directly from the bench, not the assigned counsel administrator, because some judges want “fighters” while others “want lap dogs.” Two more attorneys

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<sup>183</sup> County Law §722-b.

<sup>184</sup> ABA PROVIDING DEFENSE SERVICES, Standard 5-1.3.

<sup>185</sup> New York City Commission hearing transcript, p. 165.

commented that more cases are assigned to those attorneys who litigate less. Finally, a public defender observed that too frequently, judges hand-pick attorneys from the panel; however, it was implied that this is necessary because of some “disastrous” attorneys on the panel.

In Tompkins County, assignments may be made by the assigned counsel administrator, who does not follow a specific rotation in making assignments, or by the judges. We were also told that defendants can request particular 18-B attorneys to be assigned from the panel. In Onondaga County, although there is an assigned counsel administrator, assignments are made by the judges. A judge there told us that a number of judges got together and had a “draft” to pick the core attorneys that they wanted in their courtrooms. One 18-B attorney in the county told us that although he is not on the felony panel, he is sometimes assigned felony cases by a judge.

In Erie County, the assigned counsel administrator assigns attorneys on a rotating basis; except in felony cases in Superior Court, the judges reportedly assign attorneys as they wish, and one judge told us that some judges regularly appoint counsel “off the list.”

In Cattaraugus County, the assignment process is “kind of a mishmash.” Support staff in the Public Defender Office assign city court cases and 75 percent of local court cases to 18-B attorneys when the Public Defender has a conflict.<sup>186</sup>

Some of the larger courts, such as White Plains City Court in Westchester County and some district courts in Suffolk County, have developed a duty day rotation for attorney assignments in which all attorneys on the list are rotated on a periodic basis, and the duty attorneys receive the assignments in court that day. However, in the local courts in Westchester County, getting assignments was described by at least one attorney as “a crony system.” In Suffolk County, we were told that the duty attorneys do not get paid unless they receive a case assignment, so the attorneys try to schedule their private cases at the same time.

Often, the courts will assign cases to whichever 18-B attorney is present in court that day. In one large county court where there is no formal assignment procedure, one judge said he will assign whoever is in the courtroom, and he keeps “mental notes” on the cases assigned to each attorney. In some local courts, an attorney’s presence is a prerequisite to assignment. If there are a good number of 18-B attorneys in the area, the result is often that attorneys will come to court and end up waiting around to receive an assignment; if they receive an assignment, the attorney may choose to bill for the waiting time (see also Vouchers and Billing Practices, below).

## **6.5 Effects of the Increased Attorney Fees**

Throughout our site work, we asked attorneys, assigned counsel administrators and judges whether there were any effects from the 2004 increase in 18-B rates. That is, did the rate increase bring back some experienced attorneys that left the panel, attract more new attorneys to the panel, or affect the overall representation that the 18-B attorneys were providing? The answer is inconclusive.

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<sup>186</sup> Rochester Commission hearing transcript, p. 191.

Steuben County has reportedly always had a problem finding attorneys willing to take 18-B assignments, and the increase in compensation rates did not change this. Broome County similarly continues to have a problem attracting attorneys to the 18-B panel; currently, there are no attorneys on the appellate panel. We were told that judges in Broome County try to solicit attorneys to join the panel at bar meetings and that the local Criminal Justice Committee is asking large law firms to have associates take some cases. Meanwhile, the average caseload of public defenders in city court is 750-800 cases annually.

An assigned counsel administrator in one county told us that the rate of people joining the 18-B panel had not increased with the new rates, but that people who had dropped off the panel because of the low rates were coming back. He further said that attorneys are asking for more cases and many attorneys seemed to be spending more time on their cases. In another county, some people thought that the new rates did bring more new attorneys to the panels; for some, this resulted in fewer assignments. In fact, some attorneys felt that the panels should be limited in number so as not to spread too thin the work. An assigned counsel administrator in another county reported a large increase in the number of vouchers submitted after the rate increase.

A few attorneys commented that the rate increase did not change their practice, as they were providing quality representation prior to the increase. Still, one attorney told us that because the increase in rates and subsequent creation of a conflict defender office reduced the number of assignments he receives, he is able to spend more time on each case and still make the same amount of money. Similarly, some 18-B attorneys noted that they are able to “breathe easier” with the increased rates, and that some are now better able to devote their practice to indigent defense. One attorney said before the rate increase, he was losing \$34 per hour on court-appointments, and now he can cover his overhead. Still, a solo practitioner in another county commented that, even with the rate increase, he is still unable to afford support staff; without support staff, his hourly overhead is \$13.

## **6.6 Vouchers and Billing Practices**

Among the counties, assigned counsel billing forms, or vouchers, vary. Generally, attorneys are required to report the number of hours spent on each case. The hours are reported after a final disposition in the case. Not only do the voucher forms vary among the counties, but the procedure for reviewing and approving them varies among the counties. The forms may be reviewed by one, two or more persons before being paid; they may be submitted to an assigned counsel administrator, the court, county personnel, or any combination of these entities.

In most counties, the judges are responsible for approving assigned counsel vouchers at some point in the payment process. We heard from a number of judges that they are uncomfortable with this role. First, the courts often do not have sufficient staff and resources to scrutinize the voucher forms for accuracy; as a result, the judicial review may be cursory. Second, some judges in the superior courts do not like to review time billed for activities in the lower courts because they have no idea whether such billing is accurate. Third, some judges are uncomfortable with the lack of billing standards because this results in a lack of uniform billing

practices among the attorneys. We were told, for example, “some attorneys bill 15 minutes for phone calls, some don’t.” On the other hand, some judges do not feel the need to review the vouchers at all. As one judge told us, “I’ll not second-guess a professional.”

An 18-B attorney candidly admitted to similarly being uncomfortable about the lack of billing standards that results in “some ethical issues” for the attorneys. For example, when attorneys go to the local courts and wait for 18-B assignments, some attorneys may bill for that waiting time, others may not. This attorney noted that having billing guidelines “would put people on a level playing field.”

Some expressed concern with fraudulent or wasteful billing practices. One judge in Oswego County who reviews vouchers said that he has seen some that are truly fraudulent; however, the attorneys responsible are still on the assigned counsel list. We were told that some will arrive in court but make sure that their case is not called until hours later, so that they can bill for the waiting time. In other instances, we were told that late and inefficient judges cause wasteful billing by assigned counsel.

Another concern that was raised in some counties is the timeliness of voucher payments. In Suffolk County, for example, attorneys said that it can take between four and seven months to get paid. In Onondaga County, there is reportedly a large delay in paying any vouchers that have been cut and then contested by the attorney. One attorney reported to have \$25,000 in pending vouchers at the time of our visit.

Finally, some expressed concern over the counties controlling payment of the vouchers. A town judge spoke of the conflict that can arise when a judge approves a voucher but the county refuses to pay. “If we sign a voucher, is that a court order to pay? ...What’s the remedy if the county refuses to pay? Does the lawyer not get paid until someone brings a piece of litigation?”<sup>187</sup> Such a case was described to the Commission by an attorney in which, after the judge approved \$10,000 of the \$12,000 voucher for a five-week trial, Rensselaer County refused to pay until the matter was litigated before the Court of Appeals.<sup>188</sup>

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<sup>187</sup> Ithaca Commission hearing transcript, p. 207.

<sup>188</sup> Albany Commission hearing transcript, pp. 116-117, *citing* *Kindlon v. County of Rensselaer*, 158 AD 2d.

## CHAPTER 7: OTHER FACTORS AFFECTING INDIGENT DEFENSE

### 7.1 Client Contact

One of the most important duties of a criminal defense attorney is establishing and maintaining sufficient contact with a client. Client contact is essential to developing an attorney-client relationship and the trust of the client, performing a factual investigation, and conducting plea negotiations. Both sets of New York standards for the performance of counsel providing mandated representation require attorneys to adequately communicate with the client, keep the client informed of the progress of the case, and meet with the client regarding plea negotiations to ensure the client's full understanding of the consequences of a plea.<sup>189</sup> In addition, New York lawyers are ethically obligated to "exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations."<sup>190</sup> Unfortunately, in the area of client contact, as in other areas discussed in this chapter, sub-standard practice has become the acceptable norm in many parts of New York State.

Numerous clients of both institutional providers and assigned counsel in New York suffer from a lack of sufficient contact with their attorneys. Client contact is often inadequate in terms of its timing, frequency, and confidentiality. During our site visits, we learned that it is not uncommon for indigent defense attorneys across New York State to meet a client for the first time on the day of court. Thus, attorney-client contact frequently occurs in court where the attorney's time is short and there is often no setting for meaningful, confidential communications.<sup>191</sup> In a number of counties, we observed communications between attorneys and inmates taking place in front of other inmates as well as sheriffs or court guards. As a result of the lack of contact prior to court, some cases are adjourned because agreements cannot be reached; in other cases, clients may agree to something they do not fully understand.

A local justice in Suffolk County noted that the lack of court facilities is a hindrance to proper attorney-client communication. In his court, there is no space for confidential attorney-client communications. The situation is worse for inmates who are chained together on two benches inside the courtroom and must speak with attorneys in front of other inmates and the sheriff's deputy. Non-English speaking inmates must "cram into a closet" with the attorney and sheriff to use the interpreter phone. We observed similar problems in other counties, such as

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<sup>189</sup> See *NYSDA Standards for Providing Constitutionally and Statutorily Mandated Legal Representation*, Standards VIII-A(5), (7) [hereinafter *NYSDA Standards*], *NYSBA Standards for Providing Mandated Representation*, Standard I-3 [hereinafter *NYSBA Standards*].

<sup>190</sup> The Lawyer's Code of Professional Responsibility, EC 7-8.

<sup>191</sup> See *ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION – LAWYER-CLIENT RELATIONSHIP* (3d ed. 1992) [hereinafter *STANDARDS FOR PROSECUTION AND DEFENSE FUNCTION*], Standard 4-3.1(b) ("To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions for counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.")

Westchester County, where in one local court we witnessed conferences between attorneys and their in-custody clients occur in front of sheriffs and other inmates.

The courthouse meetings that occur are frequently inadequate. In Albany County, we were told that most public defender contact with clients takes place in court, where conversations are brief and insufficient to provide defendants with an opportunity to meaningfully participate in the process; this was said to be true especially in misdemeanor cases. Indeed, the Director of the New York Civil Liberties Union (NYCLU), Capital Region, testified that attorneys in the Albany Public Defender's Office admitted to her that they did not have time to visit their clients in jail. She further spoke of the lack of trust and communication that exists in Albany between attorney and client: "[T]he perception of most of the defendants we spoke to, was that it is a slam dunk, already done, they have no defense, it is simply a deal that's struck between the Public Defender, the District Attorney, and the Judge, and often without even turning to ask the client whether they agree to the plea."<sup>192</sup> A mother of a former public defender client in Albany County described a lack of contact from the public defender for four months before court. She further described what occurred on the day of court:

So on the day of court [the public defender] told my daughter, told both of us, "You are going to get youth status," because she was 17. "You say that you are guilty." And my daughter said, "Well, I want to talk." "No, you say that you are guilty and I explained everything to you." I said, "You didn't explain everything to us." She said, "You say that or she gets seven years." This was new to me. I didn't want her to get seven years. I say, "Yeah, when the Judge asks you did I explain everything, you say yes." So this was a good example, under oath, for my daughter to perjure herself."<sup>193</sup>

The Commission heard the following statement of a former public defender client that had been in custody in Schenectady County:

The day I was arraigned I was assigned a Public Defender. At that time I was given a new court date that was approximately two months later. Despite the fact that calls were made to the Public Defender's Office numerous times and letters were sent, I received no response. The first time I seen my assigned counsel was the morning of my new court date. When I questioned him about his lack of communication, he simply brushed me off and said it was because he was busy. I think he failed me miserably.<sup>194</sup>

In Onondaga County, client contact was also reported to be a problem. We spoke with several 18-B attorneys who admitted that they frequently are unable to visit their client in jail prior to court. We were also told that the assigned counsel voucher committee frequently cuts vouchers for too much client contact. The Executive Director of Central New York Civil

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<sup>192</sup> Albany Commission hearing transcript, pp. 92, 97-98.

<sup>193</sup> Albany Commission hearing transcript, pp. 286-287.

<sup>194</sup> Albany Commission hearing transcript, pp. 277-278.

Liberties Union told the Commission about some of her organization's findings in Onondaga County, including "failure to visit clients in jail, repeated failure to respond to client letters or to engage in meaningful communication with clients prior to scheduled court proceedings." She further described problems of attorneys blocking or refusing to accept collect calls from their in-custody clients, resulting in indigent defendants remaining "in jail for weeks or months without any way to contact their attorney besides letters, which may be ignored or filed away without response."<sup>195</sup> The Director of Jail Ministry in the same county told the Commission of the results of a survey of randomly-selected inmates: "56 percent of inmates complain that their lawyer has never visited them; 58 percent could not contact their lawyer; 46 percent state that their lawyer's phone has a block on it; and 9 percent claim that their case has been postponed without their knowledge." He further said that is not uncommon for a defendant to remain in jail "long beyond what we know would be a reasonable time served simply waiting for the first appearance of the Assigned Counsel attorney."<sup>196</sup>

A former client of the Monroe County Public Defender described for the Commission his experience in which he pled to one-to-three years in prison after very little contact with an attorney because he was told it was the best deal he was going to get:

Scared of getting more time and figuring I better get the best deal I can, I take it. In the back of my head, I'm saying what about this certain issue, can we raise this at trial, etcetera. With the pressure to get it done and over with, I say yes and plead guilty. I don't fully comprehend everything that is involved in the sentence, just having the thought reverberate in my head, this is the best you can get, so now – I'm sorry...So overall, my cases from start to finish, including in front of the judge and speaking with a lawyer, took all of at most 45 minutes to dispose of. That's being generous. I was not given adequate time to speak with my lawyer, and to be honest, I never remembered their names. Never was I given a response when I called my Public Defender [from jail]...The only time I saw my attorney was at arraignment for about two minutes and a different attorney about five minutes before I was to plead my case out. How might it be different if I were able to employ my own attorney?...And if the representation I received is adequate, I would really hate to see what inadequate is.<sup>197</sup>

Some 18-B attorneys meet all out-of-custody clients before or after court hearings because, we were told, they do not have an office where they can hold attorney-client meetings. Unfortunately, this practice of courthouse communication is not unique to attorneys without offices. In one county with part-time LAS staff attorneys, the Department of Corrections told us that the LAS attorneys normally meet their clients at the courthouse, and that inmates are often complaining that they do not know what's going on with their case because they haven't heard from their attorney. This office reportedly assigns one attorney a week to conduct jail interviews.

We heard complaints in a number of counties that client contact at the local jails is or is becoming more difficult, often due to the allowable hours for attorney-client visitations. For

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<sup>195</sup> Albany Commission hearing transcript, pp. 146-147, 163-164.

<sup>196</sup> Albany Commission hearing transcript, pp. 176, 184.

<sup>197</sup> See Rochester Commission hearing transcript, pp. 109-114.



instance, in a jail in Onondaga County, “you only have certain time slots and you have to meet with the client in a tiny, little room at the same time other contacts are being done and have to deal with the overwhelming din and short time limits.”<sup>198</sup> In Nassau County, traveling to the local jail is a problem for many. LAS attorneys without a car must take a bus or a cab to the jail, which is five miles away. In Steuben County, we were told that a public defender may have to wait an hour at the jail before seeing a client, and the county does not allow the office to accept collect calls from the jail; public defender clients are reportedly told to send a letter to the Public Defender if they want to speak to their attorney.

A number of public defender and legal aid programs substitute client contact by attorneys with contact by investigators or other non-attorney staff who often conduct initial interviews. While the use of support staff for client interviews may save attorney time and allow the office to handle a greater number of cases, it is often a disservice to the client; it does not serve to create the attorney-client relationship or to develop a client’s trust. In Erie County, we were told that the Legal Aid Bureau uses an investigator or paralegal to conduct the initial interviews with in-custody clients. The Greene County Public Defender also uses investigators to conduct screening and initial interviews. We were candidly told that this can be problematic as clients do not trust the information they receive from the public defender investigators.

While many attorneys make the effort to visit clients in serious felony cases, clients who are charged with low-level offenses or who are out of custody are sometimes ignored until the court date. One 18-B attorney from Suffolk County said that he only goes to the jail to visit homicide clients. This was echoed by an 18-B attorney in another county who said that misdemeanor clients are normally only met at court. This same attorney candidly said that he’s “pretty sure that innocent people get convicted” in Albany County. In one upstate county, a city court judge reported that the public defender in her courtroom does not meet with out-of-custody defendants until 40 to 90 days after arraignment. Similarly, in Nassau County, a judge expressed concern that LAS attorneys do not meet with district court clients unless they are in custody. LAS confirmed that attorneys do not normally meet with a client after being assigned a case until the next court date; however, attorneys are supposed to meet with in-custody clients within 10 days.

## 7.2 Interpreters

Access to interpreters is essential in any indigent defense system in order to effectuate the rights of non-English speaking defendants. Interpreters are needed both for court proceedings and for out-of-court attorney-client communication. Unfortunately, throughout our site work, we were repeatedly told about the lack of access to interpreters, both in and out of court.<sup>199</sup> Not only

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<sup>198</sup> Ithaca Commission hearing transcript, pp.109-110.

<sup>199</sup> The New York State Unified Court System recently issued a report in which it recognized the need to improve “the effective and efficient delivery” interpreter services and developed an Action Plan that includes better recruitment and retention of interpreters, greater testing and assessment of prospective interpreters, improved training, and “expanded assistance to Justice Courts, to enhance interpreting capacities for locally-funded and operated Town and Village Courts.” *Court Interpreting in New York: A Plan of Action* (April 2006).

do some courts lack a sufficient number of interpreters who are available, but some attorneys are not given or fail to seek funds for out-of-court interpreter services.

In Suffolk County, there is reportedly a real need for interpreters, and although 18-B attorneys are encouraged to apply for interpreters for jail interviews, requests are not made often. The assigned counsel administrator in the county told the Commission that in addition to having a lack of Spanish-speaking 18-B attorneys, some towns have no authority to provide for interpreters in court.<sup>200</sup> In Nassau County, few requests for interpreters are made in the district court; instead, attorneys use the court's interpreter to speak with clients in court, either in the halls or in the lockup. In one village court in Nassau County, we were told that out-of-court interpreters are not provided. The judge in another village court in Nassau County said that the court does not have a certified interpreter. Instead, "Nassau County provides us with a police officer who's bilingual and I use them as court officers." We were also told that defendants regularly use family members to interpret for them in court.<sup>201</sup> Similarly, the Executive Director of the New York Civil Liberties Union (NYCLU) told the Commission that NYCLU observers "have witnessed court proceedings that have gone on involving indigent defendants who are not English speaking without any court interpreters present."<sup>202</sup> In Onondaga County, a city court judge noted a growing immigrant population and a corresponding need for more interpreters, both for court proceedings and for attorney-client communications.

Interpreter services in some places are provided through a telephone language line. District courts in Suffolk County will use such a service for languages other than Spanish or Polish for which they have staff interpreters. Outlying local courts will also use language lines. One town court justice felt that OCA should set up or recommend a certified translator phone service for courts to use statewide. He noted that such services are essential for moving cases.

However, the cost of in-court interpreters is largely being transferred to the local courts; we were told that the counties have reduced to \$25 the hourly rate that it will contribute for these services. In Putnam County, for example, where interpreters charge \$125 per court appearance, the town courts must now pay \$100 of this.

An 18-B attorney in Westchester County reported that in the two local courts where she practices, the judge will not approve requests for out-of-court interpreter services. This attorney will use a family member or friend of the client's to interpret her attorney-client interviews. In the same county, Yonkers City Court reported that there is "no mechanism" for attorneys to use interpreters out of court and that attorneys do not file motions for them. Another local judge in the county said that he thinks attorneys "should make their own arrangement" for out-of-court interpreters, although he would approve such services in a "significant case."

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<sup>200</sup> New York City Commission hearing transcript, pp. 196-197.

<sup>201</sup> In its recent report, the New York State Unified Court System confirmed the lack of interpreter resources in the town and village courts: "Justice Courts have no interpreters of their own, no guidelines for interpreter credentials, no training systems, and no coordination to harmonize their independent administration in this important area." Further, "Given the due process and access-to-justice implications, anecdotal reports that relatives or arresting officers serve as interpreters for arraigned defendants are especially troubling." *Court Interpreting in New York: A Plan of Action*, p. 24.

<sup>202</sup> New York City Commission hearing transcript, p. 389.

In Putnam County, one 18-B attorney will either tell the client to bring a friend to his office to interpret the meeting, or if the client is in custody, the attorney will pay a visitor at the jail \$15 to interpret for him. In the same county, we were told that sometimes 18-B attorneys will call LAS and ask to use the Spanish-speaking staff member to interpret their interviews. One 18-B attorney in Albany County who handles serious felonies said that he has never asked for an interpreter to go to the jail with him; he gets around it as best he can. In Broome County, while one public defender reportedly got a case dismissed once because the court could not find an interpreter, another reported that interpreters are not often used because “those clients speak more English than they let on.” In Orleans County, although the Public Defender recognized that non-English speaking clients “don’t completely understand...what’s being said to them,” the public defenders do not get funds to use out-of-court interpreters to communicate with clients. In-custody cases are handled “case by case;” the office may either use the court’s interpreters while in court or interpreters from a volunteer organization that helps farm workers.<sup>203</sup>

Sometimes, because of a lack of available interpreters, one court interpreter must translate for multiple co-defendants in court, not only making the job quite difficult, but violating the defendants’ confidentiality. This problem exists in Monroe County, where the translator “becomes the ombudsman for all the defendants and all activity in that case.”<sup>204</sup>

In addition to the lack of available interpreter services, there also appears to be a lack of uniform certification requirements and standards governing interpretation services in New York State. In a few courts that we visited, we noted that the interpreters did not appear to be interpreting all that was being said by the court. We were told that in Greene County, to become a court interpreter, one need only say, “I speak Spanish.”

### **7.3 Expert and Investigative Services**

Throughout our site work in New York, in all parts of the state, we were struck by the inadequate provision of and a lack of requests for expert and investigative services. ABA Standard 5-1.4 states:

[A jurisdiction’s] legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process....<sup>205</sup>

Commentary to this standard describes the essential aspect of non-attorney services such as experts:

Quality legal representation cannot be rendered either by defenders or by assigned counsel unless lawyers have available other supporting services in

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<sup>203</sup> Rochester Commission hearing transcript, pp. 49-50.

<sup>204</sup> Rochester Commission hearing transcript, pp. 242, 246-247.

<sup>205</sup> ABA STANDARDS FOR PROVIDING DEFENSE SERVICES (3d ed. 1992).

addition to secretaries and investigators. Among these are access to necessary expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and sentencing. The quality of representation at trial, for example, may be excellent and yet unhelpful to the defendant if the defense requires the assistance of a psychiatrist or handwriting expert and no such services are authorized or available.<sup>206</sup>

The New York County Law also requires the counties to provide such investigative and expert services “necessary for an adequate defense.”<sup>207</sup>

In addition, lawyers providing such representation have a duty to seek and employ them. Adequate investigation, for example, is the most basic of criminal defense requirements. Standard 4-4.1 of the ABA’s *Standards for Criminal Justice Prosecution Function and Defense Function* states:

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of facts constituting guilt or the accused’s stated desire to plead guilty.

Guideline 4.1 of the NLADA Performance Guidelines for Criminal Defense Representation states, “Counsel has a duty to conduct an independent investigation regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as quickly as possible.” NYSDA standards echo this national standard and require attorneys use investigators or experts whenever necessary for preparing any aspect of the defense.<sup>208</sup> NYSBA standards require attorneys providing mandated representation to investigate the facts concerning the charged offense and, in advance of trial, to “develop a legal and factual strategy, using whatever investigative and forensic resources are appropriate.”<sup>209</sup> Finally, New York rules of professional conduct state that attorneys must not “handle a legal matter without preparation adequate in the circumstances.”<sup>210</sup> Such preparation includes investigating the facts of a case and employing the services of an expert when doing so would advance the interests of the client, as lawyers also have an ethical duty “to represent the client zealously within the bounds of the law...”<sup>211</sup>

The outcome of a criminal case can hinge on a good defense investigation. Evidence and witnesses are often necessary or helpful to support a defense theory, but evidence and witnesses must be located, photographed, interviewed, and/or subpoenaed to court. A good investigation

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<sup>206</sup> ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *commentary* (3d ed. 1992).

<sup>207</sup> New York County Law, Article 18-B , §722.

<sup>208</sup> NYSDA Standards VIII-A(6), VIII-A(8).

<sup>209</sup> NYSBA Standards I-7(b), I-7(f).

<sup>210</sup> Lawyer’s Code of Professional Responsibility, DR 6-101.

<sup>211</sup> Lawyer’s Code of Professional Responsibility, EC 7-1.

can also give the defense leverage during plea negotiations. While investigation can be essential to an adequate defense, it is often inappropriate for a defense lawyer to conduct his or her own investigation. For example, it is not proper for attorneys to interview witnesses who they believe they may later need to impeach in court, because the lawyer may have to testify against the witness.<sup>212</sup> Employing an investigator also assists the attorney who often does not have the time or ability to track down witnesses, travel to far or unknown locations, interview difficult witnesses, or survey crime scenes. An attorney from Albany County described the necessity of investigators to public defenders: “We are lawyers, but when we go to trial we are dealing with facts, for the most part... And if you can’t get access to the facts, then you really can’t do a good job.”<sup>213</sup>

Employing an expert can also be essential for an adequate defense. In a criminal case, the prosecution has at its disposal not only local, state and federal law enforcement services for investigations, but also a number of state experts, including crime investigation and laboratory experts, psychiatrists, scientists, and medical experts. In order to confront the witnesses against him, including a state expert witness, a defendant often needs an expert to conduct the same analysis and provide another, independent opinion. In addition to confronting the state’s evidence or expert, a defendant may need an expert in order to present a defense, such as insanity or battered woman’s syndrome, to test forensic evidence, such as DNA evidence, or to evaluate fingerprint, handwriting, ballistics or crime scene evidence.

While a private defendant with resources can hire an expert or investigator of his or his attorney’s choosing either to challenge the state’s evidence or to perform an independent investigation or analysis, indigent defense attorneys must either deal with limited in-house resources or seek the court’s approval for funds to employ necessary non-attorney services. In the offices of the institutional providers, investigative services must either be contracted out with the use of limited funds or performed by what is frequently an inadequate number of staff investigators. In some offices, the investigators are used to conduct indigency screening or initial client interviews. In addition, although many offices have a fund for experts, the funds are either insufficient or underutilized. For example, a public defender in Albany County who handles a number of serious cases reportedly paid some significant expenses out of his own pocket for which he was never reimbursed by his office. In Onondaga County, we were told that there is often a tacit pressure on 18-B attorneys to not apply for experts in order to keep costs down.

Frequently, the courts of New York are the gatekeepers of the funds for expert and investigative services. In the case of assigned counsel, and in the case of an institutional provider lacking investigator staff or appropriated funds for non-attorney services, all requests must be approved by the courts. In this respect, the courts are put in the position of guarding the county’s coffer. This unavoidable and unenviable role is not lost on many judges who are constrained by limited county funds. In some cases, the county or the court insists that the

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<sup>212</sup> Commentary to ABA Standard 5-1.4 notes: “[W]hen an attorney personally interviews witnesses, the attorney may be placed in the untenable position of either taking the stand to challenge the witnesses’ credibility if their testimony conflicts with statements previously given or withdrawing from the case.” ABA STANDARDS FOR PROSECUTION AND DEFENSE FUNCTION, *supra* note 191.

<sup>213</sup> Albany Commission hearing transcript, p. 134.

defense use the state's expert.<sup>214</sup> For instance, the Executive Director of the New York Civil Liberties Union testified to observing an 18-B attorney in an upstate County Court zealously arguing for expert funds for "about an hour until the ADA, the prosecutor, sort of opened the door for the County Court judge [to approve the funds.] But...the judge was clearly more concerned about moving the case along" and even said, "'You know this is just duplicative of what the State is going to be doing. They're getting their own expert, why can't you use their expert?'"<sup>215</sup> (We are unclear as to why this was not taken up as an *ex parte* request.<sup>216</sup>)

In Broome County, a judge reported that when the county legislature heard of a defense request for \$40,000-\$50,000 for an expert, they directed the attorney to use the state's expert. The Schuyler County Public Defender testified to receiving the same pressure in her county. When she used all of her \$7,500 investigator and expert budget (and exceeded it) to hire a psychiatrist in one murder case, she "was reprimanded by the legislature." She was asked by a legislator, "Why do you need to hire a psychiatrist for this case? Why don't you just use the district attorney's psychiatrist's report?"<sup>217</sup> Similarly, a judge in Chemung County reported to receive calls from county legislators asking why an expert had been appointed in particular cases. This judge said that defendants in this county are "hard-pressed to get an expert on issues not related to competency."

Similarly, in Albany County, one 18-B attorney was reportedly told by a judge in a murder case to "use the people's [experts on] forensics, accident reconstruction, etc." Another attorney in the same county said that even though seeking expert funds is an *ex parte* process, some judges may tell the District Attorney of your request; further, because the judges balked at approving expert funds, the attorney finally stopped asking for them. A county court judge in Onondaga County noted that he does not receive requests for investigators and experts except in the most serious cases, and even then he is extremely mindful of cost and requires attorneys to provide "lots of detail" as to their need for the services. In Monroe County, we were told that attorneys had seen many vouchers for investigator services cut back recently, and some judges will "not even look at" a request for an expert.

An assigned counsel described a case in Livingston County in which her two-time prior felon client was facing 25 years to life for an alleged assault in prison. Her first two requests for an investigator to interview five potential witnesses were denied, despite her arguments. With the second denial, the judge declared in conference that in his nine-and-a-half years on the bench, he had never approved a request for an investigator. "When [the attorney] gingerly asked the judge if he would like to put that on the record when we went out into open court, the

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<sup>214</sup> See *Ake v. Oklahoma*, 470 U.S. 68, 78-84 (1985) (State's interest in denying petitioner the services of a court-appointed psychiatrist on the issue of insanity is not substantial in light of the compelling interest of both the State and petitioner in an accurate disposition; similarly, citing *Barefoot v. Estelle*, 463 U.S. 880 at 899, fair adjudication requires that the defense have access to an independent expert on the issue of future dangerousness in capital sentencing proceeding so that "the factfinder would have before it both the views of the prosecutor's psychiatrists and the 'opposing views of the defendant's doctors' and would therefore be competent to 'uncover, recognize, and take due account of ...shortcomings' in predictions on this point.")

<sup>215</sup> New York City Commission hearing transcript, pp. 396-397.

<sup>216</sup> New York County Law §722-c provides for *ex parte* requests for investigative, expert and other services.

<sup>217</sup> Ithaca Commission hearing transcript, p. 303.

conversation ended abruptly.” Her third and final request for an investigator was approved, seven months into the case.<sup>218</sup>

Judges must also limit the approval of funds for such services to the \$1,000 fee cap except in “extraordinary circumstances.”<sup>219</sup> However, other than the statutory fees caps, judges are given little to no guidance on hourly rates for investigative and expert services. The last time that guidelines were issued on compensation rates for expert and other non-attorney services in court-appointed cases was over 14 years ago. In February 1992, hourly fee guidelines were issued by OCA, including \$32 for investigators, \$30-\$40 for interpreters, \$125 for psychiatrists, and \$200 for physicians.

In addition to the hurdle of court approval for non-attorney services, two additional hurdles exist in many parts of the state. First, we heard from attorneys in many counties that it is difficult to find experts and investigators to take cases at the available rates. In Onondaga, for instance, “there are situations where lawyers have to go begging for experts to take cases...on 18-B rates.”<sup>220</sup> One assigned counsel administrator suggested that a set of updated rates from OCA would help attorneys get services at lower costs because they could point to the standards when they are trying to keep costs down.<sup>221</sup> Second, a number of attorneys noted a need for a statewide list of experts and other providers who are willing and able to take cases at available rates. Lacking this resource, we were told that some attorneys have used out-of-state experts. Similarly, attorneys suffer from a lack of a centralized list of certified investigators and other non-attorney service providers for use in appointed cases. One attorney in Monroe County spoke of this problem; in his county, he receives calls from attorneys who do not know where to go to find a certified investigator.<sup>222</sup> We were told that in Erie County, it is difficult to find experts and investigators to take cases at available rates and that it is an area where some people are complacent. We were told that judges arbitrarily cut requests for investigators and experts from \$1,000 to \$300.

A local judge in Westchester County noted that in the five years he has been on the bench, he has seen perhaps one request for expert or investigative services. An 18-B attorney in the same county, who has been practicing for over twenty years and takes homicides and serious felony cases, told us that he never uses investigators because he trusts the police and does not think they are useful. In the same county, we learned of a city court judge sending a copy of a decision refusing an *ex parte* request for experts to the prosecutor; we were told that the court asked the prosecutor to weigh in on the decision; indeed, a copy of the decision was sent to the District Attorney.

According to 2004 ILSF forms for Suffolk County, LAS spent no money on experts. The assigned counsel administrator commented that experts and investigators are underutilized in Suffolk County, especially in misdemeanor cases; this was described as the culture of the

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<sup>218</sup> Rochester Commission hearing transcript, pp. 222-223.

<sup>219</sup> New York County Law §722-c.

<sup>220</sup> Ithaca Commission hearing transcript, p. 96 (testimony of Assigned Counsel Program Administrator).

<sup>221</sup> In March 2005, when the Assigned Counsel Defender Plan administrator in Nassau County wrote to Chief Administrative Judge Lippman seeking an updated set of guidelines, he was told that this Commission would be looking into expert rates as part of its study.

<sup>222</sup> Rochester Commission hearing transcript, p. 255.

practice. One 18-B attorney in Greene County candidly admitted that he rarely applies for experts, and that he conducts his own interviews of witnesses. Since he cannot testify at trial, this attorney will use his wife as a foundational witness; she also videotapes some of his investigations.

In Orleans County, we were told that there are “no investigative services [and] never have been.” The county’s UCS 195 form filed with its ILSF report shows that in 2004, the county spent \$700 on investigators and nothing on experts. In Onondaga County, while there were 2,900 felony assignments made through the Assigned Counsel Program, and \$3.8 million paid in attorney vouchers, only about \$71,000 was spent on experts and investigators.<sup>223</sup> In Clinton County, the county told us that it has not received any vouchers for experts or investigators in town and village courts for over two years.

The consequences of inadequate investigations can be very detrimental to a defendant’s case. The Director of the Center for Community Alternatives described one defendant’s case:

The lawyer never went to jail to meet this defendant. All conversations took place in court. He never asked him anything about his background and so he never learned that the defendant had sisters who could describe horrific physical and psychological abuse. We found the sisters. They weren’t this hard to find. ...I think had this information been provided to the Court prior to plea, and by the way, the lawyer didn’t even tell us that he entered into a plea before he made the referral, that it might have made a difference to the judge in meting out the sentence. This individual was a first offender... [but] he got the maximum sentence on that charge. These examples go on and on.<sup>224</sup>

## 7.4 Discovery and District Attorney Policies

The problems facing New York’s indigent defense providers - including inadequate resources, insufficient client contact, and a failure to request or receive investigative and expert services - are made more troubling by discovery practices and other prosecutorial policies with which they are faced. In this section, we discuss such policies not to pass judgment on individual prosecutors or District Attorney’s Offices, but to illustrate additional aspects of the system that burden indigent defense and contribute to an overall lack of fairness. During this study, we were surprised to learn that many prosecutors across the state routinely fail to disclose important discovery material until hours or minutes before a contested hearing or trial, severely hampering the ability of defenders to prepare an adequate defense. In addition, some prosecutors pressure the defense into not filing motions and waiving preliminary hearings by refusing to offer pleas if the defense chooses to litigate.

In a criminal case, discovery material refers to material held by the opposing party that is relevant to the charges against the accused. This includes police reports, witness statements, defendant’s statements, physical evidence, and laboratory and other test results. Discovery is

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<sup>223</sup> Ithaca Commission hearing transcript, p.102.

<sup>224</sup> Ithaca Commission hearing transcript, pp. 273-274.



usually in the hands of the prosecution but is essential to a defense attorney's obligation to provide competent representation, which requires adequate preparation and zealous advocacy.<sup>225</sup> Such representation includes preparing a theory of defense, investigating witnesses, filing appropriate pre-trial motions such as motions to dismiss and to suppress evidence, and preparing for hearings and trials in advance. When critical and basic information such as police reports are withheld from the defense, such case preparation is made much more difficult and in some cases impossible. Although discovery practices also disadvantage private attorneys, the burden is greater on the indigent defense lawyers who lack the time and resources to prepare a case in the absence of discovery, such as tracking down and interviewing police and other prosecution witnesses.

The rationale for providing discovery to the defense is grounded on fairness, and avoiding "trial by surprise" by giving the defense advance notice of the evidence that the prosecution intends to use at trial. Although providing discovery to the defense may satisfy one's notion of fair play, not all discovery material must be provided to satisfy due process requirements.<sup>226</sup> Although there is no general constitutional right to discovery in a criminal case, state courts have found due process violated where the prosecution's failure to disclose certain critical portions of its evidence before trial deprived the defendant of an adequate opportunity to prepare to meet the prosecution's case.<sup>227</sup>

In a series of cases starting with *Brady v. Maryland*,<sup>228</sup> the Supreme Court established a constitutional obligation of the prosecution to disclose exculpatory evidence within its possession when that evidence might be material to the outcome of a case. The ultimate test under the *Brady* "materiality standard," when exculpatory evidence is not produced until the time of trial, is whether there is a reasonable probability that, had the evidence been disclosed to the defense prior to trial, the result of the proceeding would have been different. In addition to federal *Brady* requirement, prosecutors in New York are also required to disclose exculpatory material under state law and ethical rules.<sup>229</sup>

Unfortunately, New York discovery rules do not require prosecutors to disclose important discovery material in a manner that allows for adequate preparation by the defense. Beyond exculpatory material, New York prosecutors are required to provide only limited discovery material upon a defendant's request prior to a hearing or trial, such as a defendant's statements, physical or mental examinations of a trial witness, photographs, the defendant's property, and

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<sup>225</sup> See NYSBA Lawyer's Code of Professional Responsibility, DR 6-101, DR 7-101.

<sup>226</sup> See, e.g., *Cicenia v. La Gay*, 357 U.S. 504 (1958) (while it may be the "better practice" to grant the defendant pretrial discovery of his confession where the prosecution intends to use it at trial, the failure to follow that practice does not violate due process).

<sup>227</sup> See *Gilchrist v. Commonwealth*, 227 Va. 540, 317 S.E.2d 784 (1984) (failure to furnish key autopsy report until chief medical examiner testified at trial); *Moore v. State*, 740 P.2d 731 (Okla. Crim. App. 1987) (failure to disclose scientific reports and sample of drug); *Wynne v. State*, 676 S.W.2d 650 (Tex. App. 1984) (defense was furnished with report of one of state's experts on the insanity issue only shortly before that expert was prepared to testify and never received the report of the other expert); see also *Clark v. Commonwealth*, 262 Va. 517, 551 S.E.2d 642 (2001) (discussing limited constitutional right to pretrial discovery under constitutional right of defendant "to call evidence in his favor").

<sup>228</sup> 373 U.S. 83 (1963).

<sup>229</sup> See CPL 240.20(1)(h), The Lawyer's Code of Professional Responsibility, DR 7-103.

laboratory and other scientific tests of evidence.<sup>230</sup> The prosecution is not required to provide significant discovery material in advance that many defense attorneys in other states consider essential to case preparation, such as police reports and witness statements. The “*Rosario* rule”<sup>231</sup> in New York, codified in the Criminal Procedure Law, states that for each witness that it calls at a pretrial hearing, the prosecution must provide prior statements, criminal convictions, or pending criminal charges; but this does not have to be provided until the close of a direct examination of the witness.<sup>232</sup> For each witness that it calls at trial, the prosecution must provide this same material, but not until after jury selection and before opening statement or, in the case of a bench trial, after commencement but before submission of evidence.<sup>233</sup> The prosecution never has to provide statements of a witness that it does not intend to call to the stand at a hearing or trial.<sup>234</sup>

While the *Rosario* rule places similar requirements on the defense with regard to discovery, it is the defense that is particularly disadvantaged by this rule; frequently in criminal cases, most if not all witnesses are prosecution witnesses. The People, who have the burden of proof in most pretrial hearings and at trial, must necessarily call a number of witnesses to the stand to prove their case, including police officers and often civilian witnesses. The defense, on the other hand, often presents no evidence or witnesses at all; instead, the defense attorney’s job is to effectively cross-examine the people’s witnesses. The client is not always a good source of facts and information regarding the case, since some clients have mental health problems and/or were under the influence of drugs or alcohol at the time of the alleged offense. In addition, in the absence of police reports, defense counsel must file pretrial suppression motions and allege sufficient facts based solely on the client’s version of events which counsel may not want to disclose at that time. Faced with the *Rosario* rule and the lack of open discovery practices of many prosecutors, it is often difficult if not impossible for defense counsel to adequately file motions, prepare for litigation or even provide adequate and informed advice regarding a plea.<sup>235</sup>

Although New York law does not require an open discovery practice, New York rules of professional conduct advise fair and timely disclosure. New York’s ethical considerations governing prosecutors states:

The responsibility of a public prosecutor differs from that of the usual advocate; it is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers.... (3) in our system of criminal

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<sup>230</sup> CPL 240.20.

<sup>231</sup> *People v. Rosario*, 9 N.Y.2d 286 (1961).

<sup>232</sup> CPL 240.44.

<sup>233</sup> CPL 240.45.

<sup>234</sup> *Id.*

<sup>235</sup> See NYSDA Standard VIII-A(7) (“Where prosecutorial or judicial policies purport to preclude consideration of the facts and law of individual cases in plea negotiation, counsel’s negotiating strategy should include consideration of ways to challenge such policies.”) See also, The Lawyer’s Code of Professional Responsibility, EC 8-2 (“Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, the lawyer should endeavor by lawful means to obtain appropriate changes in the law. The lawyer should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.”)

justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to the prosecutor, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.<sup>236</sup>

In addition, for many years, the Chief Administrative Judge's Advisory Committee on Criminal Law and Procedure has recommended that CPL 240 be amended to allow for more expeditious and liberal discovery practices.<sup>237</sup>

Similarly, New York discovery law stands in contrast to ABA criminal justice standards that provide for objectives of fairness in the institution of a jurisdiction's pretrial procedures, including to: "promote a fair and expeditious disposition of the charges, whether by diversion, plea or trial; provide the defendant with sufficient information to make an informed plea; ...permit thorough preparation for trial and minimize surprise at trial; ...[and] minimize the procedural and substantive inequities among similarly situated defendants."<sup>238</sup> Further, the discovery should be initiated "as early as practicable in the process" and completed early enough "that each party has sufficient time to use the disclosed information adequately to prepare for trial."<sup>239</sup>

Many discovery practices across New York State strongly conflict with these standards. In Onondaga County, for instance, an assigned counsel board member told the Commission that "what we have in this state is trial by ambush." In his county, there have been "numerous complaints of problems with prosecutors, of ethics violations, holding back discovery material, *Brady* material ...and other forms of prosecutorial misconduct."<sup>240</sup> The legal aid director in the same county told the Commission that although her office filed written demands for discovery in every case, and although the law requires the District Attorney to file a written response, "we knew that [the District Attorney's] staff threw them in the garbage when they received them."<sup>241</sup>

An 18-B attorney in Erie County, who reportedly has to plead for *Rosario* material to be given in advance, expressed his frustration of the discovery problem, saying, "I could deal with the [low pay] if the playing field was level." One criminal defense attorney in Albany County told the Commission that even after making a demand for discovery and requesting a bill of particulars, "if you are lucky the prosecutor gives you a nice bread sandwich. Nothing. You get nothing. You have to beg and scrape and plead, and at the end of the day you have nothing. That's crazy."<sup>242</sup> Similarly, a public defender from Wayne County told the Commission:

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<sup>236</sup> The Lawyer's Code of Professional Responsibility, EC 7-13.

<sup>237</sup> See Report of the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the State of New York, Sec. II-1 (the first of long-standing previously endorsed measures) (January 2006).

<sup>238</sup> ABA STANDARDS FOR PROSECUTION AND DEFENSE FUNCTION - DISCOVERY, Standard 11.1.1(a).

<sup>239</sup> *Id.*, Standard 11-4.1(a).

<sup>240</sup> Ithaca Commission hearing transcript, p.108.

<sup>241</sup> Ithaca Commission hearing transcript, p. 231.

<sup>242</sup> Albany Commission hearing transcript, pp. 128-129.

I feel compelled every time I have the chance to talk to someone about the criminal justice system to talk about criminal discovery in New York and what – I hesitate to use the word joke, but I just used it. If you sue someone over a large sum of money you get every piece of paper, you get depositions. If you’re charged with murder the State essentially gets to hide the ball on you until the very last second and that is our system. True open file discovery would save us all a lot of time, money and effort. Plea bargain agreements...could be reached a lot sooner [- ] [l]ess litigation is my belief. If witness statements, police reports, grand jury minutes were produced to the defense immediately upon indictment or as soon as possible thereafter...the cases that should go to trial...would still go to trial, but overall the whole system would be a lot more just if the information was handed over.<sup>243</sup>

Stringent discovery practices exist in some but not all parts of the state; thus, similarly situated defendants in different parts of the state are not equally disadvantaged. Discovery practices vary not only among the counties, but also among prosecutors in the same county. We were told by a number of attorneys that in some cases, whether the defense receives discovery in advance of a hearing or trial depends on the attorney’s relationship with the prosecutor in the case. For example, in Monroe County, although there is “allegedly...an open discovery process, [t]hat...frankly just doesn’t exist. It depends on the individual attorney.”<sup>244</sup> We found similar discrepancies in Putnam County, where one attorney said that the defense does not receive any police reports in misdemeanor cases, nor in felonies. He added, “there’s not a lot of paperwork or prep in criminal law” unless you are going to trial. However, other attorneys in the county who handle felony cases said that they receive open file discovery except for “sensitive” material. In Westchester County, we were told that police reports are handed to the defense hours before trial, or 30 minutes before a hearing. However, some district attorneys will reportedly be more forthcoming with providing discovery if they have a working relationship with defense counsel. One 18-B attorney reported that in Westchester County, he once had to send someone to the District Attorney’s Office to handwrite a copy of a police report for him.

Although the Suffolk County District Attorney’s Office described its discovery policy as “voluntary discovery,” it is not open file. Rather, the prosecutors will not provide police reports until they are legally required to, and witness statements are provided just before trial. While the prosecutor recognized that other states provide more discovery than New York, he attributed the tighter discovery policies to “New York culture.” In Nassau County, the Director of the Legal Aid Society told the Commission that prosecutors provide the defense with a “voluntary disclosure form, usually at the first, second, third, fifth or tenth conference in district court, a little earlier than in the county court. The VDF, voluntary disclosure form, basically gives us little or no information about the case. We don’t get anything that isn’t provided for by Article 240 of the CPL. We will get a copy of our client’s confession with the VDF. That’s pretty much it.” He described how these stringent discovery practices delays case dispositions, saying that “one of the big drags on the system right now is that it takes many, many adjourned dates to find

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<sup>243</sup> Rochester Commission hearing transcript, pp. 31-32.

<sup>244</sup> Rochester Commission hearing transcript, p. 236.

out what you need to know about the case before you can make an intelligent judgment on how to handle it.”<sup>245</sup>

An official from the New York branch of the National Association of Criminal Defense Lawyers (NACDL) described to the Commission the obligation on defense attorneys to determine whether the prosecution’s case consists of “legally sufficient evidence that was acquired in a constitutionally acceptable manner.” Until an attorney knows this, he cannot counsel a client on whether or not to plead. “It’s not up to me to run up to my client, did you do it, meet and plead ‘em lawyer, which is what New York State likes.” The prosecution denies this attorney’s discovery requests, saying, “Take your chances or we are going to indict.”<sup>246</sup>

The Schenectady County Conflict Defender described one of the major problems with late discovery: a delay in discovering conflicts. He told the Commission of a case that he had to conflict out of on the day of trial for prior representation of a prosecution witness whose name had not been provided to him until that day; his client had already been incarcerated for approximately nine months.<sup>247</sup>

In Oswego County, although the District Attorney has an open-file discovery policy, defense attorneys have to go to the DA’s office to see the file because the DA will not make copies. We were told that most defense attorneys do not actually go to look at the discovery. In Nassau County, two 18-B attorneys candidly said, “We might not ask for [discovery] if we know it’s a therapy disposition. We ask for it when it’s moving towards trial.”

The former public defender in Essex County told the Commission that in his county, “The DA insisted on conducting trial by ambush, turning over discovery only when demanded and ordered by the Judge and sometimes the Appellate Division.” He further said that prosecutors would threaten to end all plea bargaining if the defense litigated a motion and lost.<sup>248</sup> Similarly, an attorney in another county said that the District Attorney there is “the king of hiding things,” and that attorneys do not file motions because if they do, they will not receive an offer in the case.

In some counties, a defendant’s access to full disclosure by the District Attorney’s Office is contingent upon waiving the right to a preliminary hearing.<sup>249</sup> One district attorney candidly said that he tries to avoid preliminary hearings because they are expensive, so he will normally offer to disclose the file in exchange for a waiver. Although the stated reason for not having an open file discovery policy is avoiding potential witness intimidation (e.g., a child witness), such cases are not likely the norm; in addition, confidential information can be redacted from material that is provided.

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<sup>245</sup> New York City Commission hearing transcript, pp. 134-135.

<sup>246</sup> Rochester Commission hearing transcript, pp. 72-73.

<sup>247</sup> Albany Commission hearing transcript, pp. 147-148.

<sup>248</sup> Albany Commission hearing transcript, pp.27-28.

<sup>249</sup> Under CPL 180.60, felony defendants have a right to a preliminary hearing on a felony complaint (prior to indictment) at which the prosecution must prove through non-hearsay evidence, except for expert and scientific reports, that there is reasonable cause to believe that the defendant committed the charged felony. Under CPL 180.80, in-custody defendants have a right to such a hearing within 120 hours, or 144 hours including a Saturday, Sunday or legal holiday; otherwise, the defendant must be released on his own recognizance.

Other prosecutorial practices are often employed across the state to entice the defendant to waive the right to a preliminary hearing. In Erie County, we were told that district attorneys will refuse to negotiate a plea if the defendant insists on having a felony preliminary hearing. In Steuben County, we were told that the District Attorney's policy is to offer the "worst deals" to a defendant if counsel requests a preliminary hearing. In Monroe County, we were told that the District Attorney will try to avoid preliminary hearings by indicting defendants quickly. In still another county, one judge expressed concern that the practices of the District Attorney are violating the defendant's rights, particularly with regard to preliminary hearings. He told us that the District Attorney will secure a waiver of a defendant's right to a preliminary hearing and then have the defendant sit in jail for 45 days and then not seek to indict them. In Onondaga County, the District Attorney's Office reported that their policy is not to negotiate a case once a defendant is indicted.

Too often, throughout our site work, we were troubled to learn of prosecutorial tactics such as withholding evidence as a way to force a plea, conditioning a plea offer on a defendant's waiver of the right to appeal, refusing to provide discovery or a plea offer unless the right to a preliminary hearing is waived, and indicting quickly rather than engaging in a preliminary hearing. Such practices can create an impression that some prosecutors are more concerned about obtaining a conviction than ensuring a fair trial. Although we understand that most prosecutors are not violating the law, we are concerned about the fairness of the process. We note that ABA Criminal Justice Standard 3-1.2 on the Prosecution Function states that "[t]he duty of the prosecutor is to seek justice, not merely to convict."

## **7.5 Disparity Between Prosecution and Defense Resources**

In addition to facing difficult discovery and prosecutorial practices, many defenders across New York State must operate under a large disparity of resources that further tips the balance in favor of the prosecution. Prosecutors generally receive not only greater funding than the defense, but also many additional in-kind resources that cannot be quantified, such as access to federal, state and local law enforcement resources, crime labs, and expert witnesses. While it is not the purpose of this study to review the appropriate staffing and monetary and in-kind resources of the District Attorney's offices, we provide comparative information simply to illustrate the significant resource disparity between the prosecution and indigent defense in New York. The American Bar Association suggests that the appropriate measure of health within a criminal justice system is whether each agency in the system - courts, prosecution, defender - receives adequate and balanced resources. Applying this measure of success, New York's system is failing.

Recognizing the importance of balanced resources, NYSBA Standard K-1 calls for parity in compensation between the providers of mandated representation and their governmental counterparts; however, compensation is one area of common disparity. In Rennselaer County, the part-time public defenders start at \$40,000, the result of a 33.3% increase that the Public Defender was able to get when the assigned counsel rates increased. The part-time public defenders also get state retirement and 80% health benefits. The Public Defender reports that as

a result, there has been no turnover in the last five years; this was not true for the Rennselaer County District Attorney who reportedly lost 15 people in 18 months.

In Greene County, the Public Defender reported to the Commission that his office has five part-time attorneys who reportedly earn a combined \$135,000 a year to handle both family and criminal courts. In comparison, the District Attorney has five full-time attorneys who reportedly together earn over \$300,000 a year, not including an additional part-time attorney, to handle the criminal courts; two full-time Assistant County Attorneys together earn approximately \$120,000 to handle the family courts. While the Public Defender's caseload (about 1,200 cases) is reported to be approximately 80-85 percent of the District Attorney's caseload, his staff is less than half of the prosecutor's staff.<sup>250</sup>

In Westchester County, according to the county's operation budget, in 2005, the county projected to spend approximately \$17 million on indigent defense (LAS and 18-B combined) and had appropriated \$21.8 for the District Attorney. Probation was appropriated \$19.9 million. For 2006, indigent defense was allowed approximately \$16.9 million in county funding, while the District Attorney was allowed \$23.4 million and Probation was allowed \$20.7 million. The county funding for the District Attorney is in addition to over six million dollars in grant funding. In addition, while the District Attorney's Office has eight branch offices for local court representation, LAS rents one central office space in White Plains and must travel to the outlying courts to handle felonies. In terms of compensation, District Attorney salaries reportedly range from \$52,906 to \$142,944 for a first deputy, while LAS salaries range from \$47,000 to \$121,700 for a first deputy.

Similar disparities can be found in Suffolk County, where the Legal Aid Society has reportedly experienced a 16% turnover in staff, particularly resulting in a loss of experienced attorneys with 5-10 years of experience. One of the main reasons for the loss, we were told, is the low salaries. A new attorney at LAS starts at \$48,000; a new assistant district attorney (ADA) starts at \$54,000. Even the District Attorney's Office feels that the disparity is wrong. A senior DA told us that the office had an influx of LAS attorney applicants, but he stopped hiring them because "it wasn't right. There's plenty of other lawyers to draw from for entry-level ADA slots." This attorney feels that even though criminal defense has become more complicated in the last ten or more years, the government will not fund criminal defense to the level that it will fund law enforcement. LAS has 90 attorneys handling criminal and family court cases and appeals. In contrast, the District Attorney's Office has 175 attorneys. The DA's budget for 2006 is approximately \$30 million, of which \$5-\$6 million comes from state and federal grants. In 2004, as reported on Suffolk County's ILSF report, the total expenditures on indigent defense for LAS and 18-B combined, was \$11.3 million, including about \$685,000 in state and federal funding.

In Greene County, the Chief Assistant District Attorney reportedly receives a salary that is \$4,000 more than the Chief Public Defender's salary. In addition, we were told that approximately \$60,000 of the District Attorney's salary is paid through state funds. The District

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<sup>250</sup> New York City Commission hearing transcript, pp. 90-91, 100. Note that the Greene County Public Defender is now a full-time position.

Attorney also reportedly receives approximately \$41,000 from the State Aid to Prosecution fund which is used towards ADA salaries in Greene County. While the Public Defender in Steuben County has the ability to hire staff at a mid-range salary without prior county permission, the mid-range salary for public defenders is reportedly far less than prosecutors' salaries. We were told, for example, that the District Attorney makes twice as much as the Chief Public Defender. In addition, the District Attorney has nearly twice the ratio of support staff to attorneys as the Public Defender.

Although some counties have salary parity between defenders and prosecutors, other disparities still exist. For example, although Genessee County has salary parity, the District Attorney is able to obtain grant funds unavailable to the Public Defender and to use those funds "to add to the base common salary." So, according to the Public Defender, "everybody in the DA's office earns more in a like position than [public defenders] do."<sup>251</sup> In Monroe County, the county code requires salary parity between the District Attorney and the Public Defender offices. However, we were told that the District Attorney has additional money to promote attorneys faster within each salary grade; thus, while assistant public defenders and assistant district attorneys start at the same salary level, it does not take long for the district attorneys to begin to earn more than their public defender counterparts. Saratoga County public defenders and prosecutors have parity in salary but not in staffing. The Public Defender reported to have four full-time attorneys and three part-time attorneys on staff. In comparison, the District Attorney's Office has nine full-time attorneys and five part-time attorneys, in part due to state grant funding for matters such as domestic violence, sex crimes, car theft, and DWIs. The Public Defender testified: "That has created an imbalance in my office, as those District Attorneys are trained to specialize in the prosecution of those matters and I have no funds to provide extra training to my assistants" who must provide representation in any matter that is assigned to them.<sup>252</sup>

In Oswego County, we were told that the District Attorney's Office has six full-time attorneys, including the District Attorney, as well as three part-time attorneys and a significant number of support staff including secretaries and investigators. This staffing is in addition to the resources of the state and local police, crime labs, etc. Access to experts was described by a former prosecutor as "easy." On the other side of the aisle, assigned counsel receive the hourly rates, but receive no funding for support staff, no reimbursement for travel, and must apply to the court for investigators and experts. One assigned counsel said that it is not unusual for the District Attorney to have an expert and/or investigators, usually from a law enforcement agency, while the defense has none. In 2005, the indigent defense budget in the county was \$1.2 million, including Family Court representation which was estimated to comprise 35% of the costs. We were told that the District Attorney's budget was approximately the same, but it does not include Family Court representation.

A lawyer from the Erie County Legal Aid Bureau spoke to the Commission of another disparity between the prosecution and the defense: training budgets. "The prosecution seems to have plentiful funds to enable its office to send novice assistant district attorneys for training at DA school and to send experienced prosecutors to conferences where they learn innovative

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<sup>251</sup> Rochester Commission hearing transcript, p. 27.

<sup>252</sup> Albany Commission hearing transcript, pp. 165-166.



techniques. For lack of funding for continued criminal defense training, Legal Aid Bureau attorneys in both the city court and appeals units are at a distinct disadvantage.”<sup>253</sup>

## 7.6 Right to Counsel Problems

Across the state, counsel are frequently not appointed on low-level offenses in city, district and town and village courts, despite the potential for incarceration and the requirements of the law (see Chapter 3). In this section, we discuss appointment of counsel problems in city and district courts; we separately address appointment problems in the town and village courts in Chapter 8.

Frequently, defendants’ right to counsel is not honored when they are charged with violations that carry a potential of 15 days in jail; in some cases, the courts also fail to appoint or offer counsel on misdemeanors. The problem is occurring for several reasons. First, judges have different understandings and opinions as to when they must appoint counsel. (Upon analyzing the law ourselves, we understood why people might be confused.) However, under both federal and New York law (as discussed in Chapter 3), whenever a defendant faces the possibility of incarceration for a charged offense, including petty offenses such as violations and “traffic violations,” the courts must advise the defendant of the right to counsel and must appoint such counsel if the defendant is financially unable to obtain one.<sup>254</sup> Second, some judges do not apply the law as they know it, either out of fiscal concern or a belief that the appointment of counsel is simply unnecessary. Third, some institutional providers with limited staffing and resources limit their representation on low-level offenses. As a result, disparate practices exist across the state, and the right of many defendants to appointed counsel is being violated. Unfortunately, such problems appear to have existed throughout the state for years; that they continue to exist today suggests that they have become an acceptable part of New York practice.

In Nassau County District Court, we were told that whether counsel will be appointed in a violation case depends on the judge. Some judges will reportedly deny counsel to a defendant who is in custody or facing jail time if the charge is a violation. In fact, we observed such a situation in one courtroom hearing desk appearance tickets (DATs) where an 18-B attorney is regularly assigned to help handle the docket but is not formally appointed and does not represent anyone beyond that day’s hearing. We observed a defendant charged with a traffic violation taken into custody after the judge set bail at \$250 cash (the defendant reportedly had a significant driving record). Although the 18-B attorney made an argument that the defendant be released on his own recognizance (ROR), cash bail was set because the prosecutor was likely to be seeking a jail sentence on the case. During this hearing, the court failed to inform the defendant of his right to counsel and made no effort to determine eligibility. One prosecutor commented that in this courtroom, the 18-B duty attorney should either represent the defendants fully or not at all, as the current practice “opens it up for withdrawal of a plea or a lawsuit.”

In Oswego City Court, defendants charged with traffic violations (with the potential of 15 days in jail) and other low-level offenses are not represented by a duty attorney at arraignment.

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<sup>253</sup> Rochester Commission hearing transcript, pp. 182-183.

<sup>254</sup> See *People v. Weinstock*, 80 Misc.2d 510 (1974); see also County Law §722.

They are told to sign up to go to the District Attorney's Office to speak with a prosecutor without representation.

In a city court in Chemung County, we witnessed an arraignment of an in-custody 16-year-old pro se defendant charged with misdemeanor criminal mischief. The judge informed the defendant that he could plead guilty and either receive three years of probation or one year in jail. The defendant, who admitted that he had charges pending in another court, wanted to choose the year in jail. The court adjourned the case and told the defendant to speak with the probation officer in court that day about a pre-sentence investigation. At no time did we observe the court inform the defendant of his right to counsel.

In Westchester County, a city court judge reported to us that defendants are not entitled to counsel on violations. This was said with the knowledge that all violations except unlawful possession of marijuana carry a potential 15-day sentence. This judge may appoint counsel on such cases only if the circumstances are such that the violation is "likely to be elevated by the DA." In most violation cases, pro se defendants negotiate with the prosecutors. In addition, although the court uses a written waiver of rights form for defendants to sign in misdemeanor cases, the court provides no written waiver form and does not do a plea colloquy for violations.

In Albany County, we were told that defendants do not receive public defender representation at arraignment unless they are in custody. In addition, it is the policy of the Public Defender to not accept motor vehicle violations and traffic infractions because it is very unlikely that the defendant will go to jail. We observed the effects of this policy in one court where a man was charged with violations for allegedly harassing an ex-girlfriend and breaking her windshield. The man vehemently proclaimed his innocence, but was told that the Public Defender would not represent him and that the judge would not sentence him to jail. However, should the defendant later face incarceration for violating the terms of a suspended sentence, probation, or an unpaid fine, the fact that he was not offered counsel on the underlying offense would violate his right to counsel under *Alabama v. Shelton*.<sup>255</sup>

We have reason to believe these problems have existed in New York State for some time. NYSDA has studied the right to counsel problems in violations and in 1990 documented its findings in an affirmation filed in the Allegheny County Supreme Court. NYSDA's findings include the following:

The underrepresentation of people charged with violations and unable to afford counsel is a critical statewide problem;

In 1986, the NYSDA Backup Center wrote a piece on the right to counsel in violation cases for the New York State Magistrates Association in which it described "the routine miscomprehension of the right to counsel" and clearly stated "Under New York statutory and decisional authority, it is the exposure to and not the imposition of imprisonment which activates the right to assigned counsel;"<sup>256</sup>

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<sup>255</sup> 535 U.S. 654 (2002); see also Chapter 3, Right to Counsel.

<sup>256</sup> Citing "The Defendant's Right to Counsel in Violation Cases," *The Magistrate*, April 1986.

Data revealed that “the deprivation of counsel in violation cases is a low visibility problem of vast constitutional dimension routinely affecting thousands of people throughout the state of New York and in Allegheny County;”

In 1982, Clinton County introduced a bill to reduce the scope of the right to counsel in New York to exclude cases where the judge has stated upfront that the defendant will not be sentenced to jail;

The “routine practice of the assigned counsel administrator” of St. Lawrence County is to “not assign counsel ‘for a violation unless the judge indicates...that a jail sentence will be given if you are found guilty...’”; and

Data in Allegheny County shows “the low-visibility statewide problem of underrepresentation in violation cases. The refusal to appoint counsel in violations as required by law is a phenomenon that has routinely evaded review in Allegheny County... It has occurred and reoccurred in Allegheny County for each year of the last decade....”

Our study disclosed that in criminal courts throughout New York today, some indigent defendants who are entitled to appointed counsel do not receive counsel, particularly in minor offenses. Some judges appeared to be confused about the requirements of the law. Others do not offer appointed counsel because they believe counsel is unnecessary. In addition, some prosecutors speak to pro se defendants directly in order to negotiate plea offers, thus raising ethical concerns.<sup>257</sup> The right to counsel problems are widespread, and the need is clear for the implementation of explicit standards and procedures for all cases for which the right to counsel attaches.

## 7.7 Collateral Consequences

In addition to the need to fully understand the terms of a sentence resulting from a plea and conviction, a defendant also needs to understand any number of potential collateral consequences that result from that conviction. In today’s climate, the collateral consequences of a conviction seem to be greater and more numerous than in the past, and for some defendants, they are greater than the terms of the actual sentence. Collateral consequences encompass issues such as immigration, employment (including public and private employees), housing (including private, public and federally-subsidized housing), public benefits and welfare, family law (including custody, visitation and family offense proceedings), driver’s licenses, forfeitures, civic participation (including voting and jury service), federal student loans, military service, government contracting, insurance coverage, and international travel. Many collateral consequences may result not only from a felony conviction, but also from a misdemeanor or

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<sup>257</sup> This runs contrary to the ABA Standards for prosecutors, which states “A prosecutor who is present at the first appearance (however denominated) of the accused before a judicial officer should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel or in arranging for the pretrial release of the accused.” ABA STANDARDS FOR PROSECUTION AND DEFENSE FUNCTION, Standard 3-3.10.

violation conviction. It is therefore incumbent upon the attorney to advise a client of the collateral consequences of a conviction as well as the terms of a sentence.<sup>258</sup>

New York State Defender's Association (NYSDA) Standard VIII-A(7) states, "Counsel should be fully aware of, and make sure the client is fully aware of, all direct and potential collateral consequences of a conviction by plea." In this regard, NYSDA provides training and support services on collateral consequences, and at least one institutional provider (Nassau County Legal Aid Society) has two attorneys that have been trained and receive support from NYSDA in their handling of immigration consequences.<sup>259</sup> In addition, New York State Bar Association (NYSBA) Standard I-7(a) states that counsel should avoid "if at all possible, collateral consequences such as deportation or eviction."

Unfortunately, not all indigent defense attorneys in New York inform their clients of collateral consequences, often because they lack sufficient knowledge and training in the area. A provider may also be restricted by a county from providing representation in any non-criminal areas that relate to a case. In addition, many defendants are pleading without counsel to low-level offenses without being informed of potential collateral consequences. Below we provide several examples of these problems in upstate New York.

In Albany County, the probation department was concerned that defendants do not understand what is expected of them in terms of court-ordered treatment and other sentence requirements. They reported that both public and private counsel fail to explain certain collateral consequences to clients; for example, a convicted felon cannot work in a place that serves alcohol unless they receive a letter of relief from the sentencing court. Similarly, in Onondaga County, we observed an issue arise regarding the collateral consequences of an incarcerated defendant pleading to a prison assault. His assigned counsel was unaware of the consequences on his client's good time at the prison resulting from the plea. The judge in fact raised the issue for the defendant and asked the attorney to look into the matter.

In a village court in Nassau County, we observed the arraignment and plea of a pro se defendant charged with a seatbelt violation and speeding. The prosecutor offered to dismiss the seatbelt violation in exchange for a plea to a red light violation, but the defendant was concerned about the consequences of a plea on her license to drive. She asked the judge, "What will this mean [for my license]?" The judge responded, "I'm not your attorney – do you want an attorney?" He then told her that it would mean three points on her license, and she pled. Similarly, in another county, a local judge noted that uncounseled defendants pose a particular problem because they ask questions regarding collateral consequences that require the advice of counsel and the judge cannot answer.

In Genesee County, the Public Defender is restricted from providing representation beyond the disposition of a criminal case. For example, the public defenders are restricted from pursuing issues collateral to the criminal case such as educational advocacy for juveniles, administrative reviews of entitlement determinations (e.g., Medicaid and housing) and "can't

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<sup>258</sup> See The Bronx Defenders, *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records* (March 2005).

<sup>259</sup> New York City Commission hearing transcript, p. 136.

even perform post-disposition follow-up for clients.” In addition, the Public Defender “can’t deal with immigration issues[,] [a]lthough [the county] has a significant resident alien population...of farm workers.”<sup>260</sup> This stands in stark contrast to the Bronx Defenders and Neighborhood Defenders in New York City that have developed a “holistic” approach to representation, as discussed in Chapter 9.

## 7.8 Fines, Fees and Surcharges

Across the country defendants are faced with a number of fines, fees and surcharges at various stages throughout their involvement in the criminal justice system. Money raised from these fees is intended to off-set some of the costs of running the criminal justice system, including the payment of court-appointed counsel; however, oftentimes the people who are charged these fees are the very same people eligible for appointed counsel. In other words, states are placing the responsibility of paying for indigent defense costs on the backs of the indigent. In New York State, defendants that fail to pay a fine or surcharge may face incarceration.<sup>261</sup> See Chapter 3, Unpaid Fines and Surcharges, above.

New York has 11 mandatory surcharges, including felony, misdemeanor and violation surcharges and several surcharges for certain vehicle and traffic law infractions or offenses. A defendant may face nearly 20 different fines or fees, including penal and vehicle and traffic law fines, and various civil penalties such as county-imposed probation fees, fines for a chemical test refusal, and fines for operating a vehicle without adequate insurance. Justice Strategies, a research, training and policy initiative of the Center for Community Alternatives, provides a summary of surcharges, fees and civil penalties that defendants may face. See *Appendix M* for their report.

These fines, fees and surcharges generate a large amount of revenue for the state and local governments. In New York City, for example, according to the 2004 Annual Report for the Criminal Court of the City of New York, \$20,122,159 was collected from various fines, fees and surcharges.<sup>262</sup> The greatest revenue producing stream was a fine for city summons, which brought in \$4,935,980, or just about a quarter of the total revenue. Chapter 8 of this report on Town and Village Courts (below) shows that over \$175 million of revenue was collected by town and village courts in calendar year 2004.

## 7.9 Specialty Courts

Since 1993, when the Midtown Community Court opened in Manhattan, alternative or specialty courts have become more common in New York State. According to an OCA report published in 2005, there are currently 188 specialty courts around the state and another 84 in the

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<sup>260</sup> Rochester Commission hearing transcript, pp. 24-25.

<sup>261</sup> See Adam Liptak, *Debt to Society Is Least of Costs for Ex-Convicts*, N.Y. TIMES, Feb. 23, 2006 (describing the impact that fines, fees and surcharges have had on a number of defendants across the country).

<sup>262</sup> See *Criminal Court of the City of New York, Annual Report 2004*, at <http://www.nycourts.gov/courts/nyc/criminal/NYCCD-Annual-Report-2004.pdf>.

planning stage. One-half of these specialty courts are drug courts; others include domestic violence, community, mental health, gambling, homelessness, sex offender management, and gun courts.

During our visits to the counties, we encountered several issues with regard to specialty courts. First, many of the courts are mandated without additional funding to staff them. Second, staffing the specialty courts becomes difficult because they usually require additional appearances, special training, and a greater number of days to case disposition. The amount of time and resources required of the indigent defense providers to handle the specialty courts exceeds those in other criminal cases. Finally, the practices of the courts appear to vary among the counties.

We heard from a number of indigent services providers that the specialty courts are often created without additional funding for the providers, despite the fact that the providers must staff the courts with attorneys. Too often, the providers are also not included in the planning process when a court is discussing the creation of a specialty docket. The funding problem is made more difficult by the fact that most of these courts require additional time from court-appointed attorneys, including travel and additional court appearances that are not required in non-specialty courts. The Legal Aid Society Director in Onondaga County told the Commission that in her experience, while the court and District Attorney get additional staff to cover specialty dockets, “[t]he defense gets zero. The impact, particularly on underfunded, understaffed providers is that...with the institution of every new specialized court, you have new parts to cover, new calendars to cover, and we have the same number of people to cover those courts. Then we hear afterwards, well, we are waiting for the legal aid attorneys and we are having to delay cases, etc., etc. We are between a rock and a hard place with that.”<sup>263</sup>

The Monroe County Public Defender similarly told the Commission that his office was asked to take on additional work in specialty courts without additional resources.<sup>264</sup> In Westchester County, we were told that two specialty courts for mental health and sex offender cases have been scheduled by the state to start in 2005 and 2006 with no additional state funding. As stated by the Westchester County LAS in its 2006 budget, specialty courts “require much more time on the part of the defense attorneys for involvement with the personal lives of the client, client’s family and program support services than the ‘standard’ criminal case.” In Suffolk County in 2004, LAS attorneys made 1,871 court appearances in 271 drug court cases, for an average of seven appearances per case. In addition, as the Westchester LAS points out, the specialty courts involve “long post-conviction periods of compliance, involving many more court appearances than the average case.”

Drug court in Tompkins County is reportedly a tremendous drain on the assigned counsel plan and constitutes approximately ten percent of its budget. Assigned counsel in Tompkins County are not permitted to skip the post-plea drug court meetings, although prosecutors are not required to attend and do not since the prosecutor’s drug court position was reportedly cut by the county. We were told that six 18-B attorneys cover three drug courts where they attend lengthy

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<sup>263</sup> Ithaca Commission hearing transcript, p. 237.

<sup>264</sup> Rochester Commission hearing transcript, p. 5.

(sometimes all-day) hearings each week. They also attend their clients' drug programs. Some attorneys commented that they serve more as social workers than attorneys in these cases.

Not surprisingly, a number of people expressed concern over the need for additional training, as well as staffing, for the specialty courts; but again, the funding for this is lacking. As stated by one defense attorney to the Commission, "Indigent defense organizations are routinely expected to staff the new problem solving courts, including those like the unified domestic violence parts that combine criminal and family court calendars and, therefore require expertise in multiple areas of law, without any additional compensation. Similarly, the increased need for training, not just for new attorneys, but for experienced lawyers as well, has not resulted in a commensurate increase in training funding."<sup>265</sup> Not only do the providers need additional staff and training, but some judges and at least one probation department expressed the same concern for additional staff and appropriate training to handle the specialty dockets. In the integrated domestic violence (IDV) courts, for instance, it is our understanding that, acting as a temporary Supreme Court judge, the IDV judge has final jurisdiction to resolve a variety of different and often complicated legal matters with a nexus through domestic relations, including criminal, child welfare, family and custody matters. In addition to the issue of training, some judges expressed a concern over the constitutionality of this arrangement in IDV courts.

In Monroe County, although drug and IDV courts have received some funding (state, county and grants), a mental health court is unfunded despite the additional time and work required to run the court which requires a number of review or compliance hearings. The court "is creating havoc" on the Public Defender Office, as it requires eight public defenders to sit in court once a week, for three hours, to handle only a couple of cases each. Because of the required in-court time, some public defenders are unable to perform their in-office work. We were told that private attorneys do not attend these hearings with their clients. The drug court in Monroe County similarly requires many appearances, and one 18-B attorney admitted that when he is appointed on a case in this court, he does not make a court appearance for six months even though the client is required to make a number of appearances during this time. One judge in the county said that specialty court cases are "a pain" for defenders and for the court as they require a greater time commitment than other cases. A county official described them as an "unfunded mandate." The Monroe County Public Defender said, "We are simply being drowned in our ability to cover each of these courts even though they have a worthwhile endeavor... We need the ability to add staff," including social workers and investigators, but the county will not provide the funding.<sup>266</sup>

In addition, when state or other start-up grants for the creation of specialty courts expire, the courts and related positions must either end or the county must pick up the costs. In 2001, Suffolk County created an IDV court with the expansion of a state drug court grant. However, the grant of \$299,000 recently ended, leaving four LAS attorney positions for IDV court unfunded. In response, the county recommended \$117,783 be appropriated for the continuation of the four LAS positions.

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<sup>265</sup> New York City Commission written testimony of Russell Neufeld (February 11, 2005).

<sup>266</sup> Rochester Commission hearing transcript, pp. 126-127.

In an IDV court in Tompkins County, attorneys lamented that they spend a lot of time in court waiting while DSS and the DA meet and converse. This happens once a week as attorneys must be present for every court appearance. In addition, if the 18-B attorney does not handle both criminal and family court matters, both of which are heard in that court, the county must pay two attorneys to represent one defendant.

We also found a lack of uniformity across the state as to how the courts are being run. Although the Chief Administrative Judge of the Courts has issued rules regarding some specialty courts, including IDV courts<sup>267</sup> and drug courts,<sup>268</sup> differences exist among some of them. In IDV court in Monroe County, for example, criminal and civil matters (e.g., domestic violence charges and child custody matters) pertaining to the same person(s) are heard at the same time, while in Tompkins County, these matters are heard separately by the IDV court. Some specialty courts focus on treatment as an alternative to incarceration, while others are merely run as any other criminal court except that they give special attention to the cases which are of the same kind. For example, in Nassau County, the domestic violence misdemeanor (DVM) part is not a treatment part, but is simply another criminal part where particular domestic violence cases are heard. The cases are handled like other criminal cases except that domestic violence or anger management programs are pretrial alternatives to setting bail. DVM cases require an average of one appearance a month for six months. While three district attorneys are assigned to the part, one permanent DVM attorney and one floater attorney are assigned from LAS.

Oswego County, one of the smaller counties we visited, has the following specialty courts: domestic violence; integrated domestic violence; drug; family treatment; and sex offender. One judge we spoke with observed that it is “getting very fragmented; to the point of silly.” Noting the lack of uniformity in a somewhat haphazard system, the judge commented that it is as if the cases are assigned to the courts according to the wishes of the DA or defense counsel.

## 7.10 Effect on Minorities

Problems such as inadequate funding, heavy workloads, sub-standard practice issues, harsh prosecutorial policies, and right to counsel issues within New York’s indigent defense system affect indigent defendants every day across the state. During this study, we heard several times that these problems disproportionately affect minorities. It is axiomatic that if minorities disproportionately represent the indigent defense population, then minorities indeed disproportionately suffer the effects of the problems.<sup>269</sup>

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<sup>267</sup> See Rules of the Chief Administrator of the Courts, Part 141, Integrated Domestic Violence Parts.

<sup>268</sup> See Rules of the Chief Administrator of the Courts, Part 143, Superior Courts for Drug Treatment.

<sup>269</sup> Statistics show that nearly 66 percent of the prison population in the United States is minority. See Bureau of Justice Statistics Bulletin, *Prisoners in 2004* (Oct. 2005). Specifically in New York State, 81 percent of those incarcerated are minority. See Human Rights Watch, *Race and Incarceration in the United States: Minority Proportion of the Incarcerated Population by State* (Feb. 22, 2002), at <http://www.hrw.org/backgrounder/usa/race/pdf/chart1.pdf>.



An attorney from the NAACP Legal Defense and Education Fund (LDF) spoke to the Commission of the significant percentages of minorities across the nation who are incarcerated in state prisons. In response to a recent survey of the United States Department of Justice (DOJ), the American Bar Association “recognized that ‘one conclusion to be drawn from [the DOJ’s] harsh statistics is that people of color require appointed lawyers disproportionately more than white people. Therefore, when the quality of representation provided by appointed lawyers is diminished by underfunding, the consequences will be disproportionately felt by people of color.’”<sup>270</sup>

This same witness told the Commission that in New York State, while African Americans comprise 16 percent of the state’s population, they comprise 22 percent of the residents who live in poverty. Twenty-six percent of its residents who live in poverty are Latino. These figures become more alarming in New York City, where indigent defense issues most affect the minority population. In New York City, “a staggering 25 percent of African Americans live below the poverty line.”<sup>271</sup>

One criminal defense attorney described for the Commission the “social alienation” of young minorities and immigrants in a state in which serious crime has dropped dramatically and misdemeanor crime has increased: “In the absence of real crime, the criminal justice system has sustained itself by devouring what ever else it can. This has lead to systemic resentment towards the police and the ‘system’ from an entire new generation of young people – again disproportionately immigrants and people of color – leading to tremendous social alienation.”<sup>272</sup>

In central New York State, another disparity exists. The Executive Director of the Central New York Chapter of the New York Civil Liberties Union described for the Commission the disproportionate representation of African Americans in the jail population in Onondaga County. While African Americans reportedly comprise 6.6 percent of the county’s population, they comprise between 50 and 60 percent of the pre-trial jail population in the county.<sup>273</sup>

Finally, in Suffolk County, the Amistad Bar Association told us that it receives complaints from minority defendants who feel pressured to take plea offers and who feel that discrimination is the root cause. The bar association noted that the county’s Legal Aid Society would benefit from employing more attorneys of color.

## **7.11 Eligibility Determinations**

Indigent defense in New York State suffers from a lack of uniform guidelines and procedures for determining a defendant’s eligibility for court-appointed counsel. While the court is the ultimate appointing authority, in some counties the eligibility determinations are made by

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<sup>270</sup> New York City Commission hearing transcript, p. 403.

<sup>271</sup> New York City Commission hearing transcript, p. 402.

<sup>272</sup> New York City Commission written testimony of Russell Neufeld (February 11, 2005).

<sup>273</sup> Ithaca Commission hearing transcript, pp. 156-167.

the indigent defense providers, stretching thin the limited resources of those providers.<sup>274</sup> In other counties, judges are making eligibility determinations that are often based on their own personal standards and procedures. The absence of uniform eligibility standards and procedures in New York has resulted in disparate and, in some instances, inappropriate eligibility determinations.

The conflict defender of Chemung County aptly described to the Commission the disparate eligibility determinations made among neighboring counties. At least five or six times a year, his office represents a client who has been found eligible for services in Chemung County, but ineligible yet unable to retain counsel in another county, such as Schuyler or Steuben county. Sometimes his staff will travel to the neighboring county to provide representation there for their client.<sup>275</sup>

In Westchester County, eligibility determinations are made according to different and often subjective standards and procedures of each judge. The County Attorney, who provided written testimony to the Commission, was very critical of the lack of uniform eligibility screening standards and procedures in Westchester County. Some courts follow the federal poverty guidelines, some do not; some use written application forms, some do not. She noted that the lack of standards puts judges in “a bad position.” When one judge in the county was asked how she determines indigency, she candidly replied, “I sort of wing it.” Similarly, in Rensselaer county, where judges also make the eligibility determinations, the process was described to the Commission as, “Whatever you think, Judge.”<sup>276</sup>

In Nassau County, eligibility screening is performed by the court, and we were told that some judges are stringent while others are lenient. One attorney in district court said, “Eligibility depends on the philosophy of the judge.” Another attorney in one of the city courts noted that “it’s impossible for the judge to screen and run a calendar.” Until a few years ago, Nassau County employed a Defense Counsel Screening Bureau to make eligibility determinations. The assigned counsel plan reported that the number of vouchers has dramatically increased in the county since the bureau disbanded;<sup>277</sup> there are those in the county that believe defendants who are ineligible are receiving counsel in the absence of the screening bureau. Some judges in the county refer to eligibility guidelines developed by the 2<sup>nd</sup> Department, but this is not required.<sup>278</sup> Under these guidelines, a defendant is presumptively eligible if the gross household income is at

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<sup>274</sup> Placing eligibility determinations in the hands of providers also runs the risk of creating a potential conflict between the interests of a defendant to receive counsel and the interests of an overworked provider to keep caseloads down. *See also* NYSBA Standard C-3 (judges should make both the initial and continuing eligibility decisions).

<sup>275</sup> *See* Ithaca Commission hearing transcript, p. 68.

<sup>276</sup> Albany Commission hearing transcript, p. 209.

<sup>277</sup> In 2002, 3,834 vouchers were submitted by assigned counsel; the following year, after the screening bureau disbanded, 5,197 vouchers were submitted, an increase of 1,363 vouchers.

<sup>278</sup> The 2<sup>nd</sup> Department guidelines include a colloquy for judges to use in which one of the questions asks the defendant for the salary of a “spouse/roommate.” We should note that the income of an unrelated roommate should not be a consideration in determining eligibility. *See* ABA, *Providing Defense Services*, Standard 5-7.1 (“Counsel should not be denied because...friends or relatives have resources to retain counsel...”); NYSBA Standard C-2 (“Mandated representation should not be denied... because friends or relatives have resources to retain counsel...”); NYSDA Standard VII-C (“Counsel should not be denied because friends (or relatives of the potential client have resources to retain counsel...”).

or below 250% of the federal poverty guideline in the case of a misdemeanor charge, and at or below 350% of the poverty guideline in the case of a felony charge.

Often, the courts will rely on the attorneys to inform them if a defendant is ineligible. Some judges will presumptively appoint counsel or will “err on the side of appointing” counsel and then rely on counsel to tell them if information arises that would make the client ineligible. New York County Law §722-d states: “Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel *may* report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise” (emphasis added). Therefore, although attorneys are not required to notify the court of a client’s ineligibility, some attorneys do, and a number of judges rely on it.

In Westchester County, one judge said, “We rely on the attorney assigned to tell us if someone’s not eligible.”<sup>279</sup> One attorney in Putnam County described an appointed case in which the client sought his private services in a \$700,000 real estate deal; the attorney notified the court and was removed from the case. Other practitioners are concerned about this role and the conflict with attorney-client confidentiality. NYSBA Standard C-4 speaks to this concern of confidentiality and states that eligibility standards and procedures “shall be designed to protect clients’ privacy and constitutional rights and to avoid interfering with the attorney-client relationship.” NYSBA also points to Disciplinary Rule 4-101(B)(1) that prohibits an attorney from revealing a “confidence or secret of a client.”<sup>280</sup> In Orleans County, 18-B attorney can receive conflict assignments without any eligibility determination being performed. One attorney described to the Commission the “awkward position” of the attorney in deciding whether to tell the court when a client should not have been assigned counsel.<sup>281</sup> (See also Monroe County, below.)

When counties lack clear eligibility standards and procedures, the judges making the appointments become more susceptible to considering the fiscal concerns of the counties. (See also Chapter 8, Right to Counsel.) A legal aid director in Onondaga County told the Commission of direct pressure that judges received from the county in making final eligibility determinations and assigning counsel: “A letter...was sent to judges of the city court that urges them to view themselves as gatekeepers for the allocation of county funds. It was accompanied by a list of all the cases in which the individual judge had ordered assigned attorneys to continue in a case and how much each of those cases cost.”<sup>282</sup>

Some people expressed concern over the application of stringent eligibility standards that deny defendants counsel even though they are “financially unable to obtain counsel” as required by County Law §722. As one legal services attorney in central New York told the Commission,

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<sup>279</sup> A number of people told us that they believe public defenders should not be directly involved in making eligibility determinations since it may create an appearance of a conflict of interest, especially when a public defender is already overworked.

<sup>280</sup> NYSBA Standard D-1, footnote 1.

<sup>281</sup> Rochester Commission hearing transcript, p. 212.

<sup>282</sup> Ithaca Commission hearing transcript, p. 224.

“There are issues in which ownership of a home automatically precludes assignment of counsel, without consideration of the value of the home, the equity in the home, or the ability to obtain a loan against the home, without looking to the time. And that home can even be a mobile home.” This same person also expressed concern that applicants are sometimes required to sign general authorizations for organizations such as the Court, the District Attorney, and the County Attorney “to obtain whatever financial information they would like from employers, banking institutions, and others.”<sup>283</sup> The Executive Director of Central New York Civil Liberties Union in Onondaga County also told the Commission of problems with “narrow guidelines” that exclude persons who own some assets but ignore the existence of debt. She said that she was referred to a gentleman by the NAACP “that said I have to pay my mortgage, my children need a place to live. If I pay the attorney, I can’t pay my mortgage. And the standard is cannot afford an attorney.... There should be clearer statewide guidelines for eligibility assessments for these indigent defendants.”<sup>284</sup> The Director of Jail Ministry in Onondaga County expressed an additional concern regarding eligibility verification of parents of young defendants. He spoke of a 19-year-old Spanish-speaking inmate who spent three months in jail on a bench warrant for a petit larceny charge without ever being brought to court. Court dates were postponed when the defendant’s mother failed to show up to sign the eligibility form. When the mother finally signed the form, the inmate received an adjournment in contemplation of dismissal and an order to pay \$100 in restitution.<sup>285</sup>

In some counties, the institutional provider makes the initial eligibility determination. The screening is often performed by support staff, some of whom lack the time to sufficiently perform other duties. In Broome County, the initial determination is made by intake specialists in the Public Defender Office, but the Public Defender makes the final determination. In Putnam County, LAS paralegals make the initial eligibility determination, which is then reviewed by the director. If a defendant wishes to appeal a denial, there may be an appeal before two members of the LAS Board of Directors; after that, there may be an appeal to the court. However, there are no written guidelines for LAS or the county to follow in determining eligibility. The factors considered by LAS in determining eligibility were reported to be the complexity of the case, the availability of resources, and the standards in the community. Public defender investigators in Greene County perform screening when they conduct the initial client interviews; however, there are no eligibility guidelines and no verification is performed. Similarly, public defender investigators in Albany County perform the eligibility screening, and we were told that, as a result, they do little investigative work. In Saratoga County, the Public Defender determines eligibility, including the eligibility of defendants needing 18-B attorneys, which raises some concern over co-defendants and conflict of interest cases.<sup>286</sup>

In Monroe County, four public defender paralegals screen approximately 30,000 applicants a year, leaving little time for them to perform paralegal work. The eligibility standard used by the paralegals is 125 percent of the federal poverty guidelines. It is interesting to note that the Public Defender’s screening efforts are duplicative of similar efforts by the county’s

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<sup>283</sup> Albany Commission hearing transcript, p. 236.

<sup>284</sup> Ithaca Commission hearing transcript, pp. 164-165.

<sup>285</sup> Ithaca Commission hearing transcript, pp. 195-196.

<sup>286</sup> Albany Commission hearing transcript, p. 169. The Public Defender also reportedly reviews the assigned counsel vouchers, which raises the same concern.

pretrial services agency. However, the Public Defender takes the position that if it were to rely on the information received by the pretrial services agency rather than its own paralegals, the information would no longer be confidential and could be subpoenaed by the District Attorney.

In Suffolk County, the eligibility screening is performed by probation or the Legal Aid Society, depending on the location of the court. Probation performs the screening in Central Islip, while LAS screens in Riverhead and family court. However, because LAS is not present in all the local courts, some defendants are made to travel to LAS in order to be screened. For example, applicants in the Southampton Town Court are told to travel approximately 45 miles to Riverhead in order to be screened, while their cases are adjourned. In some cases, these adjournments occur two or three times because defendants return without counsel and without having been screened. After three adjournments, the court will simply appoint the legal aid attorney in court on that day.

### **7.11.1 Partial Payment and Upfront Fees**

In New York, county law permits partial payment of the cost of indigent defense services by quasi-indigent defendants. Although County Law §722 places on the counties the burden of providing and funding defense services to persons “who are financially unable to obtain counsel,” §722-d states that, upon learning that a defendant is ineligible or is able to make partial payment for representation or other services, a “court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise.” Both NYSBA and NYSDA standards allow for partial payment under §722-d as long as a number of procedures are in place to safeguard the defendant’s rights.<sup>287</sup>

Throughout our site work, we were told that there is a substantial group of defendants who are ineligible for appointed counsel but who cannot afford to hire private counsel. In Onondaga County, we spoke with a city court judge that signs partial indigency orders that require such defendants to partially reimburse the assigned counsel program for the cost of their representation; this reportedly happens often in DWI cases. However, it appears that few other counties have implemented a similar partial payment plan. In Schuyler County, in an effort to deal with those defendants who are found ineligible but cannot afford to hire an attorney, the Public Defender has created a referral list of attorneys that are willing to provide representation on a sliding fee scale.<sup>288</sup>

While we are unaware of any authority for the practice under New York law, in Chemung County, defendants may receive appointed counsel but be billed for the representation on a sliding scale. We were told that very little screening is performed because the county had found that screening was not a cost-effective effort; yet, because the judges are “interested in moving cases,” they will tell public defenders to represent defendants who are ineligible but to bill them on a sliding scale. The public defender may represent 10-12 clients for a sliding scale fee at any given time.

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<sup>287</sup> See NYSBA Standard D, NYSDA Standard VII-G.

<sup>288</sup> Ithaca Commission hearing transcript, p. 293.

Another method of trying to defray the costs of providing indigent defense services is to institute an upfront fee for those seeking appointed counsel. At least one jurisdiction in New York, Rensselaer County, is reportedly imposing such an upfront fee. We were told that defendants are ordered by the court to pay a fee of \$25, which may be reduced or waived depending on the defendant's financial situation.<sup>289</sup> The Public Defender is said to collect 10-15% of the total fees ordered, or about \$15,000 a year. However, we were informed that such upfront fee practices are not authorized by the county law and were discontinued by at least one county.

## **7.12 Family Court**

While not part of the Commission's mandate, family court and surrogate's court matters (hereinafter, collectively "family court") are an important consideration in assessing the needs of New York's indigent defense system. As in criminal cases, the state's indigent defense system for providing representation in family court is similarly fractured among the counties; it is also fractured between the counties and the state. As described in Chapter 3, Right to Counsel, New York State provides full funding for the representation of children in numerous family law cases, while the counties must provide for the representation of parents and adults who are financially unable to obtain counsel when the right to counsel attaches. In addition, while the counties are left to choose and oversee their own system for providing family law representation for parents and adults as they do in criminal cases,<sup>290</sup> the state provides statewide administrative oversight for the representation of children by law guardians.

Because family court matters were not within the Commission's mandate, we did not study law guardian representation during our site work. However, we briefly discuss the state's law guardian system for representing children in order to illustrate the discrepancies between it and the counties' systems for representing parents and adults. We further discuss the inextricable link in the counties' systems between the representation of indigent adults in criminal and family court matters.

### **7.12.1 State Law Guardian Program – Child Versus Adult Representation**

At the state level, OCA has established a Law Guardian Program to provide for children's representation in family court. The program has an annual budget that is submitted to the state legislature. The administrative supervision for the program resides with a Law Guardian Office of the Appellate Division in each of the four judicial departments. A Law Guardian Director in each department is responsible for overseeing operations. The Law Guardian Offices are also staffed with other administrative positions. In FY 2005-06, the Law

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<sup>289</sup> While the courts have more discretion with regard to quasi-indigent defendants, indigent defendants that have a right to appointed counsel cannot be denied counsel for failure to pay any upfront fees. Therefore, any order requiring such an upfront fee to be paid must make clear that a failure to pay the fee upfront cannot result in the denial of counsel. *See also* NYSDA Standard VII-G(2).

<sup>290</sup> As in criminal cases, under Article 18-B, §722 of the County Law, the counties decide whether to provide family law representation through a public defender, legal aid society, 18-B lawyer or a combination of these programs.

Guardian Program proposed a total of 15 full-time administrative positions for the offices. The Law Guardian Program also provides some additional oversight of law guardians. In the Third Department, for example, a 15-member oversight board or advisory committee of judges, child welfare advocates, academics and law guardians meet quarterly and develop policies regarding matters such as training, education, and qualifications for law guardians.

Beyond this administrative structure, several systems have been established to provide law guardian representation. In the Third and Fourth Departments, the Appellate Divisions have established law guardian offices that serve as institutional providers of representation of children. In the Third Department, the office covers five counties, and in the Fourth Department, the office covers one county. In New York City and in eight other counties (Erie, Monroe, Suffolk, Orange, Rockland, Tompkins, Genesee, and Chemung), OCA has established separate contracts to provide law guardian representation. The law guardian contractual programs consist of private, non-profit corporations with full-time staff. Throughout the remainder of the state, individual law guardians are compensated \$75 an hour and are appointed from county law guardian panels that are under the administrative supervision of the Appellate Division. The panel attorneys are also funded by the state law guardian program.

According to the OCA budget book for FY 2005-06 for the Law Guardian Program, statewide law guardian workload has increased rapidly over the past decade as Family Court judges make more law guardian appointments and the duration of representation becomes longer due to recent changes in legislation, increasing both the scope and role of the law guardian.<sup>291</sup> In FY 2005-06, the anticipated budget for the Law Guardian Program is approximately \$91.9 million, consisting of \$66.9 million from the state's general fund and \$25 million from the new state ILSF fund. Of the \$91.9 million, approximately \$41.9 million is anticipated to be spent on law guardian contracts, \$47.4 million on individual attorney appointments, and \$452,000 for the Law Guardian Offices. (\$820,000 is anticipated for forensic evaluations.)

In contrast to the state's Law Guardian Program, for parental representation in family law matters for which the right to counsel attaches, there is no statewide funding, administrative structure or oversight. Among the counties, we are aware of only six institutional providers that only provide representation on behalf of parents and adults in family court.<sup>292</sup> Instead, in most counties representation is provided by 18-B attorneys or by a provider that must allocate limited resources between criminal and family law case. The counties and their providers are struggling. As with the Law Guardian Program, we believe that the caseloads and cost of family law adult representation have similarly increased substantially, but we are unable to fully quantify this. In reviewing ILSF and UCS 195 forms, we found that some counties do not delineate caseload and expenditure data between family court and criminal court cases; some do not appear to report family law information at all. A review of the UCS 195 forms from 2005 shows that 12 counties failed to provide any information regarding family court appointments.

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<sup>291</sup> Some appellate decisions have also strongly encouraged the appointment of law guardians in custody cases, leading to new contracts for custody representation in the Bronx, Kings and Erie Counties. According to OCA, "[t]he usage of full time law guardians in these areas improves the quality of representation in a cost-effective way."

<sup>292</sup> In addition, we were informed that New York City recently issued a Request for Proposal for institutional providers to represent parents in child protective and child welfare cases.

### 7.12.2 Adult Representation - Another County Burden

The representation of adults and parents in family court matters (for which the right to assigned counsel attaches) is not only a necessary and integral part of the state's indigent defense system, but also accounts for a significant portion of the caseloads of the counties' indigent defense providers. They are a part of the providers' and counties' costs and compete with criminal cases for a portion of the counties' limited resources. The greater the needs in family law cases, the fewer staff and resources available for criminal cases. For these reasons, we provide several examples of the burden of family court cases on New York's indigent defense system. In addition, because a number of annual reports from the counties do not individually report family court appointments and costs, the distinction between the needs of indigent criminal defense and indigent family court representation is further blurred.

In Onondaga County, the legal aid director testified to the importance of considering family court cases: “[T]he experience of the Legal Aid Society in this past year in family court has show that the same problems exist in that court [as in indigent criminal cases] where consequences to clients are equally serious. I therefore urge [the Commission] to either address the issues of mandated legal representation in family court or to include a recommendation in your report that these issues be taken up by another commission such as your own.”<sup>293</sup>

In Monroe County, a significant portion of the providers' caseloads are family court cases. The Public Defender Office staffs seven attorneys that handle approximately 2,500 cases a year, an average of 357 cases per attorney. In addition, these attorneys must cover 18 family court parts. The Monroe County Public Defender described to the Commission the situation in which family court caseloads “have exponentially gone up and resources have not” as a “serious crisis in providing adequate representation.”<sup>294</sup> In the Conflict Defender Office, we were told that family court cases comprise approximately half of its caseload. Moreover, the average cost to the county for 18-B representation in family court cases is reportedly \$1,000. In Rensselaer County, the Conflict Defender has two assistant defenders in the office and told the Commission, “I have to deploy them almost exclusively to do Family Court work, and I am it as far as the criminal end of things goes.”<sup>295</sup> In Schuyler County, the Public Defender handles many child abuse and neglect cases and told the Commission, “I spend more time trying cases in family court defending Article 10 [abuse and neglect] proceedings than I do trying criminal cases.”<sup>296</sup>

While a county's family court caseload may be lower than its criminal caseload, family court matters frequently require more court appearances and take longer to resolve than criminal cases, which can escalate costs. For example, in Tompkins County, family court cases are said to comprise 35-40 percent of the assigned counsel defense caseload, but slightly more than half of the assigned counsel budget. In Suffolk County, the county-funded 18-B attorneys, who represent parents in abuse and neglect cases, make more court appearances than the criminal attorneys. For instance, in 2004, 18-B attorneys made 1,997 court appearances in family court and 1,776 court appearances in criminal court. In Genesee County, the Public Defender told the

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<sup>293</sup> Ithaca Commission hearing transcript, pp. 239-240.

<sup>294</sup> Rochester Commission hearing transcript, p. 11.

<sup>295</sup> Albany Commission hearing transcript, p. 205.

<sup>296</sup> Ithaca Commission hearing transcript, pp. 295-296.



Commission that abuse and neglect cases in family court will soon be going to specialty courts, including drug court and an integrated domestic violence court. Because of the additional court appearances that will be required in these courts, they “will be difficult, if not impossible, to staff with [his] current personnel.”<sup>297</sup>

In Erie County’s Assigned Counsel Program, family court cases have “exploded” in the last eight years and are the single biggest cause of increased cost to the program.<sup>298</sup> In Broome County, the cost for court-appointed counsel in family court cases is reportedly equal to that in criminal cases. In Oswego County, it was estimated that 35 percent of the indigent defense budget was spent on family court cases. In Greene County, we were told that the family court panel is larger than the 18-B panel.

Finally, in Westchester County, an interesting issue has arisen with regard to the a domestic violence agency receiving compensation through billing 18-B assigned counsel fees. The County Attorney who oversees the indigent defense budget informed the Commission and us that after the increase in 18-B rates, a local domestic violence agency that provides representation to victims in domestic violence and related matters in family court, sought to access some of the county’s ILSF funds by having its staff attorneys act as 18-B attorneys. Currently, the program’s staff attorneys act as 18-B attorneys in family court and receive 18-B fees that go to the organization.

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<sup>297</sup> Rochester Commission hearing transcript, p. 23.

<sup>298</sup> This experience of “exploding” family court cases in Erie County is reflective of comments we received in other counties.

## CHAPTER 8: TOWN AND VILLAGE COURTS

### 8.1 Introduction

While we had no intent at the outset of this study to devote an entire chapter of this report to the town and village courts, after listening to Commission testimony and performing many days of field work – observing court sessions and speaking with numerous judges, defense attorneys, prosecutors and others – the inextricable link between the local justice courts and the state of New York’s indigent defense system emerged. Not only are the local justice courts the first and often the only courts of contact for the average citizen, they are also the courts of first impression for a large number of indigent defense matters in the state.

The importance of the local justice courts cannot be overstated. In twenty-one of the upstate counties where no city court is present, 356 town and village courts have original jurisdiction for all non-felony offenses and preliminary jurisdiction for felonies. Therefore, anyone charged in these counties with any criminal offense or infraction will have his or her case heard and - except for felonies - disposed of in a town and village court, frequently off the record and before a non-lawyer judge. This may well create the citizen’s impression of the fairness, efficiency, and effectiveness of the New York justice system.

The original authority for the local justice court system can be found in the New York Constitution, although the form and content of the system was left to the state legislature.<sup>299</sup> The legislature has given deference to the local courts over time by keeping them intact throughout various stages of state court development.<sup>300</sup> Today, the local justice courts are governed by the Uniform Justice Court Act (UJCA).<sup>301</sup> However, unlike all other New York courts which are state-funded, justice or town and village courts are funded by the local government in which they sit.

Under the Criminal Procedure Law, the town and village courts have trial jurisdiction for petty offenses, trial jurisdiction in misdemeanors (concurrent with superior courts) and preliminary jurisdiction for felony offenses.<sup>302</sup> In addition to the lack of state funding, the local justice courts outside of New York City are both important and unique for a variety of reasons. For example, the town and village courts: (1) are courts of first impression; (2) hear and dispose of a large number of the state’s criminal and petty offenses; (3) are not required to be courts of record nor officially report their decisions; and (4) have a large number of part-time judges elected to four-year terms who are not lawyers.

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<sup>299</sup> N.Y. Const., Article 6, §17.

<sup>300</sup> See N.Y. Just. Ct. Act Preamble (McKinney 1963).

<sup>301</sup> After a series of commissions in New York State examining the court system, the legislature enacted the law in 1962 to make the justice courts part of the state’s unified court system. Town and village courts were continued unless abolished by the legislature and a concurring vote in a general election. See also Miscellaneous Rules Governing Justice Courts, 22 NYCRR Parts 17, 100, 125, 129, 200, and 214.

<sup>302</sup> CPL §10.30(1)(a)-(b), §10.30(2).

Each of the 57 counties outside of New York City have a number of town and village courts, ranging from six (Schenectady) to 61 (Nassau). (For a complete listing of the number of town and village courts in each county, see *Appendix N*.) According to the Town and Village Justices Education and Administration Office (“Education and Administration Office”), there are 1,281 town and village courts in New York State. Of these, 924 are town courts, and 357 are village courts. The Education and Administration Office also informed us that there are 2,154 town and village judgeships. Although the current number of individual town and village judges is apparently always in flux, we were told that there are 2,000 town and village judges, of which approximately 1,350 or 68 percent are non-lawyers.<sup>303</sup> New York’s town and village judges comprise approximately 72 percent of all New York trial judges,<sup>304</sup> and while not required to be lawyers, are required to complete a training program as a condition for exercising judicial office. Across the country, 22 states have only lawyer judges presiding in courts of original jurisdiction; among the remaining states, New York has the largest number of non-lawyer judges in courts of original jurisdiction.<sup>305</sup>

## 8.2 A Fractured System

### 8.2.1 Many Courts, Few Resources

The town and village court system outside of New York City is plagued by a myriad of issues that affect the quality of justice it renders. The local courts are numerous – scattered throughout over 1,200 towns and villages in the state – and most are small, holding part-time sessions that may occur on a weekly, biweekly or even monthly basis. At these local court sessions, coverage by prosecutors and defenders is difficult and sometimes nonexistent. Oftentimes, the courts themselves lack sufficient funding and staff. The result is a fractured system. Although many people operating in the justice court system would like to see a move towards a centralized court system, most assume there is “too much political power” against such a change.

Despite many institutional providers recognizing the importance of the local court dockets and the potential right to counsel problems arising there (see Right to Counsel, below), because of limited staff and resources, they simply cannot staff each court. In addition to a lack of resources, the institutional providers often do not address their concerns regarding the rights of indigent defendants in those courts because they lack bargaining power or fear political or financial backlash from the counties that fund them. As a result, there is often no voice for the rights of many indigent defendants in the local courts, and some defendants become lost in the system.

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<sup>303</sup> These figures were reported to us on May 10, 2006. It was also reported that there is a 20-25 percent turnover each year among town and village judges.

<sup>304</sup> According to the New York State Unified Court System Budget for April 1, 2005 to March 31, 2006, there are 780 civil and criminal trial judges in the state outside of the local justice courts (i.e., city, district, New York City criminal, supreme and county courts).

<sup>305</sup> Sources: Bureau of Justice Statistics, *State Court Organization, 1998* (Table 8); National Center for State Courts, *State Court Caseload Statistics, 1997*.

In one large county, the Legal Aid Society told us that there are numerous town and village courts in the county where legal aid attorneys are not present. And while they are concerned about the right to counsel being effectuated in those courts, they are “hesitant to cover them all” because doing so would require a dramatic increase in staff for which they are not funded. Legal Aid has cause to be concerned, as we learned that some justice courts in that county rarely make 18-B assignments.

In Orleans County, the Public Defender supports consolidation of the local justice courts because he believes they are an inefficient use of resources. For instance, in some local courts in that county, the Public Defender and the District Attorney staff dockets that may hear only five cases.<sup>306</sup> Similarly, in Onondaga, data collected during our site work indicates that assigned counsel represented only four defendants in one town court and six in another.<sup>307</sup>

The sheer number of local courts and dockets creates a staffing and financial burden not only for many indigent defense providers, but also for prosecutors and sheriffs. In some localities, the District Attorney simply does not staff the town and village court, and the docket is handled entirely by the local judge. In Oswego County, although assistant district attorneys are assigned to each of the town and village courts, they rarely appear in person. In one village court in Tompkins County, the judge hears vehicle and traffic cases one night a week without any attorneys in the courtroom; the cases are prosecuted by police officers. In Onondaga County, a town judge said that it is “almost impossible” to get a prosecutor to show up in a local court, as they prefer to handle the cases there by paper. This judge believes that the local courts are too numerous and supports a district court consolidation in the county. Another experienced town judge agreed, calling the local town and village courts in the county an “anachronism” and unnecessary. In another upstate county, the Sheriff’s Department noted that not only must it transport in-custody defendants to the local court dockets, but that it ends up performing the function of court security. The Sheriff’s Department believed that the local courts purposefully hear in-custody cases last in order to get free in-court security from the sheriffs who must guard the prisoners but who will also respond to other security issues that may arise.

Many local justices are also working under difficult conditions with inadequate support, since the localities cannot sufficiently fund them. In some cases, a single local justice works alone, with no support staff. In a 1999 study of local courts by the New York State Office of State Comptroller, of 41 courts reviewed, 24 percent (ten courts) had no staff.<sup>308</sup> An attorney judge who trains local justices described the scenario: “I have to applaud these individuals because they are working with very few resources... Many have no clerks... They have no libraries. They have no security in the court. They have no stenographers. They are not courts of record. We are working in the middle of the night when no other offices are open.”<sup>309</sup>

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<sup>306</sup> Rochester Commission hearing transcript, p. 56.

<sup>307</sup> See *Appendix O* for a table illustrating all assigned counsel program town and village court assignments for 2004 in Onondaga. Eighteen-B attorneys in Onondaga handle all indigent criminal defense cases. *Appendix O* also includes the caseload by court for the Washington County Public Defender’s Office. Much like Onondaga, several courts in Washington County had only one or two appointments.

<sup>308</sup> New York State Office of State Comptroller, “Report of Justice Court Study” (99-PS-3).

<sup>309</sup> Ithaca Commission hearing transcript, p. 200.

## 8.2.2 Lack of Legal Training and Oversight

Town and village justices are required to attend 12 hours of training a year, and non-lawyers must attend a six-day basic certification class before presiding as a local justice.<sup>310</sup> Beyond the training requirements, however, town and village justices operate without any meaningful standards or oversight, their actions and decisions are not recorded, and nearly 70 percent are non-lawyers. Alone or in combination, these factors create risks to the quality of justice rendered. Indeed, we learned that many people across New York State believe that the quality of justice in the town and village courts is suffering.

A lawyer town justice described for the Commission some of the problems surrounding non-lawyer justices:

They are lay people from various backgrounds. My co-justice is a building contractor. Many of them have no prior experience with the legal system. Those that have prior experience tend to come from law enforcement background, retired state troopers, that type of thing. Those that have no experience with the legal background are faced with issues of statutory interpretation and case law and legal concepts such as stare decisis. These are foreign concepts to them. They go to a basic certification program which is either five or six days [in which] they are supposed to learn the law, which, of course, is impossible. It's an impossible task.<sup>311</sup>

In addition, some town and village judges do not remain on the bench long enough to gain sufficient experience and confidence. There is reportedly a significant turnover of local justices each year. A 1999 state comptroller's study supports this, finding that of 64 local justices in the study, 24 or 38 percent had been in office for five years or less; five of these justices had been in office for one year or less.<sup>312</sup>

Oswego County has 23 town and village courts, and many of the town and village courts have two judges. We were told that the local judges in Oswego County are paid between \$3,000 and \$15,000 a year, with most making around \$5,000, and only about three of them are lawyers. One of the local judges commented that the town and village system is in serious need of repair, stating that it is in need of full-time, law-trained professionals on the bench and that it needs to get out of law enforcement, referring to the number of retired and current policemen and troopers serving as local judges. Another local justice in Suffolk County expressed concern over non-lawyer judges, saying that the quality of indigent defense is better in the busier courts than in the small, part-time courts where the judge is a local dairy farmer.

In 1990, the AOC created the City, Town and Village Resource Center to provide support for the state's local justices. The Resource Center is staffed with three attorneys who are available to the local justices and clerks through a toll-free number to answer questions, and one

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<sup>310</sup> See 22 NYCRR 17.02.

<sup>311</sup> Ithaca Commission hearing transcript, pp. 199-200.

<sup>312</sup> New York State Office of the State Comptroller, "A Report of Justice Court Study," 99-PS-3.

attorney is available four evenings a week through an answering machine paging system. Despite this resource, we were told by defense attorneys in several jurisdictions that if some non-lawyer town and village court judges have questions about the law, they tend to rely on the district attorneys for help. In two upstate counties, the District Attorney informed us that there are, on occasion, *ex parte* conversations with town and village court judges where defense counsel should be present. One district attorney believed this occurs because the judges are uncertain of themselves and want to make sure what they are doing is right. This was echoed by an attorney in another county who noted that one town judge did not know the difference between “overruled” and “sustained.” This attorney referred to one lay town judge as “the Jedi mind-trick judge” because he parrots whatever the district attorney says. In still another county, one attorney told us that the town judges are not independent from the district attorney and constantly have *ex parte* conversations with prosecutors about defendants. This was confirmed by a local judge who said that whenever he has a question about criminal procedure or is unsure what to do in a case, he calls the sheriff or the district attorney and follows their advice.

In one of the larger counties, the District Attorney’s Office told us that the quality of the local judges varies even though all or nearly all of the judges are reportedly attorneys; some lack criminal law experience. One prosecutor described the court as the “safety net” in the justice system and noted that the better a judge is, the better the attorneys in the courtroom learn. The prosecutor noted that when the quality of the judge is poor, “the onus is on the prosecutor” to oversee the proper handling of criminal cases.

One of the issues we heard repeatedly regarding local justices, especially non-lawyer justices, was that some have an aversion to litigation and discourage defendants from arguing motions and going to trial. For example, in Orleans County, where we were told that only two of the 21 local judges are attorneys, one judge expressed a concern that some of these judges are impatient with public defenders who “complicate things with motions” and biased toward assigning attorneys who are more likely to plead cases. We were told that some local judges are “terrified” to preside over jury trials and will do whatever they can to avoid them. One judge felt that the local court system is parochial, inefficient and subject to abuse. In Tompkins County, we were told that a town judge who is an electrician takes guilty pleas from defendants and then assigns counsel at sentencing, and that other local judges “push pleas” before they assign counsel.

The Broome County Public Defender spoke to the Commission of litigation problems created by the part-time town and village courts that are staffed by part-time justices with competing schedules. He described the difficulty in getting a trial in a local court where there is likely one jury trial a month; if “you want a trial and you are the 13<sup>th</sup> person that wants a trial, you will get that trial in the 13<sup>th</sup> month, over a year.” He added, “[I]t is my belief that some particular justice courts want to wear down your client. You’ll be there saying that you want a trial, you’ll come back four more times to say yeah, I really, really want a trial....” When asked why he believed there was only one jury trial a month, he suggested that it was due to the private practices of the part-time judges.<sup>313</sup> In another county, an 18-B attorney said that local court judges “torture” the attorneys if they ask for a jury trial and will make efforts to prevent jury trials.

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<sup>313</sup> Albany Commission hearing transcript, pp. 115-117, 120.

Such problems become more serious in the absence of meaningful oversight and standards and goals. According to the Supervising Counsel for the City, Town and Village Resource Center (Paul Toomey), although the Deputy Chief Administrative Judge for the courts outside of New York City (Judge Jan Ho) has administrative responsibility for the town and village courts, the local justices are not accountable to OCA in the way that other judges are accountable; town and village judges are not subject to any state requirements of standards and goals. Further, there is no mechanism by which town and village court statistics, such as the timing of case dispositions, are regularly reported or reviewed. If a problem arises in a local court and the State Commission on Judicial Conduct (SCJC) does not become involved by disciplining a local justice, then any “administrative concerns” are sent to Judge Plumadore and then to Mr. Toomey’s office which meets with the judges to “explain to those Judges what the problem is and somehow to resolve it.”<sup>314</sup>

With no meaningful oversight and no record, we were told that some local justices across the state run their courtrooms according to their own rules. A District Attorney in one upstate county said that the local judges “require deference and believe themselves all-knowing, are intemperate and uncivil, and berate people because they can.” A town judge in another county, who is a retired state trooper, told us that he “know[s] who the good and bad guys are” in his town. He further described his policy on the bench: “I temper my work with mercy and justice and I’m concerned about good attitude regardless of what the law requires. Some people are given a break and some with a bad attitude do not get a break.” In Westchester County, the District Attorney’s Office commented that the county has 42 police departments and that the local courts are run like “fiefdoms,” and how cases are handled depends on the personality of the court.

Such “fiefdoms” sometimes result in excessive sentences and excessive bails. The Public Defender in Essex County, who previously worked in Clinton County, described problems with non-lawyer judges and excessive bail in the neighboring county of Clinton. He told the Commission that the City of Plattsburgh is the only court with a law-trained judge. “The rest of them are guys who are firemen, farmers, that are handing out justice... They have more power than most... Supreme Court Judges [who] will order a presentence report [before issuing a sentence]. They will send a guy to jail for 89 days and don’t ask questions.”<sup>315</sup> He further described a case where bail was set at \$20,000 for three misdemeanors, and when asked, said that he thought that bail is used to coerce pleas.<sup>316</sup> In Broome County, one attorney reported to witness a person sentenced to five days in jail for a housing violation in the local justice courts. A county court judge reported seeing a \$30,000 bail set out of a justice court on a second DWI offense. In another county, Pretrial Services reported that misdemeanor defendants are held on bail more often in the town and village courts than the city courts, such as on charges of petty larceny.

The oversight problem is compounded by the lack of a court record. The Wyoming County Public Defender spoke to the Commission on this issue. “The reality is the closed door, back of someone’s house, in the barn, in the highway department, no record, leads to the types of

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<sup>314</sup> Albany Commission hearing transcript, pp. 302-304.

<sup>315</sup> Albany Commission hearing transcript, p. 34

<sup>316</sup> Albany Commission hearing transcript, pp. 35-36, 41-42.

problems that I think continue to exist in the rural areas... The reality is if you keep justice in the dark, it stays in the dark and justice isn't served. You need courts of record."<sup>317</sup> In a 1999 report of the local justice courts, the New York State Comptroller's Office found that in nearly half of the justice courts handled criminal cases, local justices failed to sign documents on case adjudications.<sup>318</sup> (See also Records and Data, below.) On several occasions were told by 18-B attorneys and institutional providers that they attempted to file an appeal but there was no record kept in the case of the town or village court disposition.<sup>319</sup>

### 8.2.3 Revenue and Local Control

During our study, we received a number of comments about the control that localities exert over the local courts which are sometimes judged not for the quality of justice they render but for the amount of revenue they produce.

All town and village judges are required to file a monthly financial statement with the Office of the State Comptroller. Currently, a large percentage of the justices file the report electronically. Information provided by the Comptroller for the calendar year 2004 discloses that the town and village judges collected over \$175 million through various town and village courts. Forty-five percent of these funds was paid to the state, six percent was paid to the counties, and 49 percent (nearly \$86 million) was retained by the appropriate town or village.

As the New York State Office of the State Comptroller noted in 1999 in a study of 41 local courts, the volume of court revenue has increased, and "a significant volume of money is processed through the local court systems, often received in the form of currency."<sup>320</sup>

In Tompkins County, some county court judges told us that at the town and village level, judges are more interested in the money they take in and frequently sentence people to fines rather than jail. One town court judge in Broome County reported that the whole town court operation in his town is funded by the fines and fees collected on town and village code violations. He told us that the town and village courts receive \$10 from the state for each arraignment and closed case, and that they retain all money collected on infractions involving failure to obey traffic devices and a portion of funds collected on speeding tickets. This judge commented that sometimes he "feel[s] like a tax collector." Another town judge said that traffic violations charges are frequently reduced and amended for a plea to a traffic signal infraction so that the town and village courts can retain all collected fees. Similarly, a local justice from another county avoids the need for assigned counsel by reducing misdemeanors to infractions and sentencing people to fines. At this court, cash payments of fines are collected during the court session by a clerk sitting in front of the justice's bench.

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<sup>317</sup> Rochester Commission hearing transcript, p. 134.

<sup>318</sup> New York State Office of the State Comptroller, "Report of Justice Court Study" (99-PS-3).

<sup>319</sup> In the case of a guilty plea, New York law requires that in order to survive appeal, the record must affirmatively show that a defendant knowingly and voluntarily waived his or her rights. *See People v. Harris*, 61 N.Y.2d 9 (1983). The Second Circuit recently granted a habeas petition of a New York defendant due to a court's failure to evidence a proper waiver of his rights on the record, noting that New York courts "have long recognized their duty to provide a record on guilty pleas that is intelligent and voluntary." *Hansen v. Phillips*, No. 04-0940-pr (2nd Cir., March 30, 2006), *citing People v. Harris*, 61 N.Y.2d at 17.

<sup>320</sup> *Id.*



Other local forces may also exert control over local courts. For example, we were told that the police have tremendous power over town courts in one county. It is “a system run by the police.” Because every town court has two justices, police go “forum shopping,” writing tickets according to the judge they prefer. A prosecutor told us of a local judge who in one case did not follow the prosecutor’s recommendation for weekend incarceration because he was afraid the sheriff would not like the outcome and would stop writing tickets to his court.

#### **8.2.4 Records and Data**

Despite the existence of specific recordkeeping requirements for the town and village courts, such records are not always maintained. Section 200.23 of the Uniform Rules for Courts Exercising Criminal Jurisdiction<sup>321</sup> requires the local courts to maintain case files with copies of all orders, notes and other written material, an index of cases with assigned case numbers, and a chronological itemization of all receipts and disbursements. In addition to some local justice courts lacking copies of orders and other records (see also Recent Administrative Order on Appointment of Counsel, below), some also lack data, making a full and accurate picture of the system extremely difficult, if not impossible.

In a 1999 study by the New York State Comptroller’s Office reviewing 41 local courts, record and data problems were found throughout, including:

- a lack of auditing by a governing board or independent accountant;
- a lack of understanding of “the concepts of internal control;”
- a failure to “see value” reviewing the reports maintained in the Department of Motor Vehicle’s database and comparing them to local court records for accuracy;
- a lack of sufficient training of support staff; and
- a failure of “justice signatures evidencing case adjudication” in 15 of 33 courts handling criminal cases.<sup>322</sup>

### **8.3 Right to Counsel in the Local Courts**

Because the town and village courts are the courts of first instance for a large number of defendants outside of New York City, the local justices play the most significant role of any other judge in the state in deciding which defendants are appointed counsel.<sup>323</sup> However, a number of obstacles exist for town and village judges properly fulfilling this important role. As discussed in the previous section, indigent defense providers are frequently unable to staff the courts and accept indigent assignments there. We also found that town and village judges often do not understand the law on the right to counsel, or they ignore it. Barriers also exist to the local justices notifying each defendant of their right to counsel and receiving proper waivers of

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<sup>321</sup> 22 NYCRR §200.23.

<sup>322</sup> “Report of Justice Court Study” (99-PS-3).

<sup>323</sup> As previously discussed, there are only 61 city courts and two district courts in comparison to the 1,281 town and village courts in New York.

counsel. In addition, the town and village courts must operate under the competing fiscal concerns and pressure of the localities that fund them.

Frequently, there is no defense counsel present at the initial appearance in the local courts. In some local courts, judges will not arraign and set bail on a defendant until an attorney is present, leaving some defendants to sit in custody an additional day or more until an attorney is scheduled to be present. We were told of at least two local courts in Westchester County where this occurs. Often as a result of defense counsel's absence in local court, defendants negotiate directly with the prosecutor. This pro se negotiation usually occurs on low-level offenses to which the right to counsel attaches, but where the imposition of jail time is unlikely.<sup>324</sup> In Steuben County, where four part-time public defenders must cover 39 local courts, the Public Defender told the Commission that "it's not unusual" for cases to be disposed of between the prosecutor, judge and a defendant without the involvement of defense counsel.<sup>325</sup> One assistant public defender in Wayne County told the Commission that defendants in motor vehicle cases, including misdemeanor cases, frequently speak with the District Attorney and negotiate a plea without ever speaking to an attorney. The public defenders are "never involved" in those cases in the local courts.<sup>326</sup> In a village court in Nassau County, a part-time special prosecutor routinely negotiates cases directly with pro se defendants unless he does not "feel good" about it because they may be looking at jail time, in which case he informs the judge who tells the defendant to apply for counsel. In this respect, the prosecutor serves as a gatekeeper on the appointment of counsel.

As we discussed previously in this report, New York law on the right to counsel is far from crystal clear and many local justices are simply unaware of it. One town lawyer justice who is involved in town and village judge trainings candidly told the Commission that town and village judges "are not aware of what 722-A of the county law says in terms of when the right to counsel attaches. I wasn't aware of it until I studied it."<sup>327</sup>

Those that are aware of the right to counsel law often misconstrue it. Two village court judges in Nassau County commented that occasionally they consider sentencing the defendant to jail time in an egregious traffic infraction case, but that "the law doesn't permit appointment of 18-B" in these cases (referring to CPL 170.10(3)). Although the judges felt that the appointment of counsel in these cases should be in their discretion, they did not believe they had the authority to appoint counsel. However, under the federal right to counsel and New York case law, the judges not only have the authority but the duty to appoint counsel in such a case.<sup>328</sup>

In one local town court in Suffolk County, the town justice told us that Legal Aid is not appointed in violation cases where the defendant receives a sentence of time-served and a fine (e.g., a public urination case); but if the violation carries possible jail time, then counsel is appointed. Whether the defendant is sentenced to a jail term (of time-served) or facing future

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<sup>324</sup> This is in direct conflict of the ABA Standards for prosecutors. See ABA STANDARDS FOR PROSECUTION AND DEFENSE FUNCTION, Standard 3-3.10, *supra* note 191.

<sup>325</sup> Ithaca Commission hearing transcript, p.42.

<sup>326</sup> Rochester Commission hearing transcript, p. 43.

<sup>327</sup> Ithaca Commission hearing transcript, p. 203.

<sup>328</sup> See, e.g., *Alabama v. Shelton*, 535 U.S. 654 (2002), *People v. Weinstock*, 80 Misc.2d 510 (1974), as discussed in Chapter 3 above.

incarceration, he or she has an equal right to appointed counsel; however, it was unclear whether the court is receiving proper waivers of counsel in the former case scenario. Such conflicting practices regarding the appointment of counsel illustrate either a misunderstanding or a misapplication of the right to counsel in violation cases.

Two superior court judges in Tompkins County said that they believe there are inconsistencies in the right to counsel notifications being given in town and village courts. They suspect that there is a lack of full advisement and full exercise of rights, as they have seen “egregious practices” in some local courts, including judges who “just want to make things go away,” judges who are influenced by the District Attorney, and judges who do not know criminal procedure law.

Further, in local courts with large dockets, some judges do not normally have the time to explain the right to counsel to each individual defendant, but provide a brief explanation to all persons sitting in the courtroom at the beginning of the docket. As a result, many defendants likely never hear or understand their rights. In addition, in some instances, the explanation misstates their rights. For example, one night docket in a village court in Nassau County consisted of 230-240 defendants charged with a variety of traffic offenses and village code violations. As we observed in other courts, this court provided an explanation en masse at the beginning of the docket. Defendants were told by the judge: “If you are facing the possibility of incarceration, I strongly recommend that you hire an attorney. If you are charged with a misdemeanor, you have the right to apply for an attorney.” Although jail time is reportedly very uncommon in this court, people were not informed that they had the right to counsel for a particular offense for which they were facing incarceration.

We observed a similar explanation on the right to counsel given en masse in another village court in which the long-time judge told us that he rarely appoints counsel. At the arraignment, where there is no prosecutor and no defense attorney, the court regularly converts offenses such as traffic misdemeanors to traffic infractions; the defendant then pleads to an infraction and pays a fine without ever waiving counsel.

Whether due to their own beliefs or pressure from the counties, some judges simply refuse to appoint counsel when the law requires it. One local judge in Oswego County commented that many defendants are “savvy” about negotiating their own cases and do not need counsel. We were told that there are about five or so local judges, or “die-hards” who regularly refuse to appoint counsel for low-level offenses, including violations and some misdemeanors. The Public Defender in Cattaraugus County told the Commission of a village judge in his county where the rule is that twenty-year-old college students do not have the right to a public defender if their parents can pay for counsel. Although the Public Defender has explained that the “parents have no legal right to know” that their adult son or daughter has been charged with an offense, the judge’s view is, “Well, they are going to find out because I’m not going to give them an attorney.”<sup>329</sup>

Finally, the failure to offer or assign counsel may also result from a fiscal burden on the counties that must pay for the representation and a resulting pressure on the local justices.

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<sup>329</sup> Rochester Commission hearing transcript, p. 194.

Referring to violations and other ordinances that carry a potential 15-day jail sentence, one local law judge involved in town and village trainings told the Commission:

The judges feel that the counties are unprepared and unwilling to commit the resources to those types of cases even though the judges are statutorily obligated to assign counsel. But they have told me point blank that counties have refused to either assign a...public defender or pay for assigned counsel in cases involving violations. Violations...under the penal law...are not defined as a crime. These would be things like harassment, trespassing, disorderly conduct. They are punishable by 15 days in jail. They are not defined as a crime. [However,] under the county law, they would be. The counties tell town judges we won't pay for it. Do not assign counsel...[Y]ou have lay judges who are trying to do a good job but do not have the self confidence, I believe, in their understanding of the law to be able to have the tools to contradict what the counties are saying to them.<sup>330</sup>

### **8.3.1 Recent Administrative Order on Appointment of Counsel**

In addition to the right to counsel issues discussed above, during our site work we discovered that a recent administrative rule regarding the appointment of counsel in the town and village courts is not always being followed. On March 25, 2005, Chief Administrative Judge Lippman, with the advice and consent of the Administrative Board of the Courts, issued an order establishing a new section 200.26 to the Uniform Rules for Courts Exercising Criminal Jurisdiction.<sup>331</sup> Section 200.26 creates an obligation on town and village courts to make an initial determination of eligibility for assigned counsel at arraignment when a defendant is being held without bail or is unable to post bail. If the court determines that the defendant is eligible for counsel, it must immediately assign counsel and notify counsel and the local pretrial services agency of the assignment. However, some local justices are unaware of the order, and in some counties, in-custody defendants are not being appointed counsel until days after arraignment. Furthermore, there appears to be little or no oversight of compliance with the rule and no direct enforcement mechanism.<sup>332</sup>

In Orleans County, despite a letter sent by the Public Defender to each local justice with the Public Defender contact information and a copy of Judge Lippman's rule, we were told that only four of the 12 local justice courts were complying with the rule. In Westchester County, at least one local justice we talked to was unaware of the rule. In Clinton County, we spoke with a non-lawyer town judge who was unaware of Judge Lippman's order. In Onondaga County, one

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<sup>330</sup> Ithaca Commission hearing transcript, pp. 204-205.

<sup>331</sup> The Supervising Counsel for the City, Town and Village Resource Center, told the Commission that prior to this order, his office had learned of some problems in the local justice courts regarding the timely appointment of counsel. He described an instance in which a local judge had failed to appoint counsel for an incarcerated defendant, citing "fiscal constraints from the County Legislature." Albany Commission hearing transcript, p. 300.

<sup>332</sup> See Albany Commission hearing transcript, pp. 304-305 (When asked by a Commission member in what way this rule could be enforced, the Supervising Counsel for the City, Town and Village Resource Center replied, "What we would do, if we found out they weren't enforcing this rule, we would certainly continue to try to educate them. We tell people in my office all the time, people that complain, we tell them that they have every right to go to the Commission on Judicial Conduct. We may go to the Administrative Judge in that particular district...and then intervene that way.")

local judge was not only unaware of the order, but had never heard of Judge Lippmann. A second local judge told us that he had read the order but it did not apply to his court.

In Greene County, we were told that attorneys are not appointed in felony cases until an attorney is needed for court; this usually occurs at the preliminary hearing after the defendant has been in custody for 2-4 days. In Nassau County, we were told that it is not uncommon for felony defendants to reach the preliminary hearing stage, two days after arraignment, without having been assigned counsel; one prosecutor said that less than half of the felony assignments have been made at the arraignment stage.

In Greene County, the Public Defender told the Commission that “many defendants appear before judges at arraignment without attorneys; many of them are remanded without attorneys; some of them sitting in jail without seeing attorneys for a number of days.” The Public Defender said that he has asked the local judges to inform his office when a defendant has been arraigned overnight and to fax him the papers in the morning and “most of the judges” have done this. However, if the defendant is in custody, “it could be a day or two or three before an attorney actually gets involved in the case because that person is not scheduled to go back to court for at least six days if it’s a felony, ...perhaps 20 days if it’s a misdemeanor.”<sup>333</sup>

The Orleans County Public Defender told the Commission that there is “no formal system where town justices notify [the public defender]” of in-custody defendants, and in his county, people could sit in jail for 29 days without an attorney, as the local courts meet once a month.<sup>334</sup> Attorneys in Broome County reportedly receive assignments between three and four days after arraignment, and in felony cases, this delay is sometimes up to two weeks. Because of a shortage of 18-B attorneys in the county, one judge assigns cases by sealed letter in court so the attorney cannot refuse to take the case in open court and embarrass the judge.

In Monroe County, although a county-funded Pretrial Services agency helps to ensure that an attorney is timely appointed for defendants being held on bail, problems exist with timely appointments. One judge in the county noted that sometimes he appoints an 18-B attorney from the bench rather than wait for an assignment to be made through the assigned counsel administrator that can take several days.

Finally, we found that a number of town and village courts are failing to keep a written record of the appointment procedures although the administrative order requires the courts to maintain such a record “in the case file of any communications and correspondence initiated or received by the court.”

### **8.3.2 Unpaid Fines**

Under New York CPL 420.10, when a defendant is sentenced to a fine, if the defendant fails to pay that fine, the court can resentence the defendant to a period of incarceration authorized for the original offense for which the fine was received (see Chapter 3, Unpaid Fines). Fines are frequently given in the local courts on pro se pleas, where there is no record of a waiver

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<sup>333</sup> New York City Commission hearing transcript, pp. 100-102.

<sup>334</sup> Rochester Commission hearing transcript, pp. 46-47.

of counsel and where quite often the defendant is not offered the assistance of counsel because the sentence does not involve jail time. This commonly occurs in cases such as traffic infractions, violations, and other low-level offenses. The right to counsel problem arises when a defendant fails to pay the fine and later faces time in custody. If a defendant fails to pay a fine and fails to appear in court to address the fine, a bench warrant is usually issued. The defendant may then be arrested on the bench warrant, and bail will be set. A number of judges reported that when a defendant returns to court on an unpaid fine and is facing jail time, they will make sure that counsel is appointed at that time. However, the subsequent appointment of counsel for the unpaid fine does not resolve the right to counsel problem under *Alabama v. Shelton* (again, see Chapter 3, Unpaid Fines).

As with the right to counsel law on low-level offenses, some judges seem to misunderstand the right to counsel law for unpaid fines. However, confusion surrounding the law in this area is not confined to the local justices. For example, one county court judge told us that in New York, if defendants plead guilty on a violation and receive a fine, they cannot later be imprisoned for failure to pay that fine. Similarly, a supervising judge of all criminal courts in one district said that no *Shelton* problem existed with unpaid fines because first, no judges would give a jail sentence in a traffic violation, and second, a defendant cannot be imprisoned for failure to pay a fine in New York.

Although we believe problems in this area exist in the city and district courts where defendants are not offered counsel (see Chapter 7, Right to Counsel Problems), during our field work we found most of the problems arising in the town and village courts.

For instance, a village justice in Nassau County told us that although judges are supposed to inquire as to the defendant's ability to pay when they return for an unpaid fine, some local judges in the state are sending the defendant directly to jail without such an inquiry and without counsel. He and another local justice learned of this practice at the annual conference for town and village justices. However, he added, "Under the law, you don't have to appoint an attorney when they come back and are looking at jail." In Chemung County, we were told that some judges get frustrated and do indeed impose a jail sentence for a defendant's failure to pay fines.

A local justice in Broome County told us that if an indigent defendant fails to pay the misdemeanor surcharge of \$165, he will send a letter warning that a warrant for the defendant's arrest will be issued, and on occasion he will issue such warrant and send a state trooper to effectuate the arrest. Upon the defendant's return to court in custody, the court will typically set bail in the amount of the unpaid surcharge.

In one village court in Nassau County, we observed persons charged with traffic violations receive a sentence of a fine with an "alternative sentence" of between three and ten days in jail. No counsel was provided or offered in these cases. While the court said that defendants rarely serve these alternative sentences, a bench warrant may issue for a failure to pay, thus authorizing authorities to place the defendant into custody.

Right to counsel problems also exist with regard to other failures to comply with the terms of a sentence. For instance, the Director of Jail Ministry in Onondaga County told the

Commission about a person who spent 16 days in jail without counsel after being picked up on a bench warrant for failing to report to the court that he had completed his community service on an AUO II charge, although such proof had previously been faxed to the court. The defendant was finally released and his case closed after a second letter showing proof of community service was faxed to the court.<sup>335</sup>

## 8.4 Justice Courts and Lay Judges

### 8.4.1 National Perspective

American courts have always had a sizeable number of lay judges, dating back to colonial times.<sup>336</sup> In addition, local justice of the peace courts have been protected from legislative action by state constitutions in 47 states. However, over the last forty years, reform of the states' lower court systems has been recommended a number of times at the national level. In 1967, the President's Task Force on the Administration of Justice expressed shock at the condition of the lower courts, confirming "widespread" conditions of "inequity, indignity and ineffectiveness" and recommending that the lower courts be completely overhauled.<sup>337</sup> In 1971, the United States Advisory Commission on Intergovernmental Relations, after reviewing various reports on the lower criminal courts, recommended that "the States abolish justice of the peace courts or overhaul them by placing them under State supervision, direction and administration...and by requiring them to be licensed for practicing law in their state." The Commission further concluded:

There are those who defend courts of limited jurisdiction as bastions of democracy, accessible to the ordinary citizen who can come and receive justice immediately and informally. Yet the quality of justice dispensed cast serious doubts on either the responsiveness or accessibility, much less professionalism.<sup>338</sup>

That same year, the National Advisory Commission on Criminal Justice Standards and Goals was appointed by the Law Enforcement Assistance Administration of the United States Department of Justice. This Commission, consisting of government officials, citizens, police, judges and prosecutors, reviewed studies and reports of the lower courts across the country and concluded in 1973 that: "(1) a unified court system should be organized within each state,

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<sup>335</sup> Ithaca Commission hearing transcript, pp. 196-197.

<sup>336</sup> Through the first half of the eighteenth century, the legal profession in America had not been highly regarded. Lawyers were often associated with the English government; lay judges were common and reportedly had considerable legal knowledge. By the mid-eighteenth century, the opposition to lawyers began to decline and colonies began to support a practicing bar. Although some efforts were made to require judicial positions to be filled by attorneys, judicial appointments were largely based on political concerns. See D.M. Provine, *Judging Credentials: Non-Lawyer Judges and the Politics of Professionalism* (1986); A.H. Chroust, *The Rise of the Legal Profession in America* (1965).

<sup>337</sup> New York State Association of Magistrates and New York Conference of Mayors and Municipal Officials, *Justice Courts in New York State: The Courts Closest to the People* [hereinafter, *Justice Courts in New York State*], p.46, citing *Task Force Report: The Courts*, op. cit., p. 29.

<sup>338</sup> *Id.*, citing the United States Advisory Commission on Intergovernmental Relations, *Court Reform: Key to a Balanced Criminal Justice System* (1971).

administrated by a statewide court administrator or administrative judge; (2) all trial courts should be unified into a single trial court with general, criminal and civil jurisdiction; [and] (3) all judicial functions in the trial courts should be performed by full-time judges who possess law degrees and are members of the bar.”<sup>339</sup> Despite the national recommendations, efforts to reform the states’ lower courts have been rejected by state-level studies, including New York.<sup>340</sup>

## 8.4.2 New York Perspective

Since 1961, under Article 6, §16 of the New York Constitution, New York’s local jurisdictions have had the authority to replace their justice courts by establishing a unified district court with general trial jurisdiction and full-time judges, either for the entire county or for one or more contiguous cities or towns within the county. In order to establish a district court system, the majority of the electorate in each town or village involved must vote for approval in a general election. In 1963, the legislature enacted the Uniform District Court Act to govern the district courts and integrate them into the state’s unified court system. To date, only two counties, Nassau and Suffolk, have created district courts, both of which pre-date the 1963 district court law. Since 1963, we understand that efforts have been made in several other counties to create a district court, but in each instance, the county’s citizens have voted to maintain the justice court system.<sup>341</sup> Even within the Long Island counties that created district courts, 92 town and village courts remain.

Over the years, a number of organizations in New York have recommended that the local court system be dissolved. In 1973, after a two-year study, the Temporary Commission on the New York State Court System (the Dominick Commission), recommended that the city, town and village courts be replaced by a district court in 16 counties, and that the rest of the counties outside New York City should have the ability to seek the replacement of the local courts with a district court.<sup>342</sup> The Commission did not believe that the quality of the justice system was best served by part-time and non-lawyer judges working in the local courts, noting that training may not “adequately prepare a justice to protect the rights of individuals” and that having part-time work outside of the court “might present conflicting demands on the judge’s time and, by implication, result in a less than zealous or rigorous attention to his judicial responsibilities.”<sup>343</sup> Later that same year, the State Commission of Investigation similarly recommended that the justice courts be replaced with a centralized system with full-time attorney judges. This

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<sup>339</sup> *Id.*, citing the National Advisory Commission on Criminal Justice Standards and Goals, *Report on Courts* (1973).

<sup>340</sup> Alfiny and Doran, *A New Perspective on Misdemeanor Justice*, 60 *Judicature* 425 (1977).

<sup>341</sup> However, when we were in Orleans County, we were told that two adjacent towns, Ridgeway and Shelby, had recently agreed to combine their local courts as a cost-saving measure. The Town and Village Justices Education and Administration Office confirmed that the two justice courts have combined.

<sup>342</sup> Prior to this, in the 1950’s, a Temporary Commission on the Courts of New York State (the Tweed Commission) studied New York’s court system and originally recommended that the number and jurisdiction of lay justices be reduced and that persons appearing before a lay justice be given the option of having their case heard before an attorney justice. However, after meeting further and holding hearings and public sessions, the commission changed its initial recommendations to merely require lay judges to receive training. *Justice Courts in New York State*, p. 56, citing *Plan for a Simplified State-wide Court System*, Report of the Temporary Commission on the Courts of New York State (1956), pp. 9-26.

<sup>343</sup> *Id.*, pp. 57-58, citing ...*And Justice For All*, Report of the Temporary Commission on the New York State Court System (1973), pp. 22-28.



commission noted an additional reason for abolishing these courts, namely, the difficulty of covering so many of them:

[T]he multiplicity of these courts makes adequate coverage by the District Attorneys and Public Defenders practically impossible in most counties. The result is that non-lawyer judges often find themselves in the position of acting as prosecutors, defense counsel, or both, in many matters coming before them.<sup>344</sup>

The League of Women Voters of New York State has been a strong critic of the town and village courts over the years. Its reasons for criticism include inadequate legal training, lack of court records thwarting appeals, the conflict of outside work of part-time judges, and susceptibility to local pressure. The League found support for its position in a report on the New York State Courts issued by the Institute of Judicial Administration; in 1967, the Institute recommended that the local justice courts be replaced by a district court system with attorney judges in every New York county.<sup>345</sup> The New York Civil Liberties Union has also shown concern over the New York justice court system and has considered a legal challenge to the constitutionality of the courts' non-lawyer judges,<sup>346</sup> although no action has reportedly been filed.

In 1967, the Association of the Bar of the City of New York concluded that because further consolidation of the state's courts would promote efficiency and flexibility, the legislature should be given the power "to create such county, district or other courts outside New York City all with lawyer judges as it believes appropriate."<sup>347</sup>

The New York State Defender's Association (NYSDA) has also sought to reform the town and village courts by studying them and creating a package for reform. NYSDA's reform efforts sought to include requirements that all criminal proceedings in the town and village courts to be recorded by a stenographer, that bail amounts be limited in non-felony cases and bail review procedures be modified.

While other efforts have reportedly been made to reform New York's justice court system, such efforts have proven unsuccessful. We understand that the failure of these efforts is due at least in part to the lobbying power of the magistrate's association and others that have fought to keep the local justice court system. The Association of Towns of the State of New York, for example, has consistently supported the justice court system and in 1975 passed a resolution opposing their replacement or reduction.<sup>348</sup> The New York Conference of Mayors, which represents the state's cities and villages, has also opposed replacing the local justice courts with district courts, citing among other reasons, delays in district courts and added costs to local governments in providing court security.<sup>349</sup> Finally, the New York State Association of Magistrates has strongly objected to abolishing the town and village courts and promoted ideas to strengthen them. The arguments of magistrate's association for maintaining the justice courts

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<sup>344</sup> *Id.*, p. 58

<sup>345</sup> *Id.*, p. 59, citing Institute of Judicial Administration, *A Model Judiciary Article for the State of New York* (1967).

<sup>346</sup> *Id.*, p. 60.

<sup>347</sup> *Id.*, p. 61, citing Association of the Bar of the City of New York, Report of the Special Committee on the Constitutional Convention, "Court Structure and Management" (1967).

<sup>348</sup> *Id.*, p. 63, citing Association of Towns of New York State, *1975 Position Statement*, p. 7.

<sup>349</sup> *Id.*, pp. 64-65.

include the importance and flexibility of local rule, the source of local revenue, and the cost of operating a district court system.<sup>350</sup>

### 8.4.3 Relevant Case Law

New York CPL 170.25 allows a defendant charged with a misdemeanor to seek removal of his case from a local justice court to a superior court. However, the defendant must seek such removal by filing a motion with the superior court prior to a plea or a trial and must show “good cause to believe that the interests of justice” require the removal. As the Court of Appeals of New York has ruled, this law creates not an absolute, but a discretionary right to be heard before a lawyer judge.

In *People v. Charles F.*,<sup>351</sup> a defendant charged with two misdemeanor offenses in the Conesus Town Court sought to have his case removed to the Livingston County Court under the terms of CPL 170.25. The defendant argued that he had “an absolute right to be tried before a lawyer judge” but did not allege any specific prejudice that would result in being tried in the town court. The county court denied the defendant’s motion for a failure to show good cause. A divided Court of Appeals agreed, holding that “a defendant has no absolute due process right under New York or Federal Law to trial before a law-trained judge, and that the mere allegation that a judge lacks legal training does not warrant removal pursuant to CPL 170.25.”

However, three judges disagreed, stating in part, “While lay judges unquestionably make a significant, valued contribution to the functioning of our judicial system, defendants facing imprisonment, with a complex array of constitutional and statutory rights, must have the option to be tried before law-trained judges.”<sup>352</sup> The dissent distinguished a prior New York case cited by the majority, *People v. Skrynski*,<sup>353</sup> in which a defendant had failed to request removal under CPL 170.25. In *Charles F.*, the defendant properly sought removal but his motion was denied in the discretion of the court for an alleged failure to satisfy the “good cause” requirement. But according to the dissent, the requirement should have been satisfied by the potential for incarceration:

The right to effective assistance of counsel and the right to trial by a jury, both so jealously guarded, lose force without a law-trained Judge to insure that motions are disposed of in accordance with the law, that evidentiary objections are properly ruled on, and that the jury is correctly instructed....Because of the technical knowledge required to insure that defendants facing imprisonment are afforded a full measure of the rights provided to them, use of non-law-trained Judges is a procedure that ‘involves such a probability that prejudice will result

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<sup>350</sup> *Id.*, pp. 65-66, citing New York State Association of Magistrates, *A Report to the Constitutional Convention on the Matter of the Local Courts* (1967).

<sup>351</sup> 60 N.Y.2d 474 (1983).

<sup>352</sup> The dissenting opinion was authored by Judge Kaye, currently New York’s Chief Judge.

<sup>353</sup> *People v. Skrynski*, 42 N.Y.2d 218 (1977).

that it is deemed inherently lacking in due process.”<sup>354</sup>

The dissent felt that in order for CPL 170.25 to be constitutionally applied, the “good cause” requirement must be satisfied by the threat of imprisonment and a denial of a request for removal in such circumstances constitutes an abuse of discretion.

Both the majority and the dissent in *Charles F.* refer to the United States Supreme Court decision in *North v. Russell*.<sup>355</sup> In that case, a Kentucky defendant was tried in a local police court before a nonlawyer judge on a misdemeanor charge. The Supreme Court held the defendant was not denied federal due process because Kentucky law afforded him an absolute right to a trial de novo before a lawyer judge in a superior court; however, the defendant had failed to exercise that right.<sup>356</sup> The majority in *Charles F.* relied on *North* as holding that there is no federal due process violation in being tried before a nonlawyer judge as long as the defendant “has an effective alternative of a criminal trial before a court with a traditionally law-trained Judge...” and, relying on *Skrynski*, found that the discretionary procedure under CPL 170.25 “provides such an effective alternative.” However, the dissent in *Charles F.* found that *North* dictated its opinion that a defendant facing possible jail time has a due process right to be tried before a lawyer judge. The Supreme Court found that the defendant in *North* was not denied due process because he had an absolute right to a de novo trial before a lawyer judge under Kentucky law, but he had failed to exercise that right. In contrast, the defendant in *Charles F.* had affirmatively sought to be tried before a lawyer judge but was denied because, unlike Kentucky, the right to such a trial in New York is not absolute.

It is our understanding that the majority ruling in *Charles F.* still stands as the New York Court of Appeals has not overruled the opinion. While we believe that attempts have been made to litigate the issue since then, such litigation has never been decided on its merits. For instance, we were told that although litigation was filed on the issue in the federal district court, the action was ultimately dismissed on abstention grounds by the Second Circuit Court of Appeals.

Arguably, the constitutionality of being tried before a lay judge in New York when facing imprisonment has yet to be finally resolved. A 1997 New York State Bar Journal article raised this and other unresolved justice court issues.<sup>357</sup> For example, an additional aspect of CPL 170.25 has not been addressed by the New York courts, namely that town and village judges are not required to notify defendants of their right to request a trial before a law-trained judge in superior court, a right that is waived by failing to request it. In addition, because most town and village court proceedings are not recorded, a defendant seeking an appeal is disadvantaged by the lack of a full court record for appellate review. Such town and village court issues appear ripe for further litigation.

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<sup>354</sup> *People v. Charles F.*, 60 N.Y.2d 474, 480, *citing* *Estes v. Texas*, 381 U.S. 532 (1965), 542-543.

<sup>355</sup> 427 U.S. 328 (1976).

<sup>356</sup> The Supreme Court dissent stated that “any trial before a lay judge that results in the defendant’s imprisonment violates the Due Process Clause of the Fourteenth Amendment. The Court has never required a showing of specific or individualized prejudice when it was the procedure itself that violated due process of law. ‘[A]t times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.’” *Id.* quoting *Estes v. Texas*, 381 U.S. 532, 542-543.

<sup>357</sup> See Colin A. Fieman and Carol A. Elewski, “Do Nonlawyer Justices Dispense Justice?,” *New York State Bar Journal* (January, 1997).

## CHAPTER 9: INDIGENT DEFENSE IN NEW YORK CITY

### 9.1 History of New York City's Indigent Defense System

Indigent defense in New York City must be viewed in the context of several major factors that have shaped the indigent defense system over the last ten-plus years into what it is today. First, since the mid-1990's there has been a shift in crime trends in New York City and violent crime has dropped significantly. This, in addition to the shift in the theories of law enforcement to the "broken window theory,"<sup>358</sup> and an increase in the so-called "quality of life" offenses,<sup>359</sup> has caused a decrease in serious felony prosecutions and an increase in minor misdemeanor and infraction cases. Second, since the opening of the Midtown Community Court in 1993, there has been a proliferation of community and specialty courts throughout New York City, in which indigent defendants require representation. Finally, in 1994 major changes to the indigent defense system took place, starting with a desire by newly elected Mayor Giuliani to shift a significant portion of the workload from 18-B attorneys to the Legal Aid Society of New York (LAS or Legal Aid). However, in October 1994, the Criminal Defense Division of the Legal Aid Society engaged in a four-day work stoppage and the Mayor cut their funding substantially. This shifted a significant amount of the Legal Aid Society's work to seven alternate institutional providers.<sup>360</sup> Since that time, budget concerns have switched the majority of the caseload back to Legal Aid. These three major factors have created a new workload for attorneys, top heavy with minor misdemeanors and violations, a political tension in the City amongst institutional providers, and a number of courts in addition to the criminal and supreme parts that must be covered by defenders with little or no additional funds.

#### 9.1.1 Crime Trends and Charging Practices

Violent crime in New York City is down, as is the trend across the United States, and felony rates have dropped dramatically. After the influx of arrests from the crack epidemic and war on drugs in the 1980's, the early 1990's saw a shift in the theories of law enforcement to the broken window theory, and law enforcement changed the way it dealt with crime.<sup>361</sup> Interestingly, total caseloads in New York City criminal courts have not increased much in the

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<sup>358</sup> The broken window theory of law enforcement is based on the premise that "crime flourishes in areas in which disorderly behavior goes unchecked." See James Q. Wilson and George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (March 1982). In this article, Wilson and Kelling describe the phenomenon of broken windows: if a building has a broken window and it is not fixed, the remainder of the windows will become broken. If the window is fixed immediately, it sends a message that broken windows will not be tolerated; if the window is not fixed, the opposite holds true.

<sup>359</sup> Quality of life offenses include minor offenses such as panhandling, jumping turnstiles, sleeping on public property, etc.

<sup>360</sup> There are two additional institutional providers, Neighborhood Defender Services of Harlem, which has handled a small percentage of cases in Manhattan since 1990 and the Office of the Appellate Defender, which has been handling appeals in New York City since 1988. Neither office came about because of the Legal Aid Society work-stoppage.

<sup>361</sup> See *Criminal Court of the City of New York, Annual Report 2004*, at <http://www.nycourts.gov/courts/nyc/criminal/NYCCD-Annual-Report-2004.pdf>.

last ten years; however, there has been a significant shift in the types of cases filed by law enforcement agencies, creating a considerable jump in the number of so called “quality of life violations” since the mid-1990’s.

Judge Juanita Bing Newton, Administrative Judge of the Criminal Court in New York City, describes in her 2004 annual report the dramatic change to the criminal courts in New York City over the last 10 years:

What is most striking about the changes in the court’s caseload over the past ten years is not so much the volume of cases, but the types of cases filed by law enforcement agencies.

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What is most significant is the change in the types of charges and cases being filed in the Criminal Court over the past ten years. Ten years ago, 5 of the 10 most frequently arraigned charges in Criminal Court were felony charges. 3 out of the 10 were violent felony charges. In 1999 only 2 out of the 10 most frequently arraigned charges were felony offenses and only 1 of them violent. In 2004, 9 out of the 10 most frequently arraigned charges were misdemeanor offenses. Only felony drug sales remained in the list of the most frequently arraigned charges. No violent felony offenses made it on this list. In 1999, the Criminal Court had trial jurisdiction over only half of the most frequently arraigned cases. In 2004, that number has risen to 9 out of 10.<sup>362</sup>

The dramatic change in the criminal court system since 1994 was also set out by Attorney Russell Neufeld in his testimony before the Commission on February 11, 2005.

One thing that’s changed in the last [twenty] or so years is the ratio of felonies to misdemeanors. [Twenty] years ago we had 2/3 felonies and 1/3 misdemeanors coming through the criminal courts. Today that’s exactly reversed. Serious crime is way, way down in New York State and in New York City, but, remarkably, the number of arrests have stayed basically constant. Which means that the courts are at this point flooded with much less serious cases. And there are now huge numbers of young people, disproportionately people of color, people from the rapidly growing immigrant communities that are charged with a huge number of marijuana charges; sometimes you see 6 kids charged on one joint. Thousands of open container charges. Round-ups of the homeless periodically arrested for loitering, trespassing and fair [sic] beats. And this has helped dramatically increase the number of mentally ill people within the jails, specifically within the city jails and county jails in this state.<sup>363</sup>

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<sup>362</sup> *Id.* at 5.

<sup>363</sup> New York City Commission hearing transcript, pp. 204-208. The term of years was changed from a “dozen” and “12” to twenty after speaking with the witness.

### 9.1.2 Changes to the Criminal Justice Court Structure

There are a number of specialty courts that have opened in New York City, starting in 1993 with the Midtown Community Court. In his Commission testimony, Mr. Neufeld outlines the theories that led to the changes in the criminal court structure in New York City:

The second point that I think has changed in the last 12 years is that unable to stem this flow the courts have nevertheless very admirably recognized that many if not most of the people coming through this system are more in need of treatment than punishment, and that's led to this huge increase we have in treatment court to problem solving courts. Again, which I think is admirable. But one of the main problems is that to get the district attorneys to buy into those courts what was given away was that you have to plead guilty in order to get any help. So it has created a situation wherein the power of a D.A. to get a plea in a case, in addition to all the traditional inducements, now if you want to get drug or alcohol counseling, if you want to get mental health treatment, if you want to get alternative to violence counseling you have to plead guilty in order to get help. And that has seriously eroded, I think, the whole adversary nature of the criminal justice system because these courts are just growing and growing and growing.<sup>364</sup>

As Mr. Neufeld noted in his testimony, in addition to the change in the caseload mix, the criminal justice court structure has changed in New York City over the past decade. Judge Newton has laid out these changes in her 2004 Annual Report. For example:

In 1993 the Midtown Community Court was opened to target quality of life offenses. Rather than sentence defendants to minimal jail time or none at all, judges can require that defendants participate in community service and local organizations provide services to defendants to help them with underlying problems, which often times result in criminal behavior. Organizations collaborate to provide on-site services such as drug treatment, health care and job training.

Drug Courts exist in every borough with a total of seven courts citywide. In these courts, judges and drug court staff supervise a defendant's progress in treatment with frequent drug tests, visits to court and intense case management.

Domestic Violence Courts, dealing with the criminal aspect of domestic violence, exist in all five boroughs of New York City. There are a total of 13 domestic violence parts in New York City, including the Domestic Violence Compliance Parts and Integrated Domestic Violence parts.

There are Domestic Violence Compliance Parts in four of the five boroughs, which include an All-Purpose part, Trial part and Compliance parts dedicated to adjudicating domestic violence cases.

Integrated Domestic Violence parts attempt to streamline the judicial process by allowing one judge to handle criminal domestic violence cases and related family and/or matrimonial issues.

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<sup>364</sup> New York City Commission hearing transcript, pp. 204-208.

Launched in 2002, Operation Spotlight focuses on chronic misdemeanor offenders who commit a disproportionate number of crimes throughout the city. A specialized court was established in each borough to deal with these cases.

In 2000, the Red Hook Community Justice Center opened in Brooklyn to not only function as a criminal court, but to provide community services and treatment options for defendants, much like the Midtown Community Court. The Community Justice Center seeks to address the needs of the entire community by providing multi-jurisdictional court and housing programs, in addition to on-site social services addressing such issues as drug abuse, poverty, family violence, unemployment and education.

Most recently, plea by mail and credit card payment programs have been added along with a focus on persistent misdemeanor offenders and an expansion of comprehensive drug screening.<sup>365</sup>

Many of these programs are relatively new, and with the exception of the Midtown Community Court, did not exist more than ten years ago. We were repeatedly told by LAS and the alternate providers that they were rarely at the table when the creation of a new court was discussed, and seldom received additional funds to provide services in these new courts. While there is no question that these courts provide important services to youthful offenders and defendants with mental health or drug problems, it is an overwhelming task to provide court-appointed counsel in every required case and at every hearing. There are many more court parts to serve and attorneys must appear in most of these sessions. Attorneys must also assist their clients in deciding whether to plead and waive certain rights to enter these programs.

### **9.1.3 Systemic Changes Starting in 1994**

Over the last ten years, the system for providing representation in criminal cases in New York City has changed dramatically. Starting with the enactment of Article 18-B of the County Laws in 1965, the New York Legal Aid Society Criminal Defense Division has handled the majority of criminal cases and arraignments shifts throughout all five boroughs and has a criminal appeals division that provides most of the representation on appeal, except in conflict and overload cases.<sup>366</sup> According to the original mayoral executive order in 1965, the Legal Aid Society was designated as the primary provider of indigent defense services and counsel designated by the County Bar Association were to provide representation when LAS had a conflict of interest or declined to represent a defendant for an “appropriate reason.”

From 1990 to 1996, a small private non-profit public defender office, the Neighborhood Defender Services of Harlem in North Manhattan, was the only other institutional defender in the City representing indigent defendants at trial. In addition to LAS and Neighborhood Defender Services, a large 18-B program provided representation in all trial and appellate level indigent defense conflict cases that LAS and Neighborhood Defender Services did not handle and representation in homicides. Oversight of the 18-B program was, as today, performed by two administrators, one in each of the first and second appellate divisions.

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<sup>365</sup> *Criminal Court of the City of New York, Annual Report 2004*, available at <http://www.nycourts.gov/courts/nyc/criminal/NYCCD-Annual-Report-2004.pdf>.

<sup>366</sup> In 1997 the Legal Aid Society stopped providing representation in Staten Island.

Between 1984 and 1994, the number of criminal cases in New York City exploded, and by early 1994 it was reported that 18-B attorneys were representing fully one-third of the indigent criminal cases in the City.<sup>367</sup> When Mayor Giuliani took office that year, he announced plans to drastically reduce the role of the private lawyers and shift their workload back to the Legal Aid Society of New York. City officials declared that they would shift all but a small number of cases from the private lawyers to Legal Aid, whose budget would be increased and made a fixed percentage of the prosecution's budget. Officials also announced that they would limit private lawyers to 75 felony cases and 200 misdemeanors cases annually.

In October of 1994, lawyers from the Criminal Defense Division of Legal Aid went on a four-day work-stoppage when their union was unable to negotiate a new contract with top management over salary increases and fringe benefits. In response, Mayor Giuliani cut Legal Aid's Criminal Defense Division's budget by approximately \$13 million, or 16.5 percent.<sup>368</sup> To accommodate the cuts, the Legal Aid Society lost a number of its lawyers through buyouts and layoffs, but was expected to continue to represent the same number of defendants as previously represented.<sup>369</sup> Also, just under half of the supervisors were laid off and others were demoted to criminal court trial attorney positions.<sup>370</sup>

In addition to cutting LAS' budget, the City of New York issued Request for Proposals (RFP's) in October 1995 and November 1996 seeking bids from non-profit and for-profit entities to provide representation to indigent criminal defendants in trial and appellate cases that otherwise would have been handled by the Legal Aid Society. The RFP's solicited contractors to handle 10,000 trial cases in Brooklyn, the Bronx and Queens; 12,500 trial cases in Manhattan; all trial cases in Staten Island; and 400 appeals citywide.<sup>371</sup> The organizations would only be permitted to handle cases in one borough and must choose between trial or appellate cases. At that time, City Criminal Justice Coordinator Katherine Lapp reported that "the administration was less concerned about cost than making sure other organizations can take up the slack if Legal Aid strikes again."<sup>372</sup> In addition, "she acknowledged that [not allowing Legal Aid to bid] might result in a situation where a legal group would charge the city more money than Legal Aid, but said it would be worth the extra cost."<sup>373</sup>

After this first round of RFP's went out in 1995, contracts were entered into with Brooklyn Defender Services, Queens Law Associates and Appellate Advocates, which all began accepting cases in the summer of 1996. All three organizations were headed by former Legal Aid Society supervisors. A second RFP was issued in November 1996. After this round of RFP's, contracts were entered into with Bronx Defenders, New York County Defender Services,

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<sup>367</sup> Although data for 1994 is unavailable, in 1993, 212,468 criminal arraignments took place in NYC. LAS was appointed in 68 percent of these arraignments, and 18-B attorneys were appointed in 32 percent.

<sup>368</sup> The City cut another \$6.4 million to fund the alternate providers. In total, LAS received a 25 percent cut in funding over three years.

<sup>369</sup> The number of staff attorneys was cut by almost 100, from 532 to 437. In addition, the support staff was cut to 462 from 602 before the layoffs.

<sup>370</sup> The number of supervising attorneys dropped from 98 to 40.

<sup>371</sup> See David Firestone, *Giuliani Moves to Reduce Legal Aid Society's Role*, N.Y. TIMES, Oct. 21, 1995; Denen Millner, *Rudy eyes trimming Legal Aid caseload*, DAILY NEWS, Oct. 21, 1995.

<sup>372</sup> Denen Millner, *Rudy eyes trimming Legal Aid caseload*, DAILY NEWS, Oct. 21, 1995.

<sup>373</sup> David Firestone, *Giuliani Moves to Reduce Legal Aid Society's Role*, N.Y. TIMES, Oct. 21, 1995.



the law firm of Battiste, Aronowski and Suchow and the Center for Appellate Litigation. These alternate defenders began operations in the summer of 1997, some of which were headed by former Legal Aid Society defenders or supervisors.

All five trial alternate defender programs were well-funded compared to the Legal Aid Society and salaries were higher to recruit primarily senior, felony lawyers. Also, their caseloads were comprised of a higher percentage of felonies than Legal Aid was receiving. These factors contributed to the shift of a number of Legal Aid's most experienced attorneys from LAS to one of the new alternate providers.

The City anticipated that the establishment of the trial-level alternate defenders would decrease LAS' criminal caseload by approximately 20,000 cases in fiscal year 1997. However, LAS' total criminal caseload that year increased slightly despite the sharp reduction in felony appointments. This was due largely to the explosion of misdemeanor and infraction cases in the City. In fact, Legal Aid's felony caseload dropped by close to 30 percent, while misdemeanor cases increased dramatically.

In anticipation of the establishment of these alternate defenders, in October 1995, the Appellate Division, First Department established the Indigent Defense Organization Oversight Committee (IDOOOC) to monitor the operation of organizations contracting with the City of New York to represent indigent defendants in criminal proceedings, excluding 18-B attorneys. Although not binding on any provider, in 1997 IDOOOC issued its quality standards, "*General Requirements for All Organized Providers of Defense Services to Indigent Defendants.*"

In 1998, IDOOOC issued a report concluding that at its current funding level and caseload levels, the Legal Aid Society of New York was not fulfilling IDOOOC standards. Citing the IDOOOC report and noting the declining funding for the Legal Aid Society and the continued failure to address the pitiful hourly compensation rate for 18-B attorneys (which had not changed since 1986) the New York County Lawyer's Association (NYCLA) urged the City of New York "to impose caseload limits on LAS and protect and preserve caseload limits on all other organizations that contract to provide representation to indigent defendants." Finally, in February 2000, after all efforts failed, NYCLA brought a lawsuit against the State alleging that indigent adult defendants and children in the First Department were being denied their constitutional rights to effective assistance of counsel.<sup>374</sup> After a favorable decision for indigent defendants, the legislature reacted by raising the compensation rates for court-appointed counsel.

Today, there is a large but still diminished Legal Aid Society providing representation to indigent defendants in four of the five boroughs, five alternate trial public defender programs, Neighborhood Defender Services, and three alternate appellate public defender programs. There is also a large but diminished 18-B program operating in each of the five boroughs.

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<sup>374</sup> New York County Lawyers Association v. New York State, et al. For further discussion on this subject, see Chapter 1: Introduction of this report for a summary of TSG's involvement in the lawsuit.

## 9.2 Citywide Funding

Table 9.1 provides data on the sources and types of funding for indigent defense expenditures in New York City for fiscal year 2004. The total amount of money spent in New York City, including both city and state funds was approximately \$234,920,305. This includes total county funding, the ILSF distribution from the state for 2004, and state expenditures for law guardians including the Legal Aid Society's Juvenile Rights Division (JRD), the two law guardian institutional providers other than LAS and the 18-B law guardian fees. In addition, the Neighborhood Defender Services of Harlem receives some state money. *See* Table 9.1 below.

**Table 9.1**  
**Total Indigent Defense Expenditures for New York City**  
**in FY 2004**

	<b>Totals for 2004</b>
ILSF Distribution (for 2004 reimbursement)	\$30,523,111
Legal Aid Society, Juvenile Rights Division	\$23,913,000
Institutional Providers for law guardian cases (other than LAS)	\$6,195,000
18-B law guardian fees	\$8,156,289
Neighborhood Defender Services of Harlem	\$294,000
<b>Total State Funding for New York City</b>	<b>\$69,081,400</b>
<b>Total County Funding for New York City</b>	<b>\$166,132,905</b>
<b>Grand Total Funding for New York City</b>	<b>\$235,214,305</b>

Table 9.2 provides a breakdown of expenditures by provider in New York City for 2004.

**Table 9.2: New York City Indigent Defense Expenditures by Provider for 2004**

<b>Organization</b>	<b>2004 Expenditures</b>
Appellate Advocates	\$2,854,697
Battiste, Aronowsky & Suchow	\$2,451,506
Bronx Defenders	\$4,323,012
Brooklyn Defenders Services	\$3,944,352
Center for Appellate Litigation	\$2,751,101
First Department Assigned Counsel	\$1,675,486
Legal Aid Society of the City of New York	\$79,176,985
LSNY Family Court	\$500,000
Neighborhood Defender Services	\$2,548,312
New York County Defender Services	\$5,243,817
Queens Law Associates	\$4,116,586
<b>Total Providers</b>	<b>\$109,585,854</b>
<b>Total 18-B</b>	<b>\$56,547,051</b>
<b>Total Expenditures for NYC in 2004</b>	<b>\$166,132,905</b>

\* Information gathered from February 2006 State Comptroller's Audit of New York City's Indigent Legal Services Fund

Note: For both Appellate Advocates and Center for Appellate Litigation we added together the total reimbursement and performance payments to get the 2004 Expenditure number.

### 9.2.1 Recent Funding Issues

Several alternate providers expressed frustration with the fact that their funding situation has not increased from year-to-year and they must go to the city council every year and argue in support of their budget requests.<sup>375</sup> We were told by one alternate provider that the office budget for experts and health insurance are the same today as it was in 1997, despite higher costs. In addition, there have been no increases in salaries over the last several years, which can make it difficult to retain and/or attract qualified attorneys.

Another alternate provider told us that their funding has not grown with the increasing costs of such things as health insurance, rent and outside vendors. The office has tried to give incentives to employees to reduce health care costs. The office has not been able to give employees raises in four years and with the increased 18-B rates it makes the panel look more attractive to their attorneys. One attorney has already left to join the 18-B panel in another borough.

<sup>375</sup> See., e.g., New York City Commission hearing transcript, pp. 82, 312.

In Staten Island the criminal court is in a residential area and when BAS tried to move their office closer to the courthouse the rent nearly doubled and the City would not give them additional money for the higher rent.

In addition to the money received from the city for indigent defense services, the alternate providers that adhere to the holistic model must get outside funding for the additional services they offer. The Chief of the Bronx Defenders testified that she “spend[s] an enormous amount of [her] time trying to raise funds to fund the piece of holistic representation and comprehensive services that the mayor’s office still won’t fund.”<sup>376</sup>

The Neighborhood Defender Services of Harlem started in 1990 primarily with money from the City. At that time, the office was able to have a larger staff and smaller caseloads than it does now. According to the Director’s testimony, at one time the office had 56 people, 23 of whom were lawyers.<sup>377</sup> Over time, funding from the City has decreased and their caseload requirements have increased. Today there are less than 30 staff members. However, the office has more private dollars than when it first began to support the civil practice unit and some of the other programs not related to direct indigent defense services.

### **9.3 The New York Legal Aid Society**

Established in 1876, the Legal Aid Society of New York remains the primary provider of indigent defense services in Bronx, Kings, New York, and Queens Counties.<sup>378</sup> LAS provides legal representation for indigent clients in criminal, civil and family court matters including child protection and delinquency matters. LAS has four criminal defense offices located in each of the four boroughs in which it handles cases and five criminal practice divisions. The Criminal Defense Division (CDD) is the trial level division that represents indigent defendants in criminal and supreme court. In addition to the CDD, an Appeals Division handles appeals in all levels of state and federal court; a Parole Revocation Defense Unit represents parolees charged with violating the terms of their release from prison; a Juvenile Offender Project addresses the needs of juvenile offenders and their families through family counseling; the MICA Project for mentally ill, chemically dependent persons, a federally-funded project provides post-conviction social work case management services to severely mentally ill clients; and the Special Litigation Unit undertakes major law reform and class action litigation on issues affecting indigent defendants. There is also a Juvenile Rights Division (JRD), which represents children throughout the family court system in New York City including child protection cases, termination of parental rights, PINS (persons in need of supervision), and juvenile delinquency petitions.

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<sup>376</sup> New York City Commission hearing transcript, p. 82.

<sup>377</sup> New York City Commission hearing transcript, pp. 310-311.

<sup>378</sup> The Legal Aid Society of New York (LAS) no longer has an office located in Richmond County (Staten Island). The primary provider of indigent defense services in Staten Island is the law firm of Battiste, Aronowski and Suchow, which replaced LAS in 1997.

The Legal Aid Society was designated the primary provider for criminal cases under Article 18-B of the County Law shortly after its enactment in 1965.<sup>379</sup> The private assigned counsel, or 18-B, program was also designated at that time to provide legal services in homicide and conflict cases.

As the President of the New York County Lawyer's Association noted during his Commission testimony, "[the Legal Aid Society] is overburdened, understaffed, it is under a contractual mandate which is inconsistent with the highest qualities of standards. Its recent financial crisis coupled with that contract have left a work force which is both inadequately supported, inadequately compensated and, I think, inadequately supervised and trained."<sup>380</sup>

### 9.3.1 Caseloads

Pursuant to LAS' contract with the City of New York, the Legal Aid Society is required to take 88 percent of all non-conflict indigent defense cases in the arraignment shifts that it staffs.<sup>381</sup> There is a penalty if LAS fails to meet that number; however, according to several estimates, so far they have exceeded that number.<sup>382</sup> According to its contract with the City, if LAS does not meet its performance standards outlined in the contract (i.e. 88 percent of cases at arraignment shifts that LAS staffs), does not meet the 24-hour arrest to arraignment standards, declines to accept cases for any reason or there is a disruption in the services it provides, it is liable to the City for any costs that the City incurs in arranging for other providers to cover those cases LAS does not take. In addition, Exhibit C of the Legal Aid Society contract lays out the specific monetary penalties that LAS would incur if its intake is below 88 percent of indigent cases arraigned in LAS parts.<sup>383</sup> If LAS handles less than 81 percent of cases at the arraignment shifts it staffs, it will not receive payment from the City.

The contract's figure of 88 percent is up from 86 percent in 2002. We were told that LAS has more cases than anticipated when they signed the contract, but there is no mechanism to increase funding or staffing and that the contract clearly states that they cannot withdraw from cases because of overload.<sup>384</sup> This is a violation of ABA standards and may create an ethical dilemma for an individual public defender attorney.

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<sup>379</sup> L. 1965, c. 878.

<sup>380</sup> Ithaca Commission hearing transcript, p. 25.

<sup>381</sup> LAS does not staff every arraignment shift in the City. Alternate providers cover approximately 2-4 arraignment shifts each week.

<sup>382</sup> *See, e.g.*, New York City Commission hearing transcript, p. 221.

<sup>383</sup> For instance, if LAS' intake is between "87%-87.4% of the indigent pool in LAS parts" LAS will be paid 98 percent of the Criminal Defense Division's (CDD) monthly payment. If that number is between 81-81.99 percent, LAS will receive only 86.75 percent of the CDD's monthly payment.

<sup>384</sup> The contract states, "It is understood that the CITY may arrange for other entities or attorneys to provide services to replace the services hereunder in whole or in part ... 3) in the event that, during the term of this AGREEMENT or of any extension thereof, the CONTRACTOR declines to accept or ceases at any time and for whatever reason to assume or continue representation in any case described in Section V.A. above.... The CONTRACTOR shall be liable to the City for the costs to the City of such other services...." The Legal Aid Society Renewal Agreement, July 1-2004-June 30, 2006, page 5. Section V.A. provides for the scope of services of the contract and requires Legal Aid to represent all defendants unless there is a conflict of interest or if the defendant is charged with homicide.

The union has mechanisms in its contract to deal with problems such as workload; if workload becomes a problem, there is an expedited grievance procedure. The union has filed a grievance recently because attorneys handling delinquency cases have an average open caseload somewhere in the 90's; which according to the union president, "it's probably not consistent with ethics, it just isn't."<sup>385</sup> The union is now in arbitration. According to her testimony, the union and LAS agree on what needs to be done, the problem lies in the failure of the City to increase funding, resulting budget cuts and the inability to hire new attorneys to fill the spots lost by attrition.<sup>386</sup>

In fiscal year 2005, the Legal Aid Society provided representation in 208,815 felony, misdemeanor, violation and infraction cases. While we do not have the exact number of criminal case appointments in New York City for 2005, we do know that Legal Aid handled 64 percent of the City's fingerprintable offenses.<sup>387</sup> This number is actually down from 1995, when Legal Aid was handling 68 percent of fingerprintable offenses. However, from 2002 to 2003, Legal Aid Society's percentage of the total number of fingerprintable offenses in New York City increased from 52 percent to 61 percent, reflecting the fact that their new contract with the City required Legal Aid to handle 86 percent of all non-conflict indigent cases in the arraignment shifts that it staffs. The increase in LAS' contract from 86 percent to 88 percent in 2004 appeared to cause a 2.5 percent increase in Legal Aid's percentage of fingerprintable offenses.

Also during the period of 1995-2005, 18-B representation dropped from 24 percent of all fingerprintable offenses in 1995 to 11 percent in 2005. While not representing the exact number of total indigent appointments in New York City (there are criminal filings that are not fingerprintable), is indicative of the shift in caseloads from 18B to LAS. Interestingly, the alternate providers should have reduced Legal Aid's caseload, however, absent the four years between 1999-2002, LAS' caseload has remained fairly consistent over the last ten years due, in part, to the increased number of misdemeanor and other low-level cases during the period.

We were told that attorneys in the Bronx office have approximately 100-105 open files at one time, consisting of 50 felonies and 55 misdemeanors. The attorney-in-charge will occasionally reassign cases when an individual attorney's caseload gets too high, however, vertical representation is the rule. The average open caseload per attorney in Queens is 90-100 cases, with approximately 50 percent misdemeanors, 30 percent un-indicted felonies, and 20 percent indicted felonies.

In Brooklyn case assignments are maintained by an office computer system with data entered at the arrainging court. Supervisors also monitor the caseloads of attorneys in their complexes and it is estimated that an average open caseload is approximately 50 misdemeanor and 50 felony open case files. One senior attorney described the office as employing a "system of triage" and told us that some attorneys have an open caseload of 130, of which 45 are indicted felonies. Senior attorneys take more serious cases and have a slightly smaller caseload and are

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<sup>385</sup> New York City Commission hearing transcript, pp. 226-227.

<sup>386</sup> *Id.*

<sup>387</sup> Information obtained from the New York State Division of Criminal Justice Services (DCJS) and includes lower court arraignment data for fingerprintable offenses only.

limited to only one open murder case. The greatest number of complaints from both LAS attorneys and outside observers about high LAS caseloads came from Brooklyn.

In the Criminal Appeals Bureau, although the number of cases has slightly declined by eight percent, the actual workload of the office has increased because case numbers do not consider the addition of recent case types to the bureau's workload such as court-assisted drug resentencing cases and sex offender registry or SORA appeals. In considering these cases, the bureau's workload actually increased by 10 percent (597 assignments in 2003 to 671 assignments in 2005). This is despite a 25 percent reduction in staff since 2003.

### **9.3.2 LAS Staffing Problems and Funding Issues**

As discussed above, LAS suffered a major cut-back in staffing in late 1994 following a work-stoppage by attorneys in the Criminal Defense Division and the resulting \$13 million cut to Legal Aid funding by then Mayor Giuliani. The office did not receive a major increase in staff until 2003 when, in anticipation of the increase in compensation rates for 18-B attorneys, the City changed Legal Aid's 2002-2003 contract by increasing the percentage of cases that LAS would handle to 86 percent of cases in the arraignment parts LAS staffed. To help with the increase in caseload, LAS was given money to hire 70 attorneys in 2003 and 35 additional lawyers in 2004, including 12-15 supervisors.

However, in late spring of 2004, the President and Chief Attorney of LAS resigned amidst a threatened layoff of hundreds of employees, a deficit of \$22 million and potential bankruptcy. Over 250 LAS staff members, many of them criminal defense attorneys, received notice that they could face layoffs due to a potential budget cut and a lingering deficit. Then in the fall of 2004, after 125 trial attorneys were hired to start in the LAS fall "class" of incoming attorneys, LAS withdrew its offers to these attorneys due to the funding crisis. By the end of 2004, LAS staff was cut by 14 percent, including approximately 25 percent of its support staff.<sup>388</sup> No staff lawyers were laid off; although some supervising attorneys who were not part of the union were let go. To make up for the \$22 million deficit, LAS received \$9 million in private donations from firms in New York City and \$11 million from the City. As a condition for receiving the \$11, LAS was required to increase the percentage of cases it handles in the arraignment shifts it staffs from 86 to 88 percent.

Since fiscal year 2003, LAS' baseline budget has remained the same although the costs of running the Criminal Defense Division have risen. From fiscal year 2003 through today, LAS received a one-time payment of \$11 million in 2004, an additional \$2.82 million to create a City-funded parole revocation program in 2005 and \$6.326 million in 2006 from the City. The \$6.326 million appropriation allowed Legal Aid to hire 59 attorneys for the fall 2005 incoming class, as LAS had not received enough additional staff to cover the caseloads of those lost through attrition over the prior several years. According to the testimony of Peter Cobb, President of

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<sup>388</sup> According to the written testimony of The Legal Aid Society on The Mayor's Fiscal Year 2007 Preliminary Budget, presented before the New York City Council at page 2, "For the Society's July 1, 2004-June 30, 2005 fiscal year, the Society eliminated a \$22 million operating deficit. This progress did not come easy – 221 staff positions were eliminated through layoffs, buyouts, and attrition, and compensation and benefit reductions were implemented."

Legal Aid and Steven Banks, Attorney-in-Chief, without these one-time “special infusions,” Legal Aid would not be able to operate at its current workload levels.<sup>389</sup>

The preliminary fiscal year 2007 budget for LAS remains at \$68.8 million for criminal defense services, where it has been for four years. The 2007 budget does not contain the \$6.326 million funding supplement that LAS received for fiscal year 2006, and Legal Aid estimates that it will need an additional \$10.5 million in fiscal year 2007 to fund the criminal defense services and maintain adequate staffing and reasonable caseloads.<sup>390</sup>

During our site work, we were told that these staffing cuts and the very public financial crisis that the organization suffered created morale problems among staff attorneys and particularly support staff who were laid off in greater numbers. However, we were told by one Manhattan LAS attorney that since the fiscal crisis it has been a struggle to get work from support staff who have been “demoralized” from the staffing cuts. We were told that as a result, there is such a backlog in support staff completing requested tasks that attorneys must perform much of their own administrative work in order to get it done.

The Legal Aid Offices each have investigators, paralegals and social workers on staff; however, we were told repeatedly during our site work, that support staff resources are stretched thin, and attorneys must perform a number of administrative tasks that they would not otherwise perform if the office was fully staffed. For instance, one attorney at the Manhattan LAS office told us that the investigators in his office are so busy that he does not use them as much as he would like. He also said that applications for experts are almost always approved unless the budget is tight. Another Manhattan LAS attorney told us that he rarely relies on support staff. He told us the investigators are “fine” but they sometimes seem to rush through assignments. Except for serving motions, he performs all administrative work himself. Similarly, in Queens, we were told that 20 attorneys must share one investigator; as a result, many lawyers perform their own investigations.

Staffing cuts have not only affected the Criminal Defense Division, but the Criminal Appeals Bureau as well, which has seen a reduction in staff over the last several years, with a 13 percent reduction in attorney staff and a dramatic 60 percent reduction in support staff. The total office staff has declined by 25 percent since 2003. Supervision of staff attorneys has been cut over the years as well. In the past, the office staffed three supervisors for every 20 lawyers; today it staffs four supervisors for every 35 lawyers, which is an additional two attorneys per supervisor.

### **9.3.3 Lack of Vertical Representation: The Catcher System**

With the sheer number of courts operating at the same time, some LAS offices employ what they call a “catcher system” in post-arraignment parts, whereby one attorney is given the files of a number of cases to cover in court while the attorney of record is attending to matters in another courtroom. The catcher is generally used for quick status appearances, although they may be required to appear on any number of matters, often times with little or no background on

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<sup>389</sup> See *id.* at 3.

<sup>390</sup> See *id.*



the case. Occasionally the catcher works off of detailed notes from the attorney of record, sometimes he or she has a conversation about the case with the attorney of record the night before the hearing, other times it is a quick note with limited information. The Brooklyn, Manhattan and Queens offices employ the catcher system.

In Manhattan, while there is generally vertical representation in the office, there are five parts in which LAS assigns a catcher. These are the highly populated parts that have a large number of cases, including the upfront parts in most criminal and one of two supreme court upfront parts.<sup>391</sup> Part of the new attorney training involves shadowing the catcher. One new attorney observed that the catcher is just going through the motions and is told what to do on a case by the attorney of record.

While there is no catcher system in the Bronx, we were told by a judge that the Bronx LAS will move attorneys around and cover for colleagues when someone is not available for a court appearance. She told us that there are a lot of wasted adjournments because the original lawyer is not available and a colleague is covering.

During our site work, the catcher system was referred to as a “means to abdicate attorney responsibility and get rid of cases.” One LAS attorney in Manhattan told us that the catcher system is “wild, time consuming and difficult.” He will get a note with some documents attached for each defendant when he is the catcher. We were told that there are no rules for catching and one attorney said that some of his colleagues use catching when they should not and it would be beneficial if supervisors would review catch notes first.

#### **9.3.4 Training and Supervision**

Attorneys at Legal Aid appear to get a good deal of training upfront when they are first hired, however on-going in-house training varies among the borough offices. What was clear from our site work is that there are not enough supervisors at Legal Aid. For the most part there is a 1:20 supervisor-to-staff attorney ratio; and while several of the attorneys heading the borough offices expressed their desire to hire more supervisors, the money to do so is not available.

There are LAS offices handling trial level cases located in the Bronx, Brooklyn, Manhattan and Queens. There are three levels of certification by which attorneys get case assignments: fully (attorneys can handle any felony case), limited (low-level felonies only) and uncertified (misdemeanors and violations only). Supervisors are responsible for determining attorneys’ certification levels. It takes approximately 15-18 months to become limited certified. Because of the infrequency of misdemeanor trials, due in part to the fact that a large percentage of low-level cases are disposed of at arraignment, LAS attorneys are not getting the trial experience needed to move up to limited certification; however, to retain these talented attorneys, they are approved for the next level of certification despite their limited experience. We spoke to one attorney in the Manhattan LAS office who has been there for one year and he told us that in

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<sup>391</sup> The judge in the upfront supreme court part that does not have a catcher told us that she eliminated the catcher system in her courtroom; however, there are still attorneys that fail to show up or have a colleague show up for them.

that year he as had only one hearing. He said that attorneys do not need a misdemeanor trial to move up in the office to low level felonies because there often are no misdemeanor trials.

In the last couple years, attorneys at LAS were hired much like large law firms hire new attorneys; a new “class” is hired over the summer for a fall start date. Attorneys will start in September and receive one month of “extensive” training in Manhattan. Training is every day from 9 a.m. – 5 p.m. and includes lectures on motion practice, collateral consequences, criminal procedure, etc. Attorneys are then placed in the various boroughs and, in most offices, will have one month of training there with information specific to the practice in that borough. According to one LAS attorney, if an attorney has prior experience practicing criminal law, they will not receive formal training, and an informal mentoring system is used.

In the Bronx, someone will train the new attorneys in court and they will not put a new attorney hired directly out of law school in the arraignment part without supervision until January, three months after the attorney’s initial training. New attorneys will not have more than 15 cases until January. A supervisor or more experienced attorney will stand up with the new attorneys at arraignment initially. In Manhattan a supervisor will second-seat all first hearings and first trials.

In Queens, the office just received its first new hires in eight years - the office has a low attrition rate and a largely senior staff; however, the office does not have its own training for new lawyers but hopes to start this year. There are CLE courses offered 1-2 times a month. Each complex has approximately 20 attorneys for one supervisor. The supervisor does not carry a caseload, and is there to review staff attorney cases.

Trial level attorneys in each borough office receive additional training on an ongoing basis from the Criminal Appeals Bureau, which sends one appellate lawyer to each of the four trial legal aid offices to be used as a resource for trial attorneys and to train attorneys on developing a record for appeals. In addition to the training available through the Legal Aid Society, the New York State Defenders Association does conduct an annual training in New York City; however, we are unaware of how many Legal Aid attorneys are able to attend. The most recent training was held in February of this year and was attended by approximately 400 criminal defense attorneys.

Supervision in each borough office is done by a “complex” system, whereby a supervisor is responsible for overseeing a particular group of attorneys, who also share the same support staff and form an informal mentoring group. In Manhattan for example, we were told by the attorney-in-charge that the Legal Aid Society office has 145.5 staff attorneys, 11.6 supervising attorneys, including the director and his deputy, and approximately 70 support staff. Attorneys are divided into six complexes of 20-25 attorneys that work together under one or two supervisors. We were told that the office is in the process of hiring more supervisors because there are not enough; however, supervisors are not unionized and therefore do not have the same job security that staff attorneys do, and therefore, we were told by several attorneys, the job does not appeal to experienced senior attorneys. At 12.5 attorneys for every supervisor, we heard from several senior LAS attorneys that there is not enough supervision and that they would very

much like to see additional supervisors, but the money is not available to hire more supervisors.<sup>392</sup>

Also, there is a permanent arraignment supervisor in every arraignment part that LAS is required to staff,<sup>393</sup> as they are contractually obligated in Brooklyn and Manhattan to have an arraignment supervisor in those parts. Supervisors do not carry a full caseload; however, the size of the caseload varies among supervisors.

## 9.4 Alternate Defender Agencies

At the present time there is one trial level alternate defender agency in the Bronx, Brooklyn, Manhattan, Staten Island and Queens, and two appellate level alternate defender agencies covering both the first and second appellate divisions. In addition, there is the Neighborhood Defender Services of Harlem in Manhattan that provides indigent defense services at the trial level and the Office of the Appellate Defender. The Legal Aid Society office in each borough (excluding Staten Island) covers most of the arraignment shifts, which is where offices pick up caseloads. Each trial level alternate defender agency picks up anywhere from 2-4 arraignment shifts per week, depending on the organization, and takes all cases, absent conflicts, that are arraigned during those shifts. In total, the trial-level alternate providers handle approximately 17 percent of all fingerprintable offenses in the City, a greater percentage than 18-B attorneys. Unlike LAS, these defender agencies have specific maximum caseload limitations written into their contracts with the City.

For instance, as part of its contract with the City, Bronx Defenders has a case cap of 12,500 cases annually. There are 32 staff attorneys including all supervisors and the executive director. New attorneys in the office gradually build up a caseload and six months after starting have approximately 75 open cases. Senior attorneys carry between 75-95 cases at any given time. This translates to approximately 460 mixed cases per lawyer per year.

The New York County Defender Services (NYCDS) is located in Manhattan and opened in 1997. The office started with a caseload of 12,500 cases annually. The caseload is now up to 16,000; 80 percent of this caseload is misdemeanor cases and 20 percent are felonies. NYCDS attorneys have an average caseload of about 18-20 felony and 50 misdemeanor open cases. There is vertical representation in the office and each attorney has approximately 500 dispositions annually.

Brooklyn Defender Services must take 12,500 cases annually and accepts some walk-in clients. As per its contract with the City, Queens Law Associates (QLA) is required to take 15,000 cases annually; however, over the past two years they have actually handled 18,000 cases.

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<sup>392</sup> See, e.g., New York City Commission hearing transcript, p. 220.

<sup>393</sup> In other words, there are permanent arraignment attorneys in AR1, which is the primary felony arraignment part, and AR2, which is the primary misdemeanor arraignment part. There are a small number of cases brought by direct indictment, but the vast majority of cases will be arraigned in one of these parts. In the Bronx, Brooklyn, Manhattan and Queens, arraignments are heard from 8 a.m. to midnight at 6 hour shifts Monday through Friday. There are separate arraignment parts on weekends and holidays.

The Director testified that the only way it is possible for QLA to take the additional 3,000 cases is because of the decline in felony cases.<sup>394</sup> QLA is unique in that it is the only alternate defender agency that is a for-profit agency and lawyers are permitted to have a private practice in addition to their work at QLA.

The Neighborhood Defender Services of Harlem (NDS), which opened in 1990, is not considered an alternate defender agency and unlike the other trial level indigent defense providers, does not have specific caseload limits. Rather, NDS covers the service area of northern Manhattan, and handles between 3,300-3,500 cases a year. NDS is located in the neighborhood for which they provide services, so the organization accepts walk-in clients in addition to those appointed at arraignment. These “request for service” clients comprise approximately 30 percent of the office’s total caseload, and of these request for service clients, approximately 50 percent come in prior to their first court date. Neighborhood Defender Services has 14 criminal staff attorneys. At the time of our site visit, the office had recently lost two staff attorneys and was in the process of training four new staff. During that time, caseloads shifted to cover the cases of the departed attorneys, while the four new staff were trained. At that time, one supervising attorney said that he has an open caseload of 90-100 cases; however, he estimated that some lawyers in the office had as many as 140-150 open cases. The caseloads have now equalized and are significantly lower.

In Richmond County, or Staten Island, there is one primary provider of indigent defense services, Battiste, Aronowski and Suchow (BAS). All conflict representation and representation in homicide cases is done by 18-B attorneys and the Legal Aid Society has not had an office in Staten Island since BAS opened in 1997. BAS is required by contract to accept all non-conflict cases at arraignment, which averages to approximately 85 percent of indigent defense cases at arraignment, although they do not always keep all of the cases. BAS is appointed at arraignment regardless of a defendant’s income to provide representation at intake, and then those who are able to hire counsel do so. After subtracting post-arraignment cases that eventually become retained, they handle between 70-75 percent of the cases.

There are two alternate appellate defender organizations in New York City: the Center for Appellate Litigation, which handles appeals in the First Department, and Appellate Advocates, which handles appeals in the Second Department. The Office of the Appellate Defender handles appeals in the First Department and was created in 1988 and is a private non-profit office that started with special funding. The office submits vouchers on individual cases and there is no cap. Attorneys in the Office of the Appellate Defender with some experience are expected to file at least one brief a month. The Center for Appellate Litigation has 22 full-time appellate defenders and each lawyer is required to submit 14 substantive briefs a year, with 60 percent of the briefs appeals from jury trials.

Bronx Defenders and Neighborhood Defender Services take a holistic approach to providing indigent defense services. Staff provide comprehensive social service assistance to their clients and their clients’ families. For instance, they may provide short-term family counseling or a referral to a support group and outreach to other community-based support organizations. These organizations involve civil and criminal attorneys, social workers,

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<sup>394</sup> New York City Commission hearing transcript, pp. 440-441.

investigators and paralegals to provide a holistic defense. For instance, as part of the holistic defense approach, Bronx Defenders has an immigration specialist on staff, four civil lawyers who specialize in a variety of cases including immigration, housing, public benefits, civil rights and family court.<sup>395</sup> These defender agencies are primarily funded through the City of New York, however many of them receive fellowships or funding from private sources. Other alternate defender agencies may provide some of the services mentioned above, but none to the extent of Bronx Defenders and Neighborhood Defender Services, which are geared specifically towards providing holistic services to their clients and their clients' families in addition to their criminal defense work.

On the whole, we got the sense that turnover rates at alternate defender organizations are substantially lower than at LAS. We were told that this was due, in part, to the fact that salaries were more competitive at the alternate defender organizations than at LAS. However, we were also told that with the difficulty in negotiating budget increases with the City, many of the alternate provider salaries are equalizing with LAS salaries, if not falling behind. Also, unlike the alternate providers, LAS is unionized and thus salaries are increased on a regular basis to conform with the union contract.

#### **9.4.1 Training**

For the most part, training in these offices involves attendance for new attorneys at the NYSDA annual training and informal mentoring in the office, with additional trainings held in-house. The Bronx Defender's Office, for example, has a one year training program for all new attorneys with a supervisor and all of the support staff. The training is primarily in-house; however, they do rely on NYSDA and other bar associations' training as well. The office requires that for every felony case there are two attorneys appointed. There is also in-house training across disciplines that occurs on a regular basis. For instance, the social workers may train attorneys on how to spot a client's mental illness, or the immigration attorney may hold a training about deportation consequences.

As per their contract with the City, BAS is required to hire felony qualified attorneys only and therefore generally hire attorneys with at minimum five years of experience. With the decrease in felonies BAS sought, and was granted, permission to hire less experienced attorneys. Because of this, there has not been an extended training program. They will bring in speakers and CLE trainings to the office and the partners carry a reduced caseload so that they can supervise attorneys (each oversees four attorneys) and make themselves available for assistance. Similar to the Bronx Defenders, BAS requires two attorneys for trial, pairing a more senior attorney with a junior attorney.

### **9.5 18-B Assigned Counsel Plans**

There are two assigned counsel plan (ACP) administrators covering the five boroughs. One covers the 2<sup>nd</sup> and 11<sup>th</sup> Judicial Districts, which include Brooklyn, Staten Island and Queens.

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<sup>395</sup> New York City Commission hearing transcript, p. 80.

The other covers the 1<sup>st</sup> and 12<sup>th</sup> Judicial Districts, which includes the Bronx and Manhattan. Due to funding cuts initiated by the City, both offices have had to cut support staff in the last several years. Despite the fact that there is an assigned counsel administrator, one supreme court judge told us that she does not feel as though there is any recourse or anyone to talk with about problems with 18-B attorneys; this is unlike institutional providers where there is a supervisor to call.

Not only has the City shifted the caseload away from 18-B attorneys to the institutional providers by requiring LAS to handle 88 percent of the cases in the arraignment parts that they staff, but LAS recently took over all parole revocations from 18-B attorneys for \$2.82 million annually, which we were told amounts to one-third of what the City was paying 18-B attorneys to handle parole revocations. From 1995 to 2002 18-B attorneys were providing representation for between 23-25 percent of all fingerprintable offenses appointed in lower court. In 2003, the number of fingerprintable offenses in which 18-B were providing representation decreased by nearly 50 percent, and that number continues to decrease today. There are a number of complaints now from some institutional providers that their caseloads are excessive, and 18-B attorneys complain of the lack of arraignment shifts and the small number of cases they are able to pick up when they do have an arraignment shift.

One 18-B attorney in the Bronx observed that there has been an increase in the number of people on the panel since the rates were raised and they tend to be more experienced attorneys who are returning to the list. Another attorney said that his caseload has gone down since the rates went up because there are more people from the panel taking cases. He used to get two arraignment shifts a month but now a large number of attorneys get locked out of arraignment shifts each month and he may not get an arraignment shift in three months. In addition, he estimated that the number of cases that survive arraignment has diminished, from 15 on average a few years ago to five on average now.

We heard that a few 18-B attorneys who had previously left LAS returned after LAS' contract was increased to take 88 percent of cases. We were told this is because attorneys were not getting enough cases to make a living.

There are three significant issues regarding 18-B attorneys, which we think warrant mention: despite attorney qualification standards for getting on the panel, anecdotal evidence suggests that there are some attorneys who are not qualified that still make it onto the panel; in many instances there is no meaningful review of attorney vouchers; and attorneys not showing up in court, while not as significant of a problem as before the rates were raised, is still occurring.

### **9.5.1 Qualifications, Standards**

Through our site work and reviewing Commission testimony, there appears to be fairly stringent screening requirements for applying and acceptance onto the 18-B panel in New York City.<sup>396</sup> We were told that attorneys must have criminal practice experience, and that a number of recently admitted 18-B panel members are former ADA's or LAS attorneys. However, there was testimony at one Commission hearing from someone who formally sat on an 18-B screening

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<sup>396</sup> See, e.g., New York City Commission hearing transcript, p. 253.

committee who indicated that “oftentimes people who we thought were marginal would come in with letters from highly respected judges indicating that they were qualified to sit on the homicide panel.”<sup>397</sup> There is no debate that training requirements to stay on the panel are less stringent, although recertification is required. In fact, there are few formal training programs for 18-B attorneys and attorneys rely on criminal procedure or criminal law CLE’s for training as well as the annual New York City training provided by NYSDA.

To get on the panel in the 2<sup>nd</sup> and 11<sup>th</sup> judicial districts an attorney must first apply to the County Bar Association and then the County Bar Association will recommend the attorney to the ACP. The ACP has final say on whether an attorney is qualified for the panel, although we were told by the ACP administrator that he has only denied an attorney once, based on a prior conviction. In the 1<sup>st</sup> and 12<sup>th</sup> judicial districts, interested attorneys send an application for any one of the four panels (misdemeanor, felony, homicide or appeals) to the central screening committee. The committee reviews and sends the application to a committee member who then interviews the attorney. We were told by an attorney on the screening committee that there are no written qualifications but they want someone who has tried a number of cases. Attorneys in several boroughs told us that to get on the panel, attorneys must fill out a packet of information that includes references from judges and opponents from previous trials and writing samples.

Every year the ACP should be reviewing and recertifying one-third of all attorneys on the panel; however, we were told that the recertification process can no longer be done each year. When an attorney is recertified in the 2<sup>nd</sup> and 11<sup>th</sup> judicial districts, a recertification application is sent out to the attorney, letters are sent to attorney grievance committees, judicial questionnaires are sent to approximately 10 judges and there is an 18-member advisory committee, which undertakes the actual evaluation. At any time if the ACP administrator receives a complaint about an attorney he will review the claim.

An appellate lawyer from one of the alternate defender offices testified that “the vast majority of the cases that we handle are cases that employed 18-B lawyers at the trial level. And to be frank with you, I find that the quality of representation is fairly abysmal most of the time.”<sup>398</sup> A second lawyer from another appellate defender office agreed, “There is a dramatic difference in quality between the organized providers and the 18-B panel. That’s not to say that there aren’t some terrific 18-B attorneys. There are some who are great.”<sup>399</sup>

### **9.5.2 Review of Vouchers**

One supreme court judge in the Bronx told us that she reviews 18-B vouchers but very rarely cuts them. If she is sitting in the motion and conference parts it is very difficult to know what has gone on in the case and so it is hard to provide a meaningful review of the vouchers. We observed one judge signing vouchers prior to an interview and it did not appear that she was reviewing the vouchers, but rather just signing them as quickly as possible. One criminal court judge in Queens said that he just looks for anomalous billing and otherwise he signs off on the voucher “because he has no idea what the attorney did.” “That concerns me sometimes.”

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<sup>397</sup> New York City Commission hearing transcript, p. 355.

<sup>398</sup> New York City Commission hearing transcript, p. 323.

<sup>399</sup> *Id.* at 332.

We were told by the assigned counsel administrator in the 2<sup>nd</sup> and 11<sup>th</sup> judicial districts that he is not allowed access to how much money each attorney is paid, or how much is paid out per voucher. We were told that this is not his function and that tracking how much is spent on 18-B representation is the City's responsibility. He only receives information on the total amount spent at the end of the year so that he can fill out the UCS 195 form, which, incidentally, was not submitted directly to the comptroller's office, but rather a UCS 195 form with the total amount spent on indigent defense in all five boroughs was submitted by the Criminal Justice Coordinator. In fact, the assigned counsel plan is not given a budget at the beginning of the year.

### **9.5.3 Attorneys Not Showing Up In Court**

One supreme court judge in Manhattan told us that qualitatively the increase in rates has made a difference. Appointed counsel are more eager to take cases, they have cut down on the number of cases they take and thus spend more time on each individual case and are more responsive when judges call them to perform extra work on a case (e.g., to perform additional research on a case). In addition, attorney no-shows in court, which we were told was a big problem before the rates were increased, has gone down. Despite what this judge told us about no-shows, during afternoon court observation in his court, we saw two attorney no-shows out of approximately 6-7 attorneys. In one instance it was a private attorney who did not show up on a probation hearing, however, when one 18-B attorney did not show up the judge adjourned the case to the next day, called the attorney from the bench and was told by his secretary that the attorney was in another court on another matter at that time.

We were told by one judge in Brooklyn that there are occasionally problems with 18-B attorneys not appearing for court dates. When this happens, judges, or his or her staff, must call around to those lawyers who failed to show up. If the assigned lawyer is not available for appearance, the court will draft another 18-B attorney, with no knowledge of the client's case, to appear on behalf of the defendant. While one judge acknowledged that representation by an assigned attorney with no knowledge of the case is not much better than a pro se client, she did state that, "no good can come from a judge dealing with an unrepresented defendant." During court observation, however, we saw cases being called for trial with the defense present, but the assistant district attorney was absent. These cases were given a new trial date.

Some of the information regarding 18-B attorneys that we gathered during our site work is inconsistent with a more in-depth study we conducted in 2000. A more detailed analysis is needed to draw definitive conclusions about the changes to the 18-B program since that time.

## **9.6 Other Factors Affecting Indigent Defense in New York City**

### **9.6.1 Criminal Case Trends**

The effect of the "quality of life" crimes can best be seen through data maintained by the New York State Unified Court System: Criminal Court of the City of New York, regarding



summons filed.<sup>400</sup> From 1991 to 2004 there was a dramatic increase in summonses filed from 98,278 in 1991 to 581,734 in 2004, or an increase of 491 percent. The largest annual increase occurred from 1999 to 2000 when the number of summonses filed increased by 53 percent. In addition, statistics show that in 2001, 98 percent of summonses were disposed of at arraignment and we believe it is a similar percentage today.

In her 2004 annual report, Judge Newton reports that there were 319,306 non-summons part cases arraigned citywide, 385,627 arrest/DAT (desk appearance tickets) dispositions and 581,734 summonses filed. She also reported that there were only 727 trials in criminal court citywide, 280 by jury trial and 447 by bench trial. Of the 319,306 arraignments conducted in 2004, 55,122 were felonies and 263,126 were misdemeanors. Thus approximately 17 percent of the non-summons part filings were felonies and 83 percent were misdemeanors. Data also discloses that 163,664, or 51 percent, of all the cases disposed were disposed of at arraignment.

TSG found reliable case statistics in New York City going back to 1989, which we have used as a starting point for many of our comparisons. Excluding summons parts, the data illustrates that after a peak during 1997-2000, total arraignments and total filings in New York City have remained fairly consistent over the last 25 years despite a dramatic decline in felony filings.

Between 1989 and 2004, the total number of criminal case filings fluctuated from a low in of 267,786 in 1993 to a high of 400,886 in 1998, currently down to 319,306 in 2004. During this same time period felony filings decreased by 58 percent while misdemeanor, violation and other filings increased by 39 percent.

Of all the cases arraigned in 2004, 17 percent were felonies and 71 percent were misdemeanors, the remainder were violations and others.

From 1991 to 2004 the number of summons filed exploded by 491 percent.

Of the cases begun by summonses in the year 2000, 95 percent of were disposed of at arraignment.

By the year 2000, 18-B attorneys were disposing of 69 percent of all misdemeanor cases at arraignment. This is an increase from 48 percent in 1996.

The crime trends in New York City reflect the arraignment and filing data above, illustrating the drop in felony arrests from 1994-2004 and the increase in misdemeanor arrests.

According to the New York State Division of Criminal Justice Services (DCJS), from 2000 – 2004 the overall crime index for offenses in was down 21 percent, violent crime declined by 27 percent and property crime was down by 19 percent.

With regard to arrest data, from 1994 to 2004 felony drug arrests in New York City were down 43 percent over this time period and violent felony arrests were down 47 percent. On the other hand, during this same time period, the total number of misdemeanor arrests was up 12 percent in New York City and misdemeanor drug arrests were up 46 percent.

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<sup>400</sup> *Criminal Court of the City of New York, Annual Report 2004*, 17-19.

We were told by a senior-level defender in Manhattan that because of the serious drop in felony cases, prosecutors are now filing felonies that would not have otherwise been filed ten years ago. He suggested the same problem occurs with misdemeanors.

### 9.6.2 Pleading at Arraignment

One consistent comment we heard over the course of our site work in each of the five boroughs is that large percentages of misdemeanor, violation and infraction cases plead out at arraignment, often times after a lawyer has met with his or her client for only a couple of minutes.<sup>401</sup> Attorneys are generally only armed with the charging document, defendant's rap sheet and the "CJA form."<sup>402</sup> During these few minutes, attorneys are expected to assess whether to recommend the defendant plead or not, consult with the defendant and fully advise him or her of the consequences of pleading to a criminal charge, including all of the collateral consequences that come along with having a criminal conviction, such as housing, state and federal assistance and immigration issues. We were told that the pressure in New York City to dispose of cases is so strong, as a result of the sheer volume of cases that the courts process in any given day, that the focus becomes on pleas only.

One criminal court judge in Manhattan, who sits primarily in an all purpose part, but sits in the arraignment part eight weeks a year, told us that she has approximately 120-170 cases a day on her calendar, which allows approximately 3-5 minutes per case. The result of this limited time is defendants not understanding the consequences of a guilty plea, and in some cases not even understanding that what they have plead guilty to is a crime. For example we observed a judge in Manhattan informing a defendant at arraignment "this is not a crime but a violation, how do you plead?" There is no question, she said, that defendants walk out of court and have no idea what they just agreed to.

To illustrate the problem: in 2004, 319,306 defendants were arraigned citywide in criminal court on desk appearance tickets (DAT's) and arrest cases. Of those, 163,664 cases, primarily misdemeanor or other low-level offenses, were disposed of during arraignment, for a total of 51 percent of all arrest cases arraigned.<sup>403</sup> In addition, there were 452,434 summons arraigned in 2004.

Reflecting the quantitative data, many attorneys and judges get the accurate sense that approximately half of all non-felony cases plead at arraignment. In the Bronx, for instance, we heard several estimates that 50 percent of cases are disposed of at arraignment. One LAS attorney in Manhattan told us that about 50 percent of the cases he picks up at arraignment are

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<sup>401</sup> Specifically, we were told by one 18-B attorney in the Bronx that at arraignment shifts most minor misdemeanors including marijuana, prostitution, violations, shoplifting first offense and vehicle and traffic violations and misdemeanors are plead at the time of arraignment.

<sup>402</sup> The "CJA form" is a form created by the New York City Criminal Justice Agency (CJA), which contains a recommendation to the court as to whether a defendant should be held without bail, have bail set or released on his or her own recognizance. The CJA form contains a good deal of information about the defendant, including, as discussed below in section 9.6.5 regarding eligibility determinations, the defendant's financial information.

<sup>403</sup> *Criminal Court of the City of New York, Annual Report 2004*, at 12, at <http://www.nycourts.gov/courts/nyc/criminal/NYCCD-Annual-Report-2004.pdf>. "Almost all of these dispositions involved misdemeanor or other petty offenses." *Id.* at 17.

disposed of. The same is true in Queens, where we were told that 50 percent of misdemeanors and almost all violations are disposed of at arraignment.

To address the large volume of low-level offenses, the Legal Aid Society Office in Manhattan has five permanent arraignment lawyers who staff arraignment parts to alleviate the burden of assignments on other staff attorneys. These attorneys only take misdemeanor arraignments and we were told that they “know the going rate of a case” on misdemeanors and violations and therefore try to take only those cases that can be disposed of at arraignment. Despite the goal of having vertical representation, those cases that cannot be disposed of are reassigned. We were told by one criminal court judge in Manhattan that LAS is arraigning too many cases and the motion practice is lacking because LAS cannot keep up with the volume of cases.

In Brooklyn, one judge estimated that approximately 50 percent of non-felony cases are disposed of at arraignment and that, “[t]he volume would crush the all-purpose parts if 50 percent did not settle at arraignment.” She also noted that it is easy to identify the LAS attorneys in her courtroom who are “tired” and observes that they will plead more cases at arraignment than others.

Because so many cases plead at arraignment, litigation and motion practice has changed in New York City, with very few pretrial motions filed, especially in misdemeanor cases. For instance, one judge in Brooklyn told us that there is very little pretrial motion practice. An attorney in the alternate defender agency in Queens told us that they “don’t really file” pretrial motions in misdemeanor cases and that they “don’t really try misdemeanors” at all.

### **9.6.3 Collateral Consequences**

There are a number of collateral consequences stemming from not only a criminal conviction, but arrests as well, that many defense attorneys and defendants are not aware of.<sup>404</sup> And these consequences arise from not only felony convictions but also misdemeanors and non-criminal violations,<sup>405</sup> which is particularly applicable to New York City where there has been an explosion of misdemeanor and non-criminal violations in the last ten years. Collateral consequences include issues related to a lawful immigration status; employment; public housing; public benefits; child custody and visitation rights; a driver’s license; and the right to vote.<sup>406</sup>

Collateral consequences of a criminal conviction are of particular concern in New York City as such a high percentage of cases plead out at arraignment and defense counsel spends very

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<sup>404</sup> See The Bronx Defenders, *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records*, 1 (March 2005). For example, arrest records are available when large corporations and small businesses perform background checks on job applicants and landlords increasingly run background checks as well. Also, “data sharing among government agencies has increased exponentially, and there is widespread availability of criminal history data despite various sealing regimes.” *Id.* at 1.

<sup>405</sup> For instance, “two convictions for turnstile jumping make a lawful permanent resident non-citizen deportable. A conviction for any crime bars a person from being a barber, boxer or bingo operator. Simple possession of a marijuana cigarette cuts off federal student loads for a year.” *Id.* at 1 (internal citations omitted).

<sup>406</sup> See *id.*; see also Section 7.8 above for a more detailed discussion of collateral consequences.

little time with their clients before a plea is entered. A number of people noted during our site work that it is virtually impossible for defense counsel to explain in detail to their client every possible consequence of a criminal conviction. The Attorney-in-Chief of the Legal Aid Society commented in his Commission testimony that “given all the collateral concerns of doing a misdemeanor, it takes more time than you would think.”<sup>407</sup> In addition, there is a very large immigrant population in New York City and deportation is one consequence of a criminal conviction for certain offenses.

A prominent New York City attorney who worked for LAS in the past noted in his written testimony to the Commission that because of the shift in crime from felonies to misdemeanors, where before attorneys worried about how much time their client was going to get, the new concern has shifted to the collateral consequences of pleading to a misdemeanor or violation:

The collateral consequences of criminal convictions has [sic] grown rapidly. So the balance has shifted from the primary harm to a client almost always being the amount of prison time he or she is facing, to the collateral consequences of a conviction. These include a myriad of penalties such as deportation, an entire family’s loss of public housing, expulsion from school, ineligibility for student loans and the disclosure to prospective employers of even violation convictions. Of these, deportation has increased to epidemic proportions. Our immigrant population is now the largest it has been since the turn of the last century. Convictions that twelve years ago would not have resulted in deportation, do today. And in the post 9/11 climate, a much higher percentage of those eligible for deportation, are, in fact, being deported.<sup>408</sup>

One judge in Queens observed that attorneys need to be more conscientious about collateral consequences, particularly immigration issues. She has seen a number of cases where a defendant has asked to withdraw a plea because they are facing deportation. Attorneys “need to be more cognizant regarding immigration status; it goes to effective assistance.”

An advocate from immigrant rights noted in her Commission testimony that many undocumented or legal permanent resident non-citizens do not know that if they plead guilty, they will be subject to deportation proceedings or they will be unable to apply for citizenship or to change their status to become a permanent resident.<sup>409</sup>

In addressing the issue of collateral consequences, the Director of Bronx Defenders said, “when a plea to disorderly conduct makes a client presumptively ineligible for New York City public housing, as it does here, or where two convictions for turnstile jumping makes a lawful, permanent resident non-citizen deportable, then something has got to change and indigent defense needs to look different.”<sup>410</sup>

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<sup>407</sup> New York City Commission hearing transcript, p. 64.

<sup>408</sup> New York City Commission written testimony of Russell Neufeld (February 11, 2005).

<sup>409</sup> New York City Commission hearing transcript, p. 427.

<sup>410</sup> *Id.* at 70.

#### 9.6.4 Effects of the District Attorneys' Practices

Much like many counties in upstate New York, District Attorney discovery practices are an issue in most of the boroughs of New York City. Failure to provide defense counsel with timely, required discovery hinders counsel's ability to effectively advocate for his or her client. What we gathered from our site work is that discovery in Queens and Manhattan is particularly bad.

For example, we were told that discovery in misdemeanor cases in Queens is "supposed to be open file." For those out-of-custody misdemeanors that survive arraignment and the first hearing date after arraignment without being disposed, defense counsel may get discovery at the next court date after that, which is 30-45 days after arrest. In felonies, defense counsel will get the defendant's statement at arraignment, but do not receive discovery until the preliminary hearing date, despite the fact that it should be received by the hearing date. These practices prevent attorneys from disposing of cases sooner and defense counsel must take SCI pleas without discovery, generally having only the lab report. We were told that there was an agreement at some point with the DA and Queens LAS that the DA would provide discovery in the SCI and felony waiver parts, but this has not happened. There has been, to our knowledge, no follow-up on this.

In Manhattan, discovery has been called "terrible" "the worst" – attorneys complain they do not get back anything of substance and must "fight tooth and nail" to get what they are entitled to. A judge in Brooklyn noted that discovery there is far more extensive than in Manhattan, and we heard several similar observations from attorneys and judges throughout New York City.

In the Bronx, we were told that sometimes the DA's do not let defense counsel know about conflict witnesses until trial; and one legal aid attorney suggested that it appears that the DA gets to trial and has not looked at the case. An 18-B attorney told us that he has a homicide case that is over two years old and he is just getting some discovery now. He did go on to say that the District Attorney in the Bronx is much more fair than in other jurisdictions, particularly in Nassau County where he formally practiced, and said that attorneys need only request certain discovery materials orally in the Bronx, where in Manhattan they would have to file written motions.

An 18-B attorney in Staten Island told us that the criminal court judges have been ordering open file discovery to stream-line the process, but in supreme court there is still a limited amount of discovery and therefore a more substantial motion practice. We were also told that there are no more preliminary hearings and when there is a preliminary hearing, it is "done only in desperation."

According to the testimony of the supervising judge in Brooklyn, there is "discovery by stipulation" in which, after arraignment when a case is transferred to an all-purpose part, judges will ask both defense counsel and the prosecutor whether they want discovery by stipulation, both agree, and defense counsel receives police reports, any scientific reports, grand jury

testimony, sometimes witness names, etc.<sup>411</sup> This process started 10-15 years ago and according to this judge, “discovery is open and free and it’s part of the process.” One legal aid attorney, however, said that in Brooklyn it takes approximately 30 days after arraignment to get open file discovery, but that in Manhattan “we do not get open file discovery, we don’t get discovery until we are in a trial part or we are about to commence a suppression hearing.”<sup>412</sup>

In addition issues of timely discovery, we were told of another prosecutorial practice in Queens that, may be valid under the law, but is unfair to defendants. In Queens, the DA’s office will overcharge a defendant, ask him or her to waive their right to a grand jury indictment within 120 hours of arrest or otherwise be released, and if he or she does not, go to the grand jury to indict the defendant immediately and set the case for trial, often on the most serious charge for which the defendant was originally arrested. It was reported to us that this has resulted in effectively forcing defendants to waive their right to a grand jury indictment and wait in custody for an additional 30 days while a plea is negotiated. In addition to this, it is difficult for defenders to get discovery and therefore defense counsel is working with a limited knowledge of the case during the 30 day period. Defense counsel are forced to make a decision upfront without the police report as to whether to advise the defendant to waive their right to a grand jury indictment or go to supreme court for trial. One 18-B attorney lamented that “you don’t know how bad witness statements are when you take a plea.”

Another area where DA practices have a significant impact on the way defense counsel practices is whether counsel feels that if they request a preliminary hearing, their client will be penalized in some way. We heard a number of complaints about the DA practices in Manhattan that result in very few preliminary hearings. One LAS attorney told us that he has had one preliminary hearing in five years; another attorney has not had one in three years.

A new DA came to Staten Island in January 2004 and one judge noted that he is indicting more cases (some of which the judge thinks are boarder-line indictments) and the plea policies are stricter, which causes some cases to last longer than they would have before. One of the partners from the institutional provider there said that the new DA’s practices have created higher caseloads for his office and stiffer pleas for defendants, as adjournments in contemplation of dismissal (ACD’s) are almost never offered, where they had been before.

Finally, we were told of issues related to waiver of the right to an appeal. Defendants in New York have the right to appeal after conviction if that conviction resulted from a plea of guilty.<sup>413</sup> Certain rights are automatically forfeited upon a guilty plea; however, a valid waiver of appeal upon a guilty plea does not affect defendant’s right to appeal the judgment, rather it forecloses certain categories of claims that might otherwise have been raised on appeal. All waivers of appeal must be made on the record, and must be voluntary, knowing and intelligent. There are certain issues that survive a defendant’s voluntary waiver of the right to appeal including: the constitutional right to a speedy trial, the legality of the sentence, competency to stand trial, jurisdictional issues concerning waiver of indictment, whether a plea was knowingly,

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<sup>411</sup> New York City Commission hearing transcript, pp. 33-34.

<sup>412</sup> *Id.* at 60.

<sup>413</sup> CPL 450.10.

intelligently and voluntarily entered, whether the defendant received effective assistance of counsel and whether there was a delay in sentencing.

During our site work we were told that if a defendant in New York City entered a guilty plea prior to trial, he or she must waive the right to an appeal following the guilty plea, rather than have an absolute right to appeal. We were told this procedure was developed by the District Attorney's Office as a condition of accepting a guilty plea and a sentence that was mutually agreed to by the defendant and prosecutor. We were also told that this is a serious problem in many cases because the defendant does not know when he or she pleads guilty at trial, because of the failure of the judge to inform the defendant, that they have lost the right to appeal.

The director of LAS' Appeals Bureau believes that only 2-3 percent of all felony cases result in trial. And while the total number of felony arrests has in fact gone down over the years, the felony pleas have risen as well, due to the DA's policy of filing extremely high charges and reducing those charges for the purpose of a plea if the defendant is willing to waive the right to appeal. This results in fewer felony trials and felony appeals.

### **9.6.5 Eligibility Determination**

What was apparent from our site work is that no one in New York City really knows who is doing indigency screening and there are no uniform standards or guidelines for determining eligibility. In addition, we were told from several defenders that despite the fact that a defendant may not be eligible for appointment of counsel, judges will not remove the defender if it would cause a delay in the case or if there is a disposition that day.

What appears to be happening in most courts in New York City can be summed up by one judge's testimony at a Commission hearing: "Legal Aid and the defender organizations make a primary determination, but the judges are directed and instructed to look at the CJA reports, inquire about the defendant's ability to pay, and it is their job to make the ultimate decision."<sup>414</sup>

There is the New York City Criminal Justice Agency (CJA), which is responsible for interviewing every in-custody defendant in each of the five boroughs to collect information and make an assessment of the risk that the defendant would not show up if released on bail or on their own recognizance. They screen approximately 290,000 defendants annually. Unlike CJA, other similar organizations in states we have visited across the country also screen defendants for eligibility. After a detailed interview with each defendant a CJA report, which contains their recommendation for bail or release on recognizance (ROR), the defendant's rap sheet and the complaint are handed to all parties, including the DA, defender and judge. The information that CJA collects includes financial information such as income, whether the defendant is responsible for supporting others, if he or she receives state or federal assistance, employment information, etc. Some of this information is included in the CJA report, and a number of individuals said that judges use this information in making indigency determinations. One LAS attorney in Manhattan told us that she looks at the CJA report in addition to talking with the client to make a

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<sup>414</sup> New York City Commission hearing transcript, p. 37.

determination. One institutional provider in Queens said that they primarily use the CJA report to make eligibility determinations.<sup>415</sup>

In the Bronx, court employees interview defendants for financial eligibility prior to arraignment. We were told by one judge that this information can be partially verified and is given to the court prior to arraignment. He told us that judges will occasionally make an inquiry about financial eligibility if the defendant has a “good” job.

Often times 18-B attorneys are expected to conduct eligibility screening. One 18-B attorney in the Bronx told us that he thinks that screening has already been done by the time he is assigned a case at arraignment, although he went on to say that both the attorney and judges look at the available financial information and make a determination. When making a determination, attorneys and judges have the defendant’s rap sheet, criminal court complaint and CJA report, the latter containing detailed financial information where available.

In Staten Island, BAS does the initial screening for eligibility. If a defendant is denied counsel, he or she may appeal the decision to the County Bar Association and will be required to show proof of income. On occasion the judges will screen defendants. We were told that BAS staff have a computer right in the courtroom so that the attorney can screen conflicts immediately and have the case reassigned to the 18-B duty attorney at arraignment. This system is also available in other criminal courts in the City.

One criminal court judge in Manhattan told us that the defense attorney accepting cases at arraignment, whether LAS or an alternate defender, should check eligibility at arraignment. If there is a question as to eligibility, she will have the client bring back tax information at the next hearing. Another supreme court judge told us that LAS is doing indigency screening. Someone at CJA told us that it is the arraignment judge that makes the ultimate determination, and there are no indigency standards in New York City. We talked to one LAS attorney who told us that staff attorneys screen for eligibility and that they have the Federal Poverty Guidelines to look at; however he said he uses his gut reaction primarily. The income guidelines are applied differently depending on whether the charge is a misdemeanor or felony.

What is clear from our site work is that eligibility screening is done sporadically, when it is done there are no uniform guidelines and the person doing the screening changes depending on the court. In addition, most defendants will receive the assistance of assigned counsel at arraignment since such a large majority of cases are resolved at this time and judges need to move the calendar along. So counsel is almost always appointed regardless of whether the defendant is eligible, unless a lawyer is retained to represent the defendant or the defendant chooses to appear pro se.

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<sup>415</sup> According to the Commission testimony of one member of the Queens County Bar Association, at some point in the 1990’s a second form was added to the forms filled out by CJA employees during their interviews with defendants. The form asked an additional six or seven questions about financial eligibility for public defense, and recommendations were made by CJA personnel based on this information. We did not hear similar information during our site work. *See* New York City Commission hearing transcript, p. 259.



### 9.6.6 Client Contact

One thing we learned from our site work is that attorney-client contact is a serious problem in New York City, particularly for in-custody clients. The jail located at Rikers Island is time consuming to get to and most attorneys, both institutional providers and 18-B, opt to visit clients in the court houses, either through submitting a motion for habeas corpus to bring the defendant from custody to the courthouse for an “attorney visit” or before or after a hearing in the court pens.<sup>416</sup> During our site work we met only a handful of attorneys who have been to Rikers to visit clients and while there is a video teleconferencing system in some of the criminal courts, we did not find that it is utilized often. In addition to Rikers Island, there were borough jail houses located adjacent to the court houses; however the borough jails in the Bronx, Brooklyn and Queens have closed in recent years.<sup>417</sup> These jail houses were convenient for defenders to meet with their clients, but now defenders rely heavily on court house visits.<sup>418</sup>

During his testimony at a Commission hearing one former inmate from Kings County told of his experience meeting with his attorney, terming it “bullpen therapy.” “Bullpen therapy is when you are sitting in the bullpen to see your lawyer. They usher you in the court and the lawyer speaks to you for a few minutes and then he is representing your life and he keeps on going out and you go back into the bullpen, and you are back in Rikers Island, or at that time in the other county jails.”<sup>419</sup>

During her testimony before the Commission, one Legal Aid attorney said that there are staff paralegals that work in the jails on Rikers Island, or are in other city jails, to facilitate communication with clients.<sup>420</sup> This is particularly helpful because calls from Rikers are limited to six minutes.<sup>421</sup> LAS paralegals that work in Rikers have offices, so that when attorneys need to have a more lengthy call with their clients, the client can call from the paralegal’s office.<sup>422</sup>

An 18-B attorney in the Bronx with over 20 years of experience told us that he sees clients on court dates, either before or after a hearing, in the court pens. The court pens consist of 4-6 tables with other lawyers and defendants around. While he said that he has never had a defendant complain about lack of privacy, he said ideally he would like more privacy. If he wants to see a client on a non-court date, he will request that the judge bring his client in for an attorney visit.

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<sup>416</sup> As an attorney from the Bronx County Bar Association testified, “The problem that I experienced in the past with going out to Rikers Island is that it would just take so long to get onto the Island and then so long for the guards to produce a client to a visiting room. Often times I was told and quite frankly in my experience, I have had a number of occasions where I have actually gotten to the Island where I only would turn and leave. I left because I was told there was not an officer available to monitor the visiting room.” New York City Commission hearing transcript, p. 246.

<sup>417</sup> New York City Commission hearing transcript, pp. 59-60.

<sup>418</sup> *Id.* For example, one institutional defender noted, “When they closed the Brooklyn House of Detention – our attorneys used to be there more because it is right around the corner.” Albany Commission hearing transcript, p. 189. This same witness testified that “I don’t think attorneys, generally speaking, go to Rikers Island.” *Id.*

<sup>419</sup> Albany Commission hearing transcript, p. 246.

<sup>420</sup> New York City Commission hearing transcript, p. 59.

<sup>421</sup> *Id.* at 62.

<sup>422</sup> *Id.*

The alternative provider in the Bronx said that attorneys do not visit clients at Rikers Island or on “the boat,” an English warship converted to a jail, located on the east river. We were told that attorneys in the Bronx LAS do not go to Rikers Island and that corrections personnel will produce the defendant at the supreme or criminal court upon an attorney’s request, but this is not done often.

In addition to Rikers, there is the 881-bed Manhattan Detention Complex, located downtown near the criminal courthouse, where defendants may be kept after arraignment and bail has been set to see if the defendant is able to post bail and is released before their next court date. We were told that LAS attorneys in Manhattan do visit their clients in the Manhattan Detention Complex but not often at Rikers.

In Staten Island the criminal court facilities are very old and the building is antiquated. There is a serious lack of interview space to speak privately with clients and attorneys must interview all defendants in the same room. One institutional defender in Staten Island commented in his testimony before the Commission that, “the real problem is in that Criminal Court, there is no interview space; there is no place where you can sit down with your client and have a confidential conversation with them.”<sup>423</sup> In addition, defendants may be handcuffed to the stairways, where conversations with attorneys take place. We were told that from Staten Island, Rikers is not easily accessible, and it is easier to speak to a client either on a court date or have a client produced for an attorney visit, again, without any privacy.

Client contact with out-of-custody clients is not much better. One first year attorney at the Manhattan LAS office told us that sometimes attorneys are given an out-of-custody client from the permanent arraignment attorney and will not see those clients for a few months. One criminal court judge in Queens told us that “many times the attorney has not spoken to the defendant before the first appearance after assignment.” An 18-B attorney told us that there are attorney conference rooms in the Manhattan Criminal Court and the Bronx Supreme Court to meet with out-of-custody clients; however, there is no private space to meet with clients.

#### **9.6.7 Ancillary Services: Experts, Investigators and Interpreters for 18-B Attorneys**

What we gathered from our site work is that attorneys are not consistently requesting experts, investigators and out-of-court interpreters in New York City. To receive money for experts, judges must sign a voucher order authorizing experts and investigators for 18-B attorneys. During our site work we heard from several judges throughout the five boroughs that very few 18-B attorneys request funds for experts and investigators in misdemeanor cases.

For example, one judge who sits in Manhattan criminal court told us that attorneys infrequently ask for experts and primarily ask on felony cases, not misdemeanors. Another judge in Staten Island told us that for the most part he approves requests for experts and investigators; however, 18-B attorneys do not generally submit many requests and in felony cases there are requests in only a quarter or a third of cases, usually murder cases where a defendant has a

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<sup>423</sup> New York City Commission hearing transcript, p. 385.

psychological history or in sex crime cases. In Queens, one criminal court judge who has been on the bench for seven years told us that “I don’t think I’ve seen an expert hired in a single case in criminal court.” He did note that defense counsel request experts in felony trials. Another criminal court judge, also in Queens told us that in her four years on the bench she has received maybe four requests for investigators or experts in a misdemeanor case.

Similarly, we heard that attorneys do not often request out-of-court interpreters. A judge in Queens said that after seven years on the bench he has never had a request for an out-of-court interpreter. Attorneys, for the most part, interview defendants in court, with the court interpreter. One 18-B attorney in Queens did say that he relies on attorney friends who are bilingual or his wife to interpret outside of court.

We also heard complaints from several court-appointed attorneys that getting approval for experts and investigators is difficult. For instance a very experienced 18-B attorney in Staten Island told us that it is somewhat difficult to get experts and investigators and attorneys must “jump through hoops” to get approval. We were told that in Queens, 18-B attorneys are not getting approval for requests for experts and investigators. If a request is granted, judges will not go above the cap except in unusual cases. One 18-B attorney told us that attorneys must pick which judge they go to for the request and there are some judges who cut vouchers, will not approve investigators or are very slow in signing vouchers. One judge said that he “tr[ies] to be sparing” about approving investigator requests.

## **9.7 New York City Conclusion**

Following our study of indigent defense services in New York City, we have concluded that many indigent defendants are not being provided meaningful and effective assistance of counsel in accordance with the requirements of state and federal law. Much of the story in New York City is similar to what we found in the rest of the state, but there are some distinct differences.

The total City expenditure for indigent defense services in 1994 is similar to what was spent in 2005; however, the number and percentage of felony cases is clearly less today. The expenditure levels have remained fairly constant due to a significant increase in the number of misdemeanor and infraction cases over the last ten years. This is due, in part, to the law enforcement and City government policy on crime, which changed in the mid-1990’s, creating a strong emphasis on “quality of life offenses.” This shift in law enforcement theory has caused the number of minor misdemeanors, infractions, and other offenses to increase significantly and the criminal court system was not provided with additional funding necessary to provide meaningful and effective representation to all indigent defendants for whom counsel is required by state and federal law.

Also since the early 1990’s, the federal, state and City governments enacted a number of provisions that place serious collateral consequences on defendants who are arrested, plead guilty to an offense or are found guilty by the court or a jury. These collateral consequences have changed criminal defense practice in New York City. Unlike ten years ago, when defense

counsel's main task was to assure that each indigent defendant received meaningful and adequate representation during the course of the criminal procedure, today counsel must also advise and represent each indigent defendant on the collateral consequences of a criminal conviction.<sup>424</sup> While the effects of collateral consequences exist throughout the state, they are enormous in New York City, given the high percentage of cases that are resolved at arraignment and the fact that defense counsel spends merely minutes with a defendant before a guilty plea is entered at arraignment. Also, the fact that, on a daily basis, defense counsel in the criminal courts of New York City spend very little time with many of their clients at arraignment raises serious ethical concerns for counsel as well as questions regarding effective assistance of counsel.

When the City became aware of the likelihood that the state legislature would substantially increase the hourly rate for 18-B attorneys in 2003, it signed a contract with Legal Aid requiring LAS to provide representation in 86 percent of all non-conflict indigent defense cases in the arraignment shifts that it staffs. After visiting all of the borough offices of the Legal Aid Society's Criminal Defense Division we have concluded that many of the legal aid attorneys have overwhelming caseloads and inadequate supervision, training, support and administrative staff. We believe that requiring Legal Aid to now handle 88 percent of cases in the arraignment shifts it staffs coupled with the fact that LAS has not received an increase in its Criminal Defense Division baseline budget since 2003 and the fact that so many cases are processed at arraignment may, in the future, raise ethical concerns for LAS.

In terms of funding, the effect of requiring Legal Aid to accept 88 percent of all non-conflict indigent defense cases in the arraignment shifts that it staffs in large part accounted for a total local expenditure reduction for the City from fiscal year 2004 to fiscal year 2005 of almost \$24 million, or a 14 percent reduction in the total City's indigent defense expenditures during this time period. While the City's total local expenditures were reduced by 14 percent (\$166,132,905 in fiscal year 2004 to \$142,241,508 in fiscal year 2005), at the same time the City received over \$62 million over two years in state money through the state's ISLF contribution from fiscal years 2004 and 2005.

As discussed previously (see Chapter 5.9), it is understandable that a number of counties facing local budget problems would look for options that would reduce the total impact of the increase in 18-B compensation rates by shifting some of the 18-B cases to new or existing institutional providers. However, this shift in appointments from 18-B attorneys to an institutional provider should require sufficient additional funds to those providers so that they can continue to provide meaningful and adequate representation for these additional cases. It is our view that LAS has not been sufficiently funded given its present caseload under the new contract.

After visiting all other trial-level alternate providers in New York City, we have concluded that the City has not adequately increased their funding since the offices opened in 1996 and 1997. The money allocated for staff salaries in the original contracts with the alternate providers, which also limit the number of cases each organization may handle, exceeded those of

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<sup>424</sup> As discussed above in section 9.6.3 of this report, collateral consequences include such things as deportation, a family's loss of public housing, expulsion from school, ineligibility for student loans and the disclosure to prospective employers of even violation convictions.

LAS and were sufficient to attract experienced lawyers. However, it was reported to us that there have been no significant salary increases for the last four years, and the alternate providers now fall below comparable salaries for LAS. Furthermore, primarily because there has been only a small increase in the alternate providers' budgets over the years, the organizations have lost some of their supervisors and support staff. Caseloads have also increased beyond an acceptable weighted standard and there is a substantial need for additional training.

The City's decision in the mid-1990's to add alternate providers to decrease the caseload of LAS with no measurable standards, and the fact that most of the alternative providers were former employees of LAS, has caused severe tension among the heads of all the institutional providers including LAS, as they all compete for City funds that are not nearly sufficient to assure meaningful and adequate representation to indigent defendants throughout the City. The result is that there is no longer a strong, single voice advocating for improved indigent defense in the City.

There are many individuals who are convinced that over the last decade, the City has been far more concerned with "who can do it cheapest" and much less concerned about adequate quality of representation. Many public defender advocates in the City feel that there should be a substantial increase in state funding and that a statewide commission should be created that would include New York City. These steps would help to assure independence of the defense function from the financial providers.

## CHAPTER 10: FINDINGS

### 10.1 Statewide Findings

- 1) New York's indigent defense system is in a serious state of crisis and suffers from an acute and chronic lack of funding. Every day - and for years - the dysfunctional system subjects indigent adults and children across the state to a severe and unacceptable risk of being denied meaningful and effective representation in violation of their state and federal right to counsel.
- 2) The current indigent defense "system" is a haphazard, patchwork composite of multiple plans that provides inequitable services across the state to persons who are unable to afford counsel. The multiple plans, created by 62 counties since 1965 pursuant to Article 18-B of the County Law, not only lack uniformity and oversight, but often fail to comply with the requirements of the enabling statute. The result is a fractured, inefficient and broken system.
- 3) New York's indigent defense system currently fails to conform with each of the American Bar Association's Ten Principles of a Public Defense Delivery System (see *Appendix C*).
- 4) It is our unanimous opinion that no structural changes in the indigent defenses system can be implemented, no mandatory and enforceable performance standards established, no statewide training developed and no substantial efforts undertaken to meet the state and federal right to counsel requirements, without a substantial infusion of additional funds to the state's indigent defense system.
- 5) It is further our opinion that the state of New York has a constitutional responsibility to provide those additional necessary funds. This funding should be provided through a general fund appropriation. The counties, who are currently providing 64 percent (or 80 percent if state Law Guardian expenditures are excluded) of the indigent defense funding, cannot shoulder this burden. Strong efforts should be undertaken to relieve the counties from all responsibility to fund the major portion of their indigent defense system, and New York State should join the other 28 states in the country that provide 100% of all costs of their indigent defense system.
- 6) The serious condition of the indigent defense program in New York State will come as no surprise to any of the branches of state government, the organized bar, county officials, or indigent defendants who have been sorely aware of problems for a number of years.
- 7) New York fails to ensure the independence of its indigent defense providers who are too often subject to undue interference from the counties that fund them. While County Law §722 requires the counties to provide indigent defense services "necessary for an

adequate defense,” this requirement is largely open to interpretation by the counties that are driven by competing fiscal (and sometimes political) concerns.

- 8) New York lacks any statewide enforceable standards that govern the performance of attorneys providing indigent defense representation, and in some areas, substandard practice has become the acceptable norm.
- 9) New York State lacks a single source for reliable, statewide indigent defense data, rendering a complete and accurate picture of the system next to impossible. Despite advanced and interconnected criminal justice data systems throughout the state, we were simply unable to gather detailed and reliable information for criminal and family court appointments. Although virtually all case information is being entered in some component of the criminal justice data system, accurate entry of indigent defense provider information is needed.
- 10) Despite the annual reporting requirements of the counties, the county-reported data is frequently incomplete, inaccurate, or missing. Until the creation of the state Indigent Legal Services Fund (ILSF), the counties had no incentive to file complete and accurate reports. Today, reliability continues to be a problem, and the self-reported UCS 195 information from the counties cannot be verified through any other data source. Accurate and complete data entry is needed to ensure consistent and comparable case counting methods, and to allow the state to study more accurate ways to determine ILSF distributions to the counties.
- 11) Lacking sufficient resources, institutional providers are struggling to provide adequate representation to their clients. Comprehensive standards are not available to the providers to allow them to control workload and ensure quality representation. The providers are burdened with heavy caseloads, inadequate staff and salaries, and numerous court dockets to cover. Office space, technology and research tools are frequently poor and in some counties, non-existent.
- 12) Many public defender and legal aid clients suffer from a lack of continuous representation by one staff attorney (i.e., “vertical representation”). In order to handle the numerous dockets and difficult workload, staff attorneys are often assigned to a court docket rather than to a client. In this manner, clients must frequently face a new attorney who is unfamiliar with his or her case, and attorney-client trust becomes difficult. In some counties, when a defendant’s case is between stages, it simply lies dormant with no representation being provided until the case is assigned a new attorney at the next stage (e.g., between preliminary hearing and indictment).
- 13) The increase in 18-B attorney fees in 2003 increased many counties’ focus on the efficiency and cost-saving efforts of their providers. A number of counties created a conflict office or shifted additional workload to institutional providers in an effort to control rising costs, often without sufficient additional resources. Some assigned counsel programs also increased their focus on scrutinizing and cutting 18-B vouchers.

Unfortunately, in many counties that are struggling to meet other fiscal demands, the focus on cost-savings is understandable.

- 14) Indigent defendants throughout the state suffer sorely from a serious lack of contact from their attorneys. Too often, the only attorney-client contact takes place in court. This in-court contact is frequently brief and occurs in an area that cannot ensure confidentiality. In many cases, the only out-of-court contact with a client is not by an attorney, but by investigators or other support staff.
- 15) The existing lack of client contact is exacerbated by insufficient access to interpreters, both in and out of court. Some courts lack adequate in-court interpreter services; others will not approve out-of-court interpreter services for attorneys to conduct client interviews. Perhaps worse, many attorneys do not ask for out-of-court interpreters, getting by with in-court contact or using defendants' friends, family members, or others to interpret out-of-court contact.
- 16) The provision of investigative and expert services is sorely lacking across the state. Investigator staff in the institutional providers is often inadequate or non-existent, and expert funds are similarly insufficient in the staffed offices. In assigned counsel cases, and when an institutional provider lacks its own resources, judges must approve investigative and expert services and become the gatekeepers of the county's coffer. This unenviable role is not lost on some judges who are hesitant to grant requests or who feel pressure to slash vouchers. When investigative and expert services are granted, the available rates and statutory fee caps are frequently unreasonably low, and finding a provider can prove difficult. Finally, we were disappointed to learn that many attorneys rarely request the assistance of an investigator or expert (except in serious felony cases), as if resigned to a practice without these essential services.
- 17) New York's indigent defense system suffers from a lack of uniform standards and procedures for determining a defendant's eligibility for court-appointed counsel. In the absence of uniform guidelines, subjective and sometimes disparate eligibility determinations are made across the state, and competing concerns such as county funding and workload may become inappropriate factors in the determinations. Many judges rely on defense counsel in making an eligibility determination, which can create ethical issues for some attorneys. Further, in some counties, the institutional provider is tasked with making the initial eligibility determination, stretching thin limited staffing resources.
- 18) Across the state, discovery policies and other prosecutorial practices contribute to severe injustices in New York's indigent defense system that, even if legal, raise serious ethical concerns. Many prosecutors routinely fail to disclose important discovery material until hours or minutes before a contested hearing or trial, severely impeding the ability of defense attorneys to adequately prepare a defense or to counsel a client regarding a plea. In some cases, defense attorneys receive little or no discovery at all. In addition, some prosecutors pressure defendants into waiving important rights by threatening to offer no plea if a defendant chooses to hold a preliminary hearing or litigate a pre-trial issue. In



the lower courts, some prosecutors also encourage pro se defendants to plead guilty or to disclose confidential information without the assistance of counsel.

- 19) New York's criminal justice system fails to provide equal and adequate resources to the prosecution and indigent defense. The scales of justice are tipped heavily in favor of the prosecution whose resources outweigh indigent defense not only in terms of dollars, but also in terms of many in-kind resources that cannot be quantified (e.g., access to the resources of state and federal law enforcement agencies, investigators, crime labs, and expert witnesses). District attorney offices are often able to receive a number of state and federal grants that are not available to the defense. In many parts of the state, district attorney offices are further advantaged by greater staffing, salaries and training opportunities.
- 20) The climate of New York indigent defense has changed significantly over the past decade. Although statewide arrests have declined, collateral consequences and specialty court dockets have both altered and increased the workload requirements of the providers. Today, many collateral consequences may result from an arrest or minor misdemeanor or violation conviction that can be more damaging than the terms of a defendant's sentence. Unfortunately, many defendants are unaware of the collateral consequences of a plea, either because they are unrepresented, because their attorney lacks sufficient training or time to inform them, or because the trial judge fails to inform them when required.
- 21) Whereas minorities comprise a disproportionate share of indigent defendants and inmates in parts of New York State, minorities disproportionately suffer the consequences of an indigent defense system in crisis, including inadequate resources, sub-standard client contact, unfair prosecutorial policies, and collateral consequences of convictions.
- 22) The emergence of numerous specialty courts has increased the workload of many indigent defense providers with additional dockets and lengthier case dispositions. Too often, specialty courts are created without the input of and additional resources for the defenders who must staff them. In some cases, the training of attorneys as well as court staff and others is inadequate for properly handling the specialty dockets. Further, many defendants are required to plead guilty or to give up other substantive rights in order to obtain necessary services through the specialty court.
- 23) Family court matters are an integral part of New York's indigent defense system and cannot be completely removed from an overall consideration of the current system. Like the provision of indigent defense in criminal cases among the counties, the provision of indigent defense of adults in family court is a severely fractured and under-funded system, and one that is disparate from the provision of legal services for children under the state-funded Law Guardian Program. Among the counties, the representation of adults in family court is a significant and often increasing burden on the providers. The distinction between the indigent defense needs in family court and criminal court is further blurred by two additional factors: insufficient data exists that, in some counties, does not separately report family court from criminal court matters; and many clients require representation in both courts.

24) The New York State Defenders Association (NYSDA) has provided critical and substantial assistance and encouragement to indigent defense providers throughout the state for many years. In addition to providing technical assistance and low-cost defender trainings, NYSDA has conducted numerous studies, issued reports, and made specific recommendations for improvement to the state's indigent defense system.

## 10.2 Upstate Findings

### *General*

25) Throughout the state, a large number of indigent defendants are not afforded counsel for violations and some minor misdemeanors in violation of their state and federal rights. Some judges are not aware of, or misunderstand the law; others do not follow it. A strong need exists for clear and formal statewide standards and procedures regarding the appointment of counsel in all cases for which the right attaches.

26) Many institutional providers are staffed with part-time defenders who, despite heavy indigent defense workloads, have competing private practices. Even some full-time defenders have private practices. While private practice can supplement a low salary, a defender's workload frequently demands full-time attention and is at odds with a part-time private practice.

27) Public defender and legal aid attorneys across the state are frequently practicing without sufficient training or oversight. Although a few programs provide formal training, others offer little to no training and have few funds to send attorneys to outside trainings. Across the state, many staff attorneys are sorely in need of supervision and often described their training as "trial by fire."

28) Despite the requirements of County Law §722(3) that a county's assigned counsel system be pursuant to a plan of the county's bar association, and that such plan be approved by the "state administrator" or OCA, in many counties, no such formal plan exists, nor does OCA appear to house a collection of such plans submitted for approval pursuant to the law.

29) Despite the requirement of County Law §722(3) that each assigned counsel plan be "coordinated by an administrator," some counties have neither a formal plan nor a formal administrator. In a number of counties, the assigned counsel budget falls within the institutional provider's budget, and the provider is also tasked with administering the county's assigned counsel program and reviewing vouchers, creating serious ethical concerns regarding conflict of interest cases.

30) Although County Law §722 does not appear to provide any authority for the practice, at least two counties are providing indigent defense services by awarding flat-fee contracts instead of compensating assigned counsel at hourly rates.

- 31) In addition to a lack of enforceable statewide standards regarding attorney performance, many assigned counsel are subject to few qualifications or rules for being on an 18-B panel and little meaningful oversight for remaining on a panel. If an assigned counsel plan has requirements for 18-B certification, often there is no re-certification requirement and the only attorney oversight that occurs is voucher review. As a result, judges become the quality-control mechanism for assigned counsel panels and are frequently the only source for effectively removing an attorney for poor performance.
- 32) Statewide or regional training programs are not required or made available to assigned counsel. In some counties, the only training required of attorneys are the CLE hours that are required of any practicing attorney in the state. In addition, CLE training regarding criminal defense is not always available in a county.
- 33) The assignment of cases to 18-B attorneys throughout the state frequently fails to conform with the requirements of the law and is open for abuse by some judges. Despite the requirement of County Law §722(3) that “the services of assigned counsel be rotated and coordinated by an administrator,” many cases are assigned on an ad hoc basis by judges. In a number of courts, assignments are made to the attorneys who are present in the courtroom at the time.
- 34) Across the state, assigned counsel voucher forms lack uniformity, billing practices lack clear standards, and some judges tasked with reviewing vouchers are uncomfortable with the role.

#### *Town and Village Courts*

- 35) The town and village or justice court system is inextricably linked to New York’s indigent defense system, with an overall deleterious effect. The town and village court system, which often creates the first and only impression of New York’s justice system, is a fractured and flawed system that affects many indigent defendants across the state. Comprising 1,281 courts in the 57 counties outside New York City, the needs of the locally-funded justice court system far outweigh available resources.
- 36) The important role of the town and village courts in the criminal justice system cannot be overstated. In addition to being courts of first impression:

The local justice courts hear and dispose of a large percentage of the state’s criminal and petty offenses;

The local justice courts are not required to be courts of record;

The part-time local courts are staffed by 2,000 elected justices (in 2,154 judgeship positions) who comprise 72 percent of all New York trial judges; 68 percent of the local justices are non-lawyers;

In comparison to other states, New York has the largest number of non-lawyer judges hearing criminal cases in the country; 22 states have no non-lawyer judges hearing criminal cases; and

In 21 New York counties that have no city court, 356 town and village courts have original and exclusive jurisdiction in misdemeanors and violations, and preliminary jurisdiction in felonies.

37) The town and village judges are not accountable to OCA in the same manner as other New York judges; they are not subject to any enforceable statewide standards and goals or meaningful oversight. In the event of a problem or complaint, the only sanction that is available is to bring an action before the State Commission on Judicial Conduct, which is a lengthy process, or to attempt to educate the judge on better practices.

38) The lack of legal training, enforceable standards and oversight of the numerous town and village justices create a risk to the quality of justice rendered in the local courts. Many described the local courts as “fiefdoms.” Often lacking sufficient legal knowledge and confidence, some justices are adverse to trials and defense motions, seek advice from local prosecutors before making decisions, make subjective rather than legally-objective decisions, and/or lose their independence by succumbing to local government pressure to guard its funds. Further, some local justices set excessive bail in many minor cases.

39) Many indigent defendants in the town and village courts across the state are deprived of their state and federal right to effective assistance of counsel. Counsel is either not present, not assigned in a timely manner, or not assigned at all. Counsel is frequently not appointed on violations or other minor offenses for which the right to counsel attaches. This problem is occurring for a number of reasons, including:

With inadequate staffing and resources, many indigent defense providers (as well as some prosecutors) are simply unable to staff the numerous local court dockets; While some local justices are unaware of the law on the right to counsel, others misconstrue it, and others choose not to apply it because they feel counsel is unnecessary or because they do not want to add to the county’s fiscal burden; A number of local courts are failing to comply with the recent administrative order on the timely appointment of counsel for in-custody defendants, and some courts are completely unaware of the order; Many town and village courts hold criminal proceedings only once a week or less, creating serious problems regarding the timely appointment of and access to counsel, as well as other substantive due process time requirements.

40) We are concerned that many defendants in the town and village courts are held in custody for unpaid fines in violation of their right to counsel under *Alabama v. Shelton*.

41) Because town and village courts are not required to be courts of record, it is often difficult or impossible for a defendant to adequately exercise the right to appeal a decision by a local justice. In addition to lacking a record, some town and village courts are not held in a public place and fail to ensure full public access and open procedures.

42) Given these factors, we do not believe it is currently possible to receive adequate and meaningful representation in many of the town and village courts in New York State. In

our estimation, major reform is needed to remove the numerous barriers to justice in the locally-funded town and village court system.

### **10.3 New York City Findings**

- 43) Felonies and violent crime have dropped substantially in the last 20 years in New York City. However, over the past decade, a dramatic rise in misdemeanors and a proliferation of “quality of life” offenses have caused an unbearable caseload on the criminal courts in New York City.
- 44) It is our opinion that a large number of New York City defendants are not receiving adequate and meaningful representation in compliance with their rights under federal and state law. In many instances, particularly in-custody cases involving minor crimes, a defendant is provided counsel at arraignment with only moments for consultation, which frequently results in a guilty plea.
- 45) The explosion of minor misdemeanors, infractions and other offenses has exceeded the ability of the City or the courts to compile reliable and accurate data on current court appointments. However, data that is available discloses that at least one half of all the criminal, non-summons cases in New York City are disposed of by plea at first appearance.
- 46) The City government and law enforcement policies established over the past 10-15 years relative to the campaign against “quality of life” offenses, has failed to take into consideration the funds necessary to assure meaningful and effective representation required under state and federal law.
- 47) The failure of the state to provide a sufficient amount of funding in New York City has resulted in a lack of resources for each provider. There are many who believe that the inadequate funding by the state has also created a situation in which cutting costs and saving money is the bottom-line for City government, resulting in the denial of meaningful and adequate representation throughout the City.
- 48) The creation by the City of seven additional institutional providers since 1996 has resulted in unhealthy competition for a limited amount of money. Currently, there is no single, unified voice in New York City to advocate for indigent defense. The lack of adequate funding over the years has contributed to an unfortunate tension that continues to exist between the Legal Aid Society, the alternate providers and 18-B attorneys.
- 49) Funding for alternate providers has barely increased over the last several years, despite an increase in cost to the providers, including increases in rent, outside vendor services, and employee health insurance. In addition, many of the alternate providers have not

received money for salary increases in the last several years, making it difficult to retain experienced staff attorneys.

- 50) Despite the fact that there are two assigned counsel plans in New York City administering the 18-B programs, there are no formal 18-B qualifications or written performance standards, and while screening appears to be fairly stringent, we heard that some attorneys approved for the panel are not qualified. In addition, there is little oversight of 18-B attorneys and we were told that recertification of attorneys, which should take place once every three years, is no longer happening. Finally, much like in upstate New York, there are no formal training programs for 18-B attorneys and attorneys rely on criminal procedure or criminal law CLE's for training as well as the annual New York City training provided by NYSDA, which they are not required to attend.
- 51) The unfortunate deficit that appeared at the Legal Aid Society in 2004 was a major shock to all individuals and organizations concerned about the quality of representation in the City. In addition, the very public financial crisis suffered by the organization, as well as the staffing cuts due to the deficit, created morale problems among staff attorneys and particularly support staff who were laid off in greater numbers. Legal Aid has not been given sufficient money to hire enough lawyers to fill staff attorney, supervisor and support staff positions lost by attrition and layoffs due to the 2004 financial crisis, creating overwhelming caseloads for many staff attorneys and an inability of support staff to complete assignments.
- 52) The proliferation of "quality of life" offenses has resulted in a disproportionate number of young people, people of color, and people from the rapidly growing immigrant communities, being charged with minor misdemeanors and infractions.
- 53) Collateral consequences are of particular concern in New York City, where the practice of pleading out a high percentage of low-level cases at arraignment after only a few minutes of consultation with a client, has left defenders with very little time to devote to each defendant, and defendants are often not fully informed of the potential collateral consequences of their conviction. Defense counsel may also not be aware of the collateral consequences of a conviction.
- 54) The New York County Lawyer's Association (NYCLA) should be commended for its efforts to improve indigent defense, including its efforts in assisting in the creation of the First Judicial Department Indigent Defense Organization Oversight Committee, to publish requirements for the organized indigent defense providers, and to evaluate several New York City providers. NYCLA should also be recognized for its valuable contribution to the systemic challenge to New York City's indigent defense system that preceded the legislative increase in 18-B rates statewide.
- 55) In addition to collateral consequences, many factors that affect indigent defense in upstate New York, are similarly affecting indigent defense in New York City. Such problems, as previously addressed in the upstate New York findings above, include:

Lack of vertical representation in three of the four Legal Aid borough offices;  
Lack of sufficient client contact, which too often only takes place in court;  
Unfair discovery and prosecutorial practices (in particular, the waiver of a grand jury indictment within 180 hours);  
Lack of access to and requests for expert, investigative, and interpreter services;  
Specialty court workloads; and  
Subjective eligibility determinations.





## Appendix B

### **Budgetary Impact of Trial Court Restructuring; Submitted by the New York State Unified Court System, February 2002**

In February of 2002, the Unified Court System presented to the New York Legislature a proposal to address the restructuring of the nine state funded trial courts (all trial courts except the town and village courts) into a three-tiered structure, consisting of a Supreme Court, a Surrogate's Court, and a District Court. In the presentation, OCA stated that:

No state in the nation has a more complex court system structure than New York's trial court system, consisting of 11 separate courts – the Supreme Court, the Court of Claims, the County Court, the Family Court, the Surrogate's Court, the New York City Civil and Criminal Courts, the District Courts on Long Island, the City Courts outside of New York City, and the Town and Village Justice Courts.

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Court restructuring is not just good public policy. A simplified and consolidated structure will also result in substantial savings for the taxpayers of the State of New York. This report quantifies those potential savings. The analysis is simple but compelling - it is more efficient and less expensive to run a court system with three trial courts than in a system with nine courts, and it is more efficient and less expensive to try related cases before a single judge in a single court than before a number of different judges in a number of different courts.

The analysis, which considers both the savings and costs of the restructuring proposal, identifies a net cost savings potential of over \$131 million in the first five years following the effective date of the restructured court system.

Specifically, it is estimated that:

- \$128.1 million would be saved from unified treatment of related cases and the resulting reduction in separate trial court filings.
- \$12.8 million would be saved by cost reductions in court management associated with improved coordinated court oversight and the elimination of administrative fragmentation.

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Thus, a consolidated court structure will provide an estimated net savings to the State of over **\$131 million** dollars in the first five years following trial court consolidation with over **\$73 million** of that savings being realized in the first three years following implementation of the proposal.

## Appendix C

# ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

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### *Black Letter*

- 1 The public defense function, including the selection, funding, and payment of defense counsel, is independent.
- 2 Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
- 3 Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
- 4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
- 5 Defense counsel's workload is controlled to permit the rendering of quality representation.
- 6 Defense counsel's ability, training, and experience match the complexity of the case.
- 7 The same attorney continuously represents the client until completion of the case.
- 8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
- 9 Defense counsel is provided with and required to attend continuing legal education.
- 10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.



# ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

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*With Commentary*

**1** The public defense function, including the selection, funding, and payment of defense counsel,<sup>1</sup> is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.<sup>2</sup> To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.<sup>3</sup> Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.<sup>4</sup> The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.<sup>5</sup>

**2** Where the caseload is sufficiently high,<sup>6</sup> the public defense delivery system consists of both a defender office<sup>7</sup> and the active participation of the private bar. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.<sup>8</sup> The appointment process should never be *ad hoc*,<sup>9</sup> but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.<sup>10</sup> Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.<sup>11</sup>

**3** Clients are screened for eligibility,<sup>12</sup> and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request,<sup>13</sup> and usually within 24 hours thereafter.<sup>14</sup>

**4** Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.<sup>15</sup> Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.<sup>16</sup> To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.<sup>17</sup>

**5** Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.<sup>18</sup> National caseload standards should in no event be exceeded,<sup>19</sup> but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.<sup>20</sup>

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**6** Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.<sup>21</sup>

**7** The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.<sup>22</sup> The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

**8** There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.<sup>23</sup> Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.<sup>24</sup> Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess,

unusual, or complex cases,<sup>25</sup> and separately fund expert, investigative, and other litigation support services.<sup>26</sup> No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.<sup>27</sup> This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

**9** Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.<sup>28</sup>

**10** Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.<sup>29</sup>

# NOTES

<sup>1</sup> “Counsel” as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments. “Defense” as used herein relates to both the juvenile and adult public defense systems.

<sup>2</sup> National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter “NAC”], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter “NSC”], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3<sup>rd</sup> ed. 1992) [hereinafter “ABA”], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter “Assigned Counsel”], Standard 2.2; NLADA *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter “Contracting”], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter “Model Act”], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter “ABA Counsel for Private Parties”], Standard 2.1(D).

<sup>3</sup> NSC, *supra* note 2, Guidelines 2.10-2.13; ABA, *supra* note 2, Standard 5-1.3(b); Assigned Counsel, *supra* note 2, Standards 3.2.1, 2; Contracting, *supra* note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter “ABA Monitoring”], Standard 3.2.

<sup>2</sup> Judicial independence is “the most essential character of a free society” (American Bar Association Standing Committee on Judicial Independence, 1997).

<sup>5</sup> ABA, *supra* note 2, Standard 5-4.1

<sup>6</sup> “Sufficiently high” is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

<sup>7</sup> NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. “Defender office” means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

<sup>8</sup> ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

<sup>9</sup> NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

<sup>10</sup> ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

<sup>11</sup> NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

<sup>12</sup> For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.

<sup>13</sup> NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(A).

<sup>14</sup> NSC, *supra* note 2, Guideline 1.3.

<sup>15</sup> American Bar Association Standards for Criminal Justice, *Defense Function* (3<sup>rd</sup> ed. 1993) [hereinafter “ABA Defense Function”], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter “Performance Guidelines”], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

<sup>16</sup> NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.

<sup>17</sup> ABA Defense Function, *supra* note 15, Standard 4-3.1.

<sup>18</sup> NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2(B)(iv).

<sup>19</sup> Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should “reflect” (NSC Guideline 5.1) or “under no circumstances exceed” (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). *See also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter “Death Penalty”].

<sup>20</sup> ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter “Appellate”], Standard 1-F.

<sup>21</sup> Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 19, Guideline 5.1.

<sup>22</sup> NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines

III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(B)(i).

<sup>23</sup> NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (*Performance*); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(B)(iv). *See* NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf.* NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

<sup>24</sup> ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.

<sup>25</sup> NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.

<sup>26</sup> ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.

<sup>27</sup> ABA Defense Function, *supra* note 15, Standard 4-1.2(d).

<sup>28</sup> NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(A).

<sup>29</sup> NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

## Appendix D

### INDIGENT DEFENSE SYSTEMS OF THE 50 STATES<sup>1</sup>

State PD with Commission		State PD without Commission		State Commission, State Director		State Commission Partial Authority		State Appellate Commission or Agency		No State Commission	
<i>State</i>	<i>Year Est.</i>	<i>State</i>	<i>Year Est.</i>	<i>State</i>	<i>Year Est.</i>	<i>State</i>	<i>Year Est.</i>	<i>State</i>	<i>Year Est.</i>	<i>State</i>	<i>Prior Study Comm.</i>
CO	1969	RI	1942	MA	1983	NV	1971	CA		AL	Yes
MD	1971	DE	1953	NC	2000	KS	1981	IL		AZ	Yes
HI	1972	NJ	1967	OR	2001	OH	1984	ID		ME	Yes
KY <sup>2</sup>	1972	VT	1972	VA	2004	IN	1989	MI		NY	Yes
NH <sup>3</sup>	1972	NM	1973	ND	2005	OK	1991	MS <sup>4</sup>		PA	Yes
CT	1974	WY	1977			SC	1993	TN <sup>5</sup>		SD	
WI	1977	AK	1980			LA	1994	WA		UT	
MO	1982	IA	1981			NE	1995				
MN	1986	WV	1989			TX	2001				
AR	1997					GA	2003				
MT	2005										

<sup>1</sup> Florida, which has elected public defenders in each judicial district or circuit is not shown here; the elected public defenders belong to a membership organization but lack state oversight.

<sup>2</sup> The Kentucky Department of Public Advocacy was created in 1972, while the Public Advocacy Commission was created in 1982 (see KRS 31.010 and 31.015).

<sup>3</sup> The New Hampshire Public Defender is a private, nonprofit corporation that was created in 1972 and is under the general supervision of the New Hampshire Judicial Council (see NH RSA 604-B:5). In addition, an all-volunteer Board of Directors oversees the program's operations.

<sup>4</sup> Mississippi created a full commission in 1998, but the legislation was later repealed; it is the only state commission legislation to have been completely repealed. Currently, Mississippi has three agencies that provide representation in appeals and capital cases at the trial and post-conviction stages.

<sup>5</sup> Tennessee has a post-conviction defender office and oversight commission. Locally-elected public defenders operate at the trial level in each judicial district without a state oversight body, similar to Florida.

## Appendix E

# Compilation of Hearings, Studies, Reports, and Committees on New York State Public Defense Services (1973-2005)

Originally Compiled by the New York State Defender Association

### Testimony, Hearings

- *Public Defense Speak Out—Schoharie County* (NYSDA, April 22, 2004)
- *Public Defense Speak Out—Schenectady County* (NYSDA, Dec. 17, 2003)
- *Adequacy of Defense Services Available to Farm Workers in Genesee, Orleans and Monroe Counties* (NYSDA, July 31, 2003)
- *Adequacy of Public Defense Services in New York City and Commenting on Draft Client Standards for Client Centered Representation* (NYSDA, June 24, 2003)
- *Gideon Day Client-Defender Speak Out--Albany* (NYSDA, March 18th, 2003)
- *Hearings on Public Defense Services and Issues Surrounding Representation of Indigent Clients In New York State—Albany* (NYS League of Women Voters And NYSDA, December 1, 1998)
- *Hearings on Public Defense Services and Issues Surrounding Representation of Indigent Clients In New York State—Syracuse* (NYS League of Women Voters And NYSDA, November 10, 1998)
- *Hearings on Public Defense Services and Issues Surrounding Representation of Indigent Clients In New York State—Rochester* (NYS League of Women Voters And NYSDA, October 20, 1998)
- *Hearings on Public Defense Services and Issues Surrounding Representation of Indigent Clients In New York State—New York City* (NYS League of Women Voters And NYSDA, October 14, 1998)

### Reports and Studies

- *A Preliminary Report Concerning the Inadequacy of Defense Services Available to Farm Workers* (NYSDA, July 31, 2003)
- *Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services* (NYSDA 2001)
- *Crisis in the Legal Representation of the Poor: Recommendations for a Revised Plan to Implement Mandated Governmentally Funded Legal Representation of Persons Who Cannot Afford Counsel* (Appellate Division First Department Committee on Representation of the Poor 2001)
- *New York State Division of Criminal Justice Services: Assigned Counsel Survey* (DCJS, February 2001)
- *Reports of the Indigent Defense Organization Oversight Committee to the Appellate Division First Department For 1996-2003*
- *Task Force on the Representation of the Indigent Assigned Counsel Compensation*



*Committee (NYCLA 1997)*

- *Model Questionnaire for Eligibility for the Appointment of Counsel and Eligibility Determination Worksheet (Proposed Draft) (NYSDA 1996)*
- *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center (NYSDA 1994)*
- *Funding Crisis for Poor Defendants in New York State (NYSDA 1992)*
- *Indigent Parolee Representation: A Mandate Unfulfilled (NYSDA 1992)*
- *State Funding of Public Defense Programs: More Than a Decade of Disparity (NYSDA 1992)*
- *NYSDA Public Defense Backup Center Outline of Proposed Cuts (NYSDA 1992)*
- *Funding the Defense of the Poor: A Reformulation of the Governor's Proposal (NYSDA 1990)*
- *An Analysis of Violation Data in Allegany County 1980-1990 (NYSDA 1990)*
- *The Deepening Crisis in the Indigent Parolee Representation Program: The Critical Need for Additional Funds (NYSDA 1990)*
- *New York State Appellate Backlog and Delay Program: A Call for the Restoration of Funds in the FY 90-91 Budget: \$283,334 (NYSDA 1990)*
- *Issue Paper: Recommended Enhancements for the Public Defense Backup Center FY 90-91 With Budget Narrative (NYSDA 1989)*
- *Defender Budgetary Request to Reduce Appellate Backlog and Delay (NYSDA 1988)*
- *Legislative Recommendations Prepared at the Request of the Office of the Director of Criminal Justice (NYSDA 1987)*
- *Eligibility for Public Defense Representation: The High Risks of Being Unable to Afford Counsel in New York State (NYSDA 1986)*
- *Public Defense Services in Clinton County: An Assessment of the Assigned Counsel System (NYSDA 1986)*
- *Assigned Counsel Fees in New York State: Time for a Change (NYSDA 1985)*
- *Model Assigned Counsel Contract (NYSDA 1985)*
- *Prosecution/Defense Funding Disparity Charts (NYSDA 1985)*
- *The Use of Expert and Investigative Services in Defense of the Poor: A Primer for New York State (NYSDA 1985)*
- *Public Defense Services in Ontario County: A Study of the Assigned Counsel System (NYSDA 1985)*
- *Model Assigned Counsel Voucher, Voucher for Compensation and Expenses of Appointed Counsel Pursuant to Section 722-c of the County Law (NYSDA 1984)*
- *Model Public Defense System and The Model Defense Case, The Tools for the*

*Professional Evaluation and Measurement of the Effective Assistance of Counsel in Local Practice* (NYSDA 1984)

- *Public Defense Services in Schenectady County: An Assessment of the Assigned Counsel Program* (NYSDA 1984)
- *Correction Law Section 606: The Unfulfilled Promise, A Report by the Public Defense Backup Center on the Legislative History of Correction Law Section 606* (NYSDA 1983)
- *A Report of the Proceedings of the First Chief Defender Convening in New York State* (NYSDA 1983)
- *Standards for the Treatment of Crime Victims*, Memorandum from Jonathan E. Gradess to Lawrence T. Kurlander, Director of Criminal Justice, and Sherrie McNulty, Counsel (NYSDA 1983)
- *The Crisis in Indigent Defense Funding: Testimony Before the American Bar Association Standing Committee on Legal Aid and Indigent Defendants* (NYSDA 1982)
- *Proposal to Establish an Appellate Defender Office Covering the Third and Fourth Departments of New York State, Submitted to the National Legal Aid and Defender Association Appellate Defender Development Project* (NYSDA 1980)
- *The Public Defender Office of Monroe County, New York: An Evaluation by the National Legal Aid and Defender Association* (NLADA 1973)
- *Review of the Existing Case Management Practices and Procedures and Recommendations for Improvements for the Oneida County Public Defender's Office, Utica, NY: Technical Assistance Report* (Criminal Courts Technical Assistance Project 1999)

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### **Task Forces, Working Groups and Committees**

- Special Committee to Ensure Quality of Mandated Representation created by the New York Bar Association (2004)
- Indigent Defense Summit held at Pace University by the Office of Justice Initiatives in the Office of Court Administration (2003)
- Committee for an Independent Public Defense Commission created by Michael Whiteman, Richard Bartlett and Warren Anderson (2001)
- Working group convened by Deputy Chief Administrative Judge for Justice Initiatives, to find solutions to the fee crisis (June 1999)
- Appellate Division, First Department established the Indigent Defense Organization Oversight Committee (1995)
- New York County Lawyers Association formed a Task Force on the Representation of the Indigent (1994)

## **Additional Reports**

- *The Status of Indigent Defense in Schuylers County* (NAACP Legal Defense and Educational Fund 2004)
- *The Impact of Quality-of-Life Policing* (New York City Criminal Justice Agency Research Brief No. 3 August 2003)
- *Assigned Counsel Compensation in New York: A Growing Crisis* (Office of Court Administration 2000)
- Report issued by the Criminal Advocacy Committee of the Association of the Bar of the City of New York Concerning Compensation of Counsel Assigned to Represent Indigent Criminal Defendants in New York (1997)
- Chester L. Mirsky, *The Political Economy and Indigent Defense: New York City, 1917-1998*, 1997 ANN. SURV. AM. L. 891 (1997)
- *General Requirements for All Organized Providers of Defense Services to Indigent Defendants* (Indigent Defense Organization Oversight Committee 1996)
- Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986-87)

## **Family Court Studies**

- *Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Welfare Proceedings* (Public Advocates Office 2000)
- *New York Family Court: Court User Perspectives* (Vera Institute 2000)
- *Special Report on Family Court: Advisory Report on Frontline and Supervisory Practice* (Special Child Welfare Panel 2000)
- *Assigned Counsel Compensation in New York: A Family Crisis* (NY State Unified Court System 2000)
- *Losing Our Children: An Examination of New York's Foster Care System* (New York State Assembly Committee on Children and Families and the Committee on Oversight 1999)
- *Families in Limbo: Crisis in Family Court* (Child Welfare Watch 1999)
- *The Good, the Bad, and the Ugly of the New York City Family Court* (Fund for Modern Courts 1997)

**Appendix F**  
**Fiscal Year 2004 Caseloads and Funding**  
**(excluding expenditures for the state Law Guardian Program)**

**Caseload**

	<b>New York City</b>	<b>Outside NYC</b>	<b>Total</b>	<b>NYC%</b>	<b>ONYC%</b>	<b>Source</b>
Criminal	531,562	232,841	764,403	70%	30%	UCS 195 Reports: NYC-2003 reports, ONYC- 2004 reports.
Adults in Family Court	13,582	50,484	64,066	21%	79%	NYC: Assigned Counsel Plan, ONYC: 2004 UCS 195 reports
<b>Total Caseload</b>	<b>545,144</b>	<b>283,325</b>	<b>828,469</b>	<b>66%</b>	<b>34%</b>	

**Funding**

	<b>New York City</b>	<b>Outside NYC</b>	<b>Total</b>	<b>NYC%</b>	<b>ONYC%</b>	<b>Source</b>
<b>Local Expenditures</b>	<b>\$166,132,905</b>	<b>\$114,455,693</b>	<b>\$280,588,598</b>	<b>59%</b>	<b>41%</b>	Net Local Expenditure by County, 2004 County Reports to Comptroller (includes expenditures on adult representation in family court, if reported)
<b>State Expenditures:</b>						
ILSF	\$30,523,111	\$21,028,599	\$51,551,710	59%	41%	March 31, 2005 ILSF distribution
State Aid to Defense	\$8,992,938	\$2,481,062	\$11,474,000	78%	22%	DCJS FY 2004
NDS of Harlem	\$294,000		\$294,000	100%	0%	
Capital Defender	\$2,161,860	\$1,441,240	\$3,603,100	60%	40%	Statewide Expenditures, apportioned 60% to NYC*
Indigent Parolee Program	\$739,800	\$493,200	\$1,233,000	60%	40%	Statewide Expenditures, apportioned 60% to NYC*
NYSDA Public Defender Backup Center	\$699,000	\$466,000	\$1,165,000	60%	40%	Statewide Expenditures, apportioned 60% to NYC*
Correction Law Reimbursement	\$230,563	\$153,709	\$384,272	60%	40%	Statewide Expenditures, apportioned 60% to NYC*
<i>Doe v. Pataki</i>	\$540,000	\$360,000	\$900,000	60%	40%	Statewide Expenditures, apportioned 60% to NYC* (one time exp.)
NYS Division of Probation & Correctional Alternatives		\$615,446	\$615,446	0%	100%	
<b>Total State Expenditures</b>	<b>\$44,181,272</b>	<b>\$27,039,256</b>	<b>\$71,220,528</b>	<b>62%</b>	<b>38%</b>	
<b>Total State &amp; Local Expenditures</b>	<b>\$210,314,177</b>	<b>\$141,494,949</b>	<b>\$351,809,126</b>	<b>60%</b>	<b>40%</b>	
<b>State Percent of Total Funding</b>	<b>21%</b>	<b>19%</b>	<b>20%</b>			
<b>Cost per Case</b>	<b>\$386</b>	<b>\$499</b>	<b>\$425</b>			
Population	8,008,278	10,968,179	18,976,457			2000 Census
<b>Cost per Capita</b>	<b>\$26.26</b>	<b>\$12.90</b>	<b>\$18.54</b>			

\* Note: The exact distribution of funds for some state appropriations was not readily available, and therefore we estimated that 60 percent of the state funds went to New York City, and 40 percent to counties outside of New York City.

Appendix G

New York State Indigent Legal Services Fund Distribution and Net Local Expenditure by County

County	Population	2002 Net Local Expenditures	2003 Net Local Expenditures	2004 Net Local Expenditures	2005 Net Local Expenditures	Percentage change '03-'04	Percentage change '04-'05	Percentage change '03-'05	March 31, 2005 ILSF Distribution	March 31, 2006 ILSF Distribution
Albany	297,845	\$2,438,966	\$2,840,562	\$3,719,627	\$3,179,650	30.95%	-14.52%	11.94%	\$683,396	\$703,906
Allegany	50,562	\$332,065	\$365,916	\$457,306	\$531,303	24.98%	16.18%	45.20%	\$84,019	\$117,619
Broome	199,360	\$2,134,020	\$2,054,489	\$2,999,403	\$2,752,434	45.99%	-8.23%	33.97%	\$551,072	\$609,329
Cattaraugus	83,354	\$635,222	\$836,896	\$1,047,805	\$997,490	25.20%	-4.80%	19.19%	\$192,510	\$220,823
Cayuga	81,726	\$354,359	\$345,235	\$597,395	\$490,907	73.04%	-17.83%	42.20%	\$109,757	\$108,676
Chautauqua	137,645	\$1,034,361	\$1,043,308	\$1,245,883	\$1,366,695	23.96%	5.67%	31.00%	\$228,902	\$302,557
Chemung	90,413	\$808,394	\$815,092	\$1,414,522	\$1,173,902	73.54%	-17.01%	44.02%	\$259,886	\$259,876
Chenango	51,659	\$261,602	\$293,794	\$374,613	\$371,938	27.51%	-0.71%	26.60%	\$68,827	\$82,339
Clinton	81,366	\$729,824	\$706,199	\$1,308,643	\$1,215,844	85.31%	-7.09%	72.17%	\$240,433	\$267,839
Columbia	63,405	\$563,220	\$563,123	\$700,742	\$682,263	24.44%	-2.64%	21.16%	\$128,745	\$151,038
Cortland	48,691	\$408,674	\$424,309	\$566,356	\$661,110	33.48%	16.73%	55.81%	\$104,046	\$146,355
Delaware	47,226	\$194,455	\$275,326	\$489,737	\$406,762	77.88%	-16.94%	47.74%	\$89,978	\$90,048
Dutchess	290,885	\$3,249,752	\$3,319,116	\$3,634,648	\$3,300,092	9.51%	-9.20%	-0.57%	\$667,783	\$730,569
Erie	941,293	\$5,657,206	\$5,919,031	\$9,289,477	\$6,884,832	56.94%	-25.89%	16.32%	\$1,706,728	\$1,524,153
Essex	38,992	\$126,464	\$266,680	\$436,413	\$462,794	63.65%	6.04%	73.54%	\$80,181	\$102,453
Franklin	51,056	\$374,040	\$366,408	\$460,377	\$380,192	25.65%	-17.42%	3.76%	\$84,576	\$84,166
Fulton	55,206	\$246,850	\$230,799	\$323,787	\$314,240	40.29%	-2.95%	36.15%	\$59,488	\$69,566
Genesee	60,020	\$573,870	\$615,861	\$860,681	\$717,152	39.75%	-16.68%	16.45%	\$158,130	\$158,762
Greene	48,865	\$373,613	\$312,440	\$523,487	\$550,804	67.55%	5.22%	76.29%	\$96,179	\$121,936
Hamilton	5,278	\$24,966	\$29,414	\$85,368	\$81,501	190.23%	-4.53%	177.08%	\$15,684	\$18,043
Herkimer	63,704	\$151,003	\$177,205	\$279,534	\$340,753	57.75%	21.90%	92.29%	\$51,358	\$75,435

County	Population	2002 Net Local Expenditures	2003 Net Local Expenditures	2004 Net Local Expenditures	2005 Net Local Expenditures	Percentage change '03-'04	Percentage change '04-'05	Percentage change '03-'05	March 31, 2005 ILSF Distribution	March 31, 2006 ILSF Distribution
Jefferson	114,651	\$842,600	\$826,853	\$1,109,182	\$972,342	34.14%	-12.34%	17.60%	\$203,787	\$215,255
Lewis	26,636	\$201,185	\$229,691	\$257,186	\$201,660	11.97%	-21.59%	-12.20%	\$47,252	\$44,643
Livingston	64,658	\$408,354	\$362,509	\$558,654	\$467,675	54.11%	-16.29%	29.01%	\$102,640	\$103,533
Madison	70,182	\$413,101	\$430,747	\$593,747	\$457,232	37.84%	-22.99%	6.15%	\$109,087	\$101,221
Monroe	736,738	\$6,682,016	\$7,462,279	\$8,249,269	\$7,695,553	10.55%	-6.71%	3.13%	\$1,515,614	\$1,703,629
Montgomery	49,371	\$231,358	\$227,908	\$337,383	\$343,939	48.03%	1.94%	50.91%	\$61,987	\$76,141
Nassau	1,339,463	\$5,528,751	\$5,697,770	\$7,840,340	\$7,349,760	37.60%	-6.26%	28.99%	\$1,440,483	\$1,627,078
Niagara	218,150	\$1,188,171	\$1,234,891	\$1,450,121	\$1,649,268	17.43%	13.73%	33.56%	\$266,427	\$365,112
Oneida	234,373	\$2,195,568	\$2,370,871	\$2,885,929	\$2,195,568	21.72%	-23.92%	-7.39%	\$530,223	\$578,674
Onondaga	460,517	\$3,979,837	\$3,965,549	\$5,467,320	\$4,987,501	37.87%	-8.78%	25.77%	\$1,004,495	\$1,104,125
Ontario	102,445	\$684,609	\$685,007	\$1,369,137	\$1,437,104	99.87%	4.96%	109.79%	\$251,548	\$318,144
Orange	363,153	\$2,335,763	\$2,607,581	\$3,738,361	\$3,852,582	43.37%	3.06%	47.75%	\$686,838	\$852,878
Orleans	43,629	\$217,197	\$218,787	\$388,483	\$433,259	77.56%	11.53%	98.03%	\$71,375	\$95,914
Oswego	123,495	\$537,467	\$581,193	\$924,215	\$929,783	59.02%	0.60%	59.98%	\$169,803	\$205,834
Otsego	62,196	\$550,667	\$563,809	\$762,628	\$713,943	35.26%	-6.38%	26.63%	\$140,115	\$158,052
Putnam	99,550	\$608,979	\$624,688	\$655,490	\$612,390	4.93%	-6.58%	-1.97%	\$120,431	\$135,570
Rensselaer	154,007	\$931,741	\$1,048,642	\$1,443,126	\$1,316,986	37.62%	-8.74%	25.59%	\$265,141	\$286,690
Rockland	292,989	\$2,581,882	\$2,927,772	\$3,937,283	\$3,164,031	34.48%	-19.64%	8.07%	\$723,385	\$700,448
St. Lawrence	111,655	\$763,090	\$1,047,760	\$1,383,012	\$1,319,520	32.00%	-4.59%	25.94%	\$254,097	\$292,113
Saratoga	209,818	\$770,400	\$885,727	\$1,097,471	\$877,792	23.91%	-20.02%	-0.90%	\$201,635	\$194,324
Schenectady	147,289	\$1,502,652	\$1,698,157	\$2,143,266	\$2,365,079	26.21%	10.35%	39.27%	\$393,776	\$523,577
Schoharie	31,685	\$176,491	\$205,977	\$297,829	\$352,914	44.59%	18.50%	71.34%	\$54,719	\$78,128
Schuyler	19,455	\$130,740	\$160,873	\$215,894	\$249,790	34.20%	15.70%	55.27%	\$39,666	\$55,298
Seneca	35,183	\$234,079	\$353,384	\$323,686	\$331,563	-8.40%	2.43%	-6.17%	\$59,470	\$73,401

County	Population	2002 Net Local Expenditures	2003 Net Local Expenditures	2004 Net Local Expenditures	2005 Net Local Expenditures	Percentage change '03-'04	Percentage change '04-'05	Percentage change '03-'05	March 31, 2005 ILSF Distribution	March 31, 2006 ILSF Distribution
Steuben	99,012	\$696,715	\$791,090	\$1,041,914	\$1,032,860	31.71%	-0.87%	30.56%	\$191,428	\$228,653
Suffolk	1,468,037	\$8,041,759	\$8,478,946	\$10,574,356	\$9,653,529	24.71%	-8.71%	13.85%	\$1,942,795	\$2,071,230
Sullivan	74,948	\$1,187,622	\$1,186,126	\$1,606,460	\$1,334,312	35.44%	-16.94%	12.49%	\$295,150	\$295,388
Tioga	51,746	\$248,458	\$250,038	\$299,802	\$316,532	19.90%	5.58%	26.59%	\$55,082	\$70,073
Tompkins	101,411	\$841,943	\$983,433	\$1,348,119	\$1,282,883	37.08%	-4.84%	30.45%	\$247,686	\$284,002
Ulster	181,111	\$1,464,829	\$1,597,968	\$1,982,290	\$1,849,817	24.05%	-6.68%	15.76%	\$364,200	\$406,882
Warren	64,715	\$323,486	\$360,753	\$611,679	\$760,375	69.56%	24.31%	110.77%	\$112,382	\$168,331
Washington	61,872	\$277,880	\$260,817	\$438,250	\$379,668	68.03%	-13.37%	45.57%	\$80,518	\$84,050
Wayne	93,728	\$1,036,750	\$1,090,937	\$1,280,802	\$1,178,978	17.40%	-7.95%	8.07%	\$235,318	\$261,000
Westchester	940,302	\$10,224,802	\$11,807,433	\$16,504,125	\$13,214,260	39.78%	-19.93%	11.91%	\$3,032,254	\$2,925,351
Wyoming	42,932	\$221,369	\$262,173	\$251,715	\$243,875	-3.99%	-3.11%	-6.98%	\$46,247	\$53,989
Yates	24,720	\$177,660	\$176,217	\$271,408	\$215,214	54.02%	-20.70%	22.13%	\$49,865	\$47,644
New York City	8,008,278	\$136,779,856	\$143,265,594	\$166,132,905	\$142,241,508	15.96%	-14.38%	-0.71%	\$30,523,111	\$31,489,187
<b>Totals</b>	<b>19,112,651</b>	<b>\$215,892,753</b>	<b>\$228,731,153</b>	<b>\$280,588,598</b>	<b>\$244,843,703</b>	<b>22.69%</b>	<b>-12.75%</b>	<b>7.04%</b>	<b>\$51,551,710</b>	<b>\$54,221,048</b>

## Appendix H

### Indigent Defense Program Types by County in 2004 - Including Information Missing from 2004 ILSF Submissions

County	Population	2004 Net Local Expenditures	Program Type <sup>1</sup>				Information Missing from the ILSF/UCS 195 Forms
			PD	CD	AC	LA	
<b>Albany</b>	297,845	\$3,719,626.58	X	X			
<b>Allegany</b>	50,562	\$457,306.00	X	X	X		assigned counsel form incomplete
<b>Broome</b>	199,360	\$2,999,403.00	X	X	X	X	Assigned counsel and legal aid UCS 195 form missing
<b>Cattaraugus</b>	83,354	\$1,047,805.40	X	X	X	X	
<b>Cayuga</b>	81,726	\$597,394.58			X		
<b>Chautauqua</b>	137,645	\$1,245,883.00	X	X	X	X	assigned counsel UCS 195 form missing conflict defender form not complete, some discrepancy with budgets
<b>Chemung</b>	90,413	\$1,414,522.35	X	X	X	X	
<b>Chenango</b>	51,659	\$374,613.20	X	X	X	X	both public defender and conflict defender UCS 195 forms are missing but say they should be attached
<b>Clinton</b>	81,366	\$1,308,643.00			X		some incomplete information on the UCS 195 form, chart from NYSDA says they have a contract for family ct rep but not designated on ILSF forms
<b>Columbia</b>	63,405	\$700,742.02	X	X	X	X	conflict defender and assigned counsel budget data not complete
<b>Cortland</b>	48,691	\$566,355.77	X	X	X		public defender UCS 195 form incomplete, no form for assigned counsel
<b>Delaware</b>	47,226	\$489,736.92			X		UCS 195 is missing some information
<b>Dutchess</b>	290,885	\$3,634,647.75	X	X	X	X	assigned counsel UCS 195 is missing
<b>Erie</b>	941,293	\$9,289,477.00	X	X	X	X	
<b>Essex</b>	38,992	\$436,413.00	X	X	X		both UCS 195 forms are incomplete - no attorney/budget numbers
<b>Franklin</b>	51,056	\$460,377.00	X	X	X	X	both forms are missing - says "information from UCS 195 available from OCA per Jane Craig"
<b>Fulton</b>	55,206	\$323,787.17	X	X	?		both PD and AC are included on same UCS 195 form - no mention of AC program in any other forms
<b>Genesee</b>	60,020	\$860,681.00	X	X	X	X	assigned counsel UCS 195 missing caseload data and budget not broken out

<sup>1</sup> The program types here are only what could be ascertained from the 2004 ILSF forms. For an updated, full listing of the types of providers in each county, see Appendix J.



**Information Missing from the ILSF/UCS 195 Forms**

County	Population	2004 Net Local Expenditures	Program Type				Information
			PD	CD	AC	LA	
<b>Greene</b>	48,865	\$523,487.00	X	?	?	the forms conflict - one says conflict defender office the other doesn't and says assigned counsel program - no UCS 195 for either	
<b>Hamilton</b>	5,278	\$85,368.40			X		
<b>Herkimer</b>	63,704	\$279,534.00			X	UCS 195 form incomplete but addendum filed	
<b>Jefferson</b>	114,651	\$1,109,181.53	X	X	X	public defender budget break down is missing	
<b>Lewis</b>	26,636	\$257,185.61	X	X		no UCS 195 forms attached	
<b>Livingston</b>	64,658	\$558,653.94	X	X	X	combined public defender and assigned counsel onto one UCS 195 form	
<b>Madison</b>	70,182	\$593,747.00	X	X	X	forms are very confusing - not sure if they have LA or AC - think it is assigned counsel - both UCS forms are included	
<b>Monroe</b>	736,738	\$8,249,269.00	X	X	X	conflict defender office UCS 195 missing	
<b>Montgomery</b>	49,371	\$337,383.34	X	?		only one form says they have a conflict defender office, however there is no UCS 195 and no budget data for a CD office	
<b>Nassau</b>	1,339,463	\$7,840,340.00			X	AC missing some caseload data, LA missing personnel numbers and budget breakdown	
<b>Niagara</b>	218,150	\$1,450,121.41	X		X	there is an Assigned Counsel Administrator that was created by the county legislature to oversee payment of assigned counsel cases - the expenses had been part of the PD budget, but are now part of a separate office - disposition figures and attorney numbers are unknown	
<b>Oneida</b>	234,373	\$2,885,929.00	X		X		
<b>Onondaga</b>	460,517	\$5,467,320.00			X	X	
<b>Ontario</b>	102,445	\$1,369,136.52			X		
<b>Orange</b>	363,153	\$3,738,361.00			X	X	
<b>Orleans</b>	43,629	\$388,483.00	X		X	AC UCS 195 form missing	
<b>Oswego</b>	123,495	\$924,215.24			X	they also included the county's operating budget	
<b>Otsego</b>	62,196	\$762,628.44	X			says there is only a public defender - who takes conflicts?	
<b>Putnam</b>	99,550	\$655,489.58			?	X	
<b>Rensselaer</b>	154,007	\$1,443,126.00	X	X	X	on the budget form it lists money for assigned counsel plan but no other mention is made in any other forms AC USC 195 form has no case data - it is not compiled	

**Information Missing from the ILSF/UCS 195 Forms**

County	Population	2004 Net Local Expenditures	Program Type				Information
			PD	CD	AC	LA	
Rockland	292,989	\$3,937,283.00	X	X	X	X	AC caseload data is missing some information
St. Lawrence	111,655	\$1,383,012.00	X	X	X	X	Budget data suggests there is a LA - but no where else does it say this - also CD and AC UCS 195 forms missing
Saratoga	209,818	\$1,097,470.97	X	X	?	X	one form says there is an AC program, but no other forms say this and no UCS 195
Schenectady	147,289	\$2,143,266.00	X	X	X	X	
Schoharie	31,685	\$297,828.60			X	X	some info missing from UCS 195 form - breakdown of cases and active attorneys on list
Schuyler	19,455	\$215,893.90	X				says there is only a public defender - who takes conflicts?
Seneca	35,183	\$323,686.14	X	X	X	X	looks like AC budget comes directly from PD budget
Steuben	99,012	\$1,041,914.33	X	X	X	X	put PD and AC on same UCS 195 form - therefore no breakout of case totals for each
Suffolk	1,468,037	\$10,574,355.59			X	X	
Sullivan	74,948	\$1,606,460.00		X	X	X2	They have two legal aid offices - one essentially serves as a conflict office but is considered a legal aid office
Tioga	51,746	\$299,802.00	X		X	X	
Tompkins	101,411	\$1,348,119.00			X	X	UCS 195 form missing breakout of caseload data
Ulster	181,111	\$1,982,290.00	X		X	X	
Warren	64,715	\$611,679.00	X		X	X	no UCS 195 form for AC but do have list of total cases by attorney, for PD form don't keep records of specific caseload breakdown or trials, enclosed annual report that has case break down by court
Washington	61,872	\$438,249.60	X		X	X	
Wayne	93,728	\$1,280,801.94	X		X	X	
Westchester	940,302	\$16,504,125.00			X	X	put LA and AC information on same UCS 195 form, therefore no case breakout by organization - but have detailed budget info
Wyoming	42,932	\$251,715.00	X		X	X	all three UCS 195 forms are missing
Yates	24,720	\$271,407.96	X		X	X	
NYC	8,008,278	\$166,132,904.69			X	X	11 LA Societies - no UCS 195 included for any LAS or the AC program
<b>Totals</b>	<b>19,112,651</b>	<b>\$280,588,598.47</b>					

**Appendix I**  
**New York State DCJS Data**  
**Fingerprintable Offenses**  
**Percent of Arraignments by Provider**

County		Legal Aid Society	Public Defender	18B	Private	Pro Se	Null value
NYC	BRONX	67%	15%	13%	4%	0%	0%
	KINGS	67%	14%	12%	6%	0%	0%
	NEW YORK	65%	16%	10%	8%	0%	0%
	QUEENS	50%	23%	12%	14%	0%	1%
	RICHMOND	0%	58%	18%	24%	0%	0%
<b>NYC Total</b>		<b>62%</b>	<b>18%</b>	<b>12%</b>	<b>8%</b>	<b>0%</b>	<b>0%</b>
ALBANY		53%	10%	1%	12%	5%	19%
ALLEGANY		2%	15%	5%	16%	42%	20%
BROOME		7%	24%	17%	14%	5%	34%
CATTARAUGUS		57%	8%	2%	9%	8%	15%
CAYUGA		24%	0%	33%	23%	6%	14%
CHAUTAUQUA		48%	15%	2%	11%	8%	15%
CHEMUNG		1%	40%	11%	13%	20%	16%
CHENANGO		6%	28%	4%	12%	8%	43%
CLINTON		15%	0%	47%	17%	14%	8%
COLUMBIA		32%	18%	4%	17%	7%	22%
CORTLAND		9%	29%	16%	34%	2%	9%
DELAWARE		0%	0%	15%	16%	27%	41%
DUTCHESS		1%	28%	7%	23%	8%	33%
ERIE		11%	37%	10%	15%	2%	25%
ESSEX		0%	15%	8%	22%	25%	30%
FRANKLIN		4%	20%	2%	17%	34%	22%
FULTON		4%	29%	9%	22%	11%	24%
GENESEE		45%	3%	8%	7%	2%	34%
GREENE		0%	5%	1%	11%	6%	78%
HAMILTON		0%	0%	11%	36%	25%	29%
HERKIMER		29%	0%	21%	21%	12%	16%
JEFFERSON		13%	31%	9%	16%	7%	23%
LEWIS		19%	5%	2%	8%	1%	67%
LIVINGSTON		1%	11%	1%	32%	8%	47%
MADISON		1%	33%	4%	22%	17%	23%
MONROE		8%	50%	10%	19%	1%	12%
MONTGOMERY		42%	14%	2%	18%	14%	10%
NASSAU		20%	0%	5%	51%	24%	1%
NIAGARA		65%	4%	1%	9%	3%	18%
ONEIDA		1%	54%	8%	21%	6%	10%
ONONDAGA		20%	0%	46%	20%	1%	13%
ONTARIO		7%	0%	38%	17%	6%	32%
ORANGE		32%	0%	11%	18%	8%	30%
ORLEANS		1%	40%	13%	25%	5%	15%
OSWEGO		10%	0%	47%	33%	3%	8%
OTSEGO		0%	33%	12%	40%	5%	10%
PUTNAM		14%	0%	3%	43%	8%	31%
RENSSELAER		8%	41%	4%	17%	0%	30%
ROCKLAND		1%	23%	2%	40%	4%	31%
SARATOGA		5%	18%	0%	29%	2%	46%
SCHENECTADY		31%	26%	5%	13%	1%	24%
SCHOHARIE		2%	0%	41%	33%	9%	15%
SCHUYLER		0%	23%	0%	14%	19%	44%
SENECA		6%	15%	1%	17%	18%	42%
ST LAWRENCE		19%	17%	5%	10%	10%	39%
STEUBEN		5%	23%	19%	24%	18%	12%
SUFFOLK		18%	0%	3%	43%	30%	5%
SULLIVAN		33%	0%	8%	17%	4%	37%
TIOGA		2%	10%	3%	8%	14%	64%
TOMPKINS		8%	0%	42%	20%	10%	20%
ULSTER		7%	22%	1%	18%	11%	41%
WARREN		7%	22%	1%	32%	14%	24%
WASHINGTON		4%	19%	2%	25%	9%	42%
WAYNE		5%	22%	6%	13%	13%	41%
WESTCHESTER		16%	0%	45%	23%	0%	15%
WYOMING		10%	18%	2%	27%	18%	25%
YATES		9%	18%	5%	24%	38%	6%
<b>Grand Total</b>		<b>43%</b>	<b>17%</b>	<b>12%</b>	<b>15%</b>	<b>4%</b>	<b>8%</b>

**Appendix J**  
**Indigent Defense Program Types in Each County**

County	Population	2004 Net Local Expenditures	2005 Net Local Expenditures	Program Type			
				PD	CD	AC	LA
Albany	297,845	\$3,719,627	\$3,179,650	1	1		
Allegany	50,562	\$457,306	\$531,303	1		1	
Broome	199,360	\$2,999,403	\$2,752,434	1			1
Cattaraugus	83,354	\$1,047,805	\$997,490	1		1	1
Cayuga	81,726	\$597,395	\$490,907			1	
Chautauqua	137,645	\$1,293,336	\$1,366,695	1			
Chemung	90,413	\$1,414,522	\$1,173,902	1	1		
Chenango	51,659	\$374,613	\$371,938	1			
Clinton	81,366	\$1,308,643	\$1,215,844			1	
Columbia	63,405	\$700,742	\$682,263	1	1		
Cortland	48,691	\$566,356	\$661,110	1	1		
Delaware	47,226	\$489,737	\$406,762			1	
Dutchess	290,885	\$3,634,648	\$3,300,092	1			
Erie	941,293	\$9,289,477	\$6,884,832			1	1
Essex	38,992	\$436,413	\$462,794	1		1	
Franklin	51,056	\$460,377	\$380,192	3			
Fulton	55,206	\$323,787	\$314,240	1			
Genesee	60,020	\$860,681	\$717,152	1		1	
Greene	48,865	\$523,487	\$550,804	1			
Hamilton	5,278	\$85,368	\$81,501			1	
Herkimer	63,704	\$279,534	\$340,753			1	
Jefferson	114,651	\$1,109,182	\$972,342	1		1	
Lewis	26,636	\$257,186	\$201,660	1	1		
Livingston	64,658	\$558,654	\$467,675	1			
Madison	70,182	\$593,747	\$457,232	1		1	
Monroe	736,738	\$8,249,269	\$7,695,553	1	1	1	
Montgomery	49,371	\$337,383	\$343,939	1			
Nassau	1,339,463	\$7,840,340	\$7,349,760			1	1
Niagara	218,150	\$1,450,121	\$1,649,268	1		1	
Oneida	234,373	\$2,885,929	\$2,195,568	1		1	
Onondaga	460,517	\$5,467,320	\$4,987,501			1	1
Ontario	102,445	\$1,369,137	\$1,437,104			1	
Orange	363,153	\$3,738,361	\$3,852,582			1	1

County	Population	2004 Net Local Expenditures	2005 Net Local Expenditures	Program Type			
				PD	CD	AC	LA
Orleans	43,629	\$388,483	\$433,259	1			
Oswego	123,495	\$924,215	\$929,783			1	
Otsego	62,196	\$762,628	\$713,943	1			
Putnam	99,550	\$655,490	\$612,390				1
Rensselaer	154,007	\$1,443,126	\$1,316,986	1	1	1	
Rockland	292,989	\$3,937,283	\$3,164,031	1		1	
St. Lawrence	111,655	\$1,383,012	\$1,319,520	1	1	1	
Saratoga	209,818	\$1,097,471	\$877,792	1			
Schenectady	147,289	\$2,143,266	\$2,365,079	1	1	1	
Schoharie	31,685	\$297,829	\$352,914			1	
Schuyler	19,455	\$215,894	\$249,790	1			
Seneca	35,183	\$323,686	\$331,563	1			
Steuben	99,012	\$1,041,914	\$1,032,860	1		1	
Suffolk	1,468,037	\$10,574,356	\$9,653,529			1	1
Sullivan	74,948	\$1,606,460	\$1,334,312				2
Tioga	51,746	\$299,802	\$316,532	1	1	1	
Tompkins	101,411	\$1,348,119	\$1,282,883			1	
Ulster	181,111	\$1,982,290	\$1,849,817	1		1	
Warren	64,715	\$611,679	\$760,375	1		1	
Washington	61,872	\$438,250	\$379,668	1			
Wayne	93,728	\$1,280,802	\$1,178,978	1			1
Westchester	940,302	\$16,504,125	\$13,214,260			1	1
Wyoming	42,932	\$251,715	\$243,875	1		1	1
Yates	24,720	\$271,408	\$215,214	1		1	
New York City	8,008,278	\$166,132,905	\$142,241,508	9		2	1
<b>Totals</b>	<b>19,112,651</b>	<b>\$280,636,092</b>	<b>\$244,843,703</b>	<b>51</b>	<b>10</b>	<b>36</b>	<b>14</b>

Notes:

1. New York City population is from 2000, all other counties are population estimates from 2003. See <http://quickfacts.census.gov/qfd/states/36000.html>.
2. There are 16 counties with legal aid offices; however, three counties share one office in upstate New York and in New York City, four counties share one administration with offices in each county. Sullivan County has two legal aid programs, one of which is a conflict legal aid office.
3. In New York City, what is categorized in this chart as a “public defender” is, in actuality, one of five trial-level alternate defenders and two alternate appellate defenders, and the Neighborhood Defender Services of Harlem and the Office of the Appellate Defender, which are not alternate defenders.
4. While all counties must employ 18-B representation to some extent, only those counties with an assigned counsel administrator have been counted.
5. In some counties the assigned counsel administrator is also the public defender, conflict defender or legal aid society. When this is the case, we have indicated that the county does have an assigned counsel program. For example, Monroe, Steuben and Warren Counties.

## Appendix K

<b>Public Defender Workload Standards</b>					
State	Felony	Misdemeanor	Juvenile	Appeals	Author/Authority
Arizona	150	300	200	25	State of Arizona v. Joe U. Smith, 681 P. 2 <sup>nd</sup> 1374 (1984)
Colorado*	33-386 <sup>1</sup>	196-430	249	--	The Spangenberg Group. "Updated Weighted Caseload Study for the Colorado State Public Defender." December 2002.
Florida*	200	400	250	50	Florida Public Defender Association. "Comparison of Caseload Standards." July 1986
Georgia	150	400	200	25	Georgia Indigent Defense Council. "Guidelines of the Georgia Indigent Defense Council for the Operation of Local Indigent Defense Programs." October 1989.
Indiana	120-200 <sup>2</sup>	400	250	25	Indiana Public Defender Commission. "Standards for Indigent Defense Services in Non-Capital Cases: With Commentary." January 1995.
Louisiana	200	450	250	50	Louisiana Indigent Defense Board. "Louisiana Standards on Indigent Defense." 1995.
Massachusetts	200	400	300	--	Committee for Public Counsel Services. "Manual for Counsel Assigned through the Committee for Public Counsel Services: Policies and Procedures." June 1995.
Minnesota*	120	400	175	--	The Spangenberg Group/Minnesota State Public Defender. "Caseload Standards for District Public Defenders in Minnesota." October 1991
Missouri	40-180 <sup>3</sup>	450	280	28	Missouri State Public Defender System. "Caseload Committee Report." September 1992.
Nebraska	50 <sup>4</sup>	--	--	40	Nebraska Commission on Public Advocacy. "Standards for Indigent Defense Services in Capital and Non-Capital Cases." May 1996.
New York* (City)	150	400	--	25	Indigent Defense Organization Oversight Committee. "General Requirements for All Organized Providers of Defense Services to Indigent Defendants." July 1996.
Oregon	240	400	480	--	Oregon State Bar. "Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases." September 1996.
Vermont	150	400	200	25	Office of the Defender General. "Policy of the Defender General Concerning Excessive Workloads for Public Defenders." October 1987.
Washington	150	300	250	25	Washington Defender Association. "Standards for Public Defender Services: Objectives and minimum Requirements for Providing Legal Representation to Poor Persons Accused of Crime in Washington State." October 1989.
Wisconsin*	145	323	207	--	The Spangenberg Group. "Caseload/Workload Study for the State Public Defender of Wisconsin." September 1990.

\* = Jurisdictions where caseload standards were developed through case-weighting studies.

<sup>1</sup> Colorado's caseload standards vary by severity of case handled. Specific statewide felony caseload standards are 32.6 Class 2 & Felony Sex Assault, 105.5 Class 3, 200.2 Class 4-5 and 386.2 Class 6 cases per year per attorney. Specific misdemeanor caseload standards are 196.4 Class 1 Misdemeanor and Sex Assault and 429.8 Class 2-3 Misdemeanor and Traffic/Other cases per year per attorney.

<sup>2</sup> Indiana's felony caseload standards vary by severity of case handled. The specific standards are: 150 non-capital murder and all felonies; 120 non-capital murder, Class A, B, C felonies only; 200 Class D felonies only; and 300 Class D felonies and misdemeanors.

<sup>3</sup> Missouri's felony caseload standards vary based on the severity of the felony charge. For Felony A and B cases, the public defender caseload standard is 40 cases per year. For Felony C and D cases, the public defender caseload standard is 180.

<sup>4</sup> The Nebraska Commission on Public Advocacy has established a felony caseload standard for only the most serious category of felonies. The standard represents the number of violent crime cases (rape, manslaughter, 2<sup>nd</sup> degree murder, sexual assault) that a single attorney could handle during a year if those cases were the only case she handled during the year.

**PUBLIC DEFENSE SYSTEM CHANGES BY COUNTY 2003-06**

	<b>County</b>	<b>Yr</b>	<b>Change</b>	<b>Description</b>
1	<b>Albany</b>	'04	New office	Conflict defender office created
2	<b>Broome</b>	'04	Contract	New contract with legal services office for family court representation
3	<b>Cattaraugus</b>	'03 '04	New office; contract	Public defender office created; contracted for family court representation
4	<b>Cayuga</b>	'03	Change considered	Proposal for full-time public defender office
5	<b>Chemung</b>	'04	New office	Conflict defender office created
6	<b>Chenango</b>	'04	New appointee	New public defender and AC administrator appointed
7	<b>Clinton</b>	'05	Contract	Contract with three private counsel for family court representation
8	<b>Columbia</b>	'03	New office	Conflict defender office created
9	<b>Cortland</b>	'06	New office	Conflict defender office approved by county legislature
10	<b>Erie</b>	'04	Change considered	After considering LAB proposal for expanded representation responsibilities, continued AC program
11	<b>Essex</b>	'03; '04	New office; PD resigns	PD office created. Changed from multi-public defender system to single public defender office; Public Defender resigns
12	<b>Genesee</b>	'04	Proposal considered	Proposal for changes for defense services
13	<b>Greene</b>	'05	Full-time PD	Public defender position made full-time
14	<b>Herkimer</b>	'04	AC rules	Changed assigned counsel plan voucher rules in treatment court.
15	<b>Lewis</b>	'05	Contract	Contract with an attorney to take conflict cases.
16	<b>Monroe</b>	'04	New office	Conflict defender office created for Rochester City Court and Family Court
17	<b>Montgomery</b>	'04	Salary increased	Public defender salaries increased to retain staff
18	<b>Nassau</b>	'04	Contract	LAS contract expanded to lessen AC cases
19	<b>New York City</b>	'02	Contract	LAS contract expanded to lessen AC cases
20	<b>Niagara</b>	'04	Change considered	Proposal for conflict defender office
21	<b>Oneida</b>	'05	Increased PD staff	Attorneys hired to PD office to save on AC fees
22	<b>Onondaga</b>	'04	AC takes over LAS criminal caseload	Existing LAS office reassigned to family court work; AC plan takes over all criminal work
23	<b>Ontario</b>	'04	Change considered	Proposal for public defender office
24	<b>Orange</b>	'04	Change considered	Proposal for conflict defender office
25	<b>Oswego</b>	'04	Change considered	Proposal for public defender office
26	<b>Otsego</b>	'04	Salary increased	Public defender salaries increased to retain staff
27	<b>Rensselaer</b>	'04 '05	New office	Conflict defender office created; hired "special appellate counsel"
28	<b>St. Lawrence</b>	'04	New office	Conflict defender office created
29	<b>Schenectady</b>	'04	New office	Conflict defender office
30	<b>Schuyler</b>	'04	Full-time PD	Public defender position made full-time
31	<b>Seneca</b>	'04	New appointee; salary increase	New public defender; salary increases for attorneys in PD office; result in less funding of AC
32	<b>Steuben</b>	'03	Full-time PD	Public defender position made full-time
33	<b>Sullivan</b>	'04	New offices	LAS dissolved; two new alternate LAS offices created
34	<b>Tioga</b>	'06	Contract	Renewed contract with private practitioner for family court representation
35	<b>Warren</b>	'04	New office	Public defender office created
36	<b>Westchester</b>	'04	AC Admin changed	LAS resumed administration of AC program
37	<b>Yates</b>	'04	Salary increased	Part-time public defender salary increased

## **PUBLIC DEFENSE SYSTEM CHANGES BY COUNTY 2003-06**

### **ALBANY COUNTY**

#### *New Alternate Public Defender*

"I am proposing the establishment a Division of Alternate Public Defender with nine new staff attorneys. This proposal responds to the State mandated increase in assigned counsel fees to \$75 per hour. This mandate would have resulted in a cost increase of \$1.8 million under the traditional Assigned Counsel Program. I believe that the Alternate Public Defender model can provide these legal services in a more economical manner and save the County taxpayers about \$1 million."

Source: County Executive's Message on the 2004 Budget, at 6.

"Attorney Gaspar Castillo is Albany County's first alternate public defender, heading an office that will provide much of the representation for indigent criminal defendants previously provided by 'assigned counsel' lawyers."

Source: Attorney Takes On Alternate Role for Albany County Defendants, Times Union, March 11, 2004.

### **BROOME COUNTY**

#### *New Contract for Legal Aid Services*

Broome County requested proposals for delivering legal services in Broome County Family Court. Legal Aid for Broome and Chenango Counties has agreed to provide legal services at the rate of \$49 per hour, a total amount not to exceed \$245,000 for the period January 1, 2004 through June 30, 2004. And at a rate of \$40,834 per month, a total amount not to exceed \$735,000 for the period of July 1, 2004 through December 31, 2005.

"Broome County taxpayers face a projected \$1.7 million in costs for assigned-counsel cases next year. That's more than double what the county paid this year and will account for nearly 2 percent of any proposed property tax increase."

Source: Pay for Counties Assigned-Counsel Lawyers To Increase In '04, Press & Sun Bulletin, October 9, 2003.

### **CATTARAUGUS COUNTY**

#### *Contract with Legal Services Office for Family Court Representation New Public Defender Office*

In 2003, in anticipation of the assigned counsel fee increase, Cattaraugus created a Public Defender Office. Mark Williams is the full-time Public Defender, and he has at least two assistant Public Defenders. In January 2004 Williams was reappointed Public Defender for four years.

Source: More Aid Sought from State Share of Casino Profits, Buffalo News, January 8, 2004, at B3.

In December 2004, Cattaraugus County contracted with Southern Tier Legal Services through Legal Aid of Western New York to handle Family Court cases that would otherwise go to assigned counsel lawyers. "The arrangement, costing between \$270,000 and \$290,000 annually for 6,006 hours of legal work on 400 to 500 cases, will prevent conflicts of interest for



## **PUBLIC DEFENSE SYSTEM CHANGES BY COUNTY 2003-06**

the public defender when each family member must be represented by an independent attorney.”

Source: Legislature Will Vote on Pact with Attorneys, Buffalo News, December 6, 2004.

### **CAYUGA COUNTY**

#### *Proposal for Public Defender Office Considered*

Anticipated impact of the new assigned counsel rate in Cayuga County is a budget increase from \$346,000 in 2002 to \$800,000 in 2004. The Assigned Counsel Director, Lloyd Hoskins, provided the Public Safety Committee with data to consider a full-time Public Defender Office. The County brought in Wayne County Public Defender Ron Valentine, who advised the County to be cautious about changing systems.

Source: Public Defender Office Revisited, The Citizen, June 12, 2003.

### **CHEMUNG COUNTY**

#### *New Conflict Defender Office Created*

Richard Rich, former Chemung County Public Defender, was appointed the County's Conflict Defender. According to Rich, he anticipates his budget will be approximately \$600,000. The staffing configuration of his office has not yet been determined. His office will handle conflict cases from the Public Defender Office as well as Family Court respondent representation.

Source: NYSDA Backup Center research.

### **CHENANGO COUNTY**

#### *New Part-Time Chief Public Defender*

“Alan E. Gordon of Oxford became public defender Friday, replacing Peter J. McBride. It's the first major change in Chenango County's Public Defender's Office since it was established in 1987.”

“McBride, public defender since 1987, was unavailable for comment Friday. He said last fall he did not expect to seek reappointment because of differences he had with the county board's Finance Committee over funding for the office.”

Source: Chenango Names Public Defender; Gordon Replaces McBride in Position, Press & Sun-Bulletin, January 3, 2004.

### **CLINTON COUNTY**

#### *Contracts with Private Lawyers for Family Court Representation*

According to the Clinton Bar Association's 2005 UCS-195 submission, the county contracts out its Family Court representation. “60 cases per month under contract with three attorneys (60 each), any additional appointed by Judge. Separate panels are not maintained.”

Source: UCS-195 Report, 2005.

## **PUBLIC DEFENSE SYSTEM CHANGES BY COUNTY 2003-06**

### **COLUMBIA COUNTY**

#### *Conflict Defender Office Created*

According to the County's UCS-195 filing with the Office of Court Administration, Columbia County created a conflict defender office in 2003.

Source: UCS-195 Reports, 2004, 2005.

### **CORTLAND COUNTY**

#### *Conflict Defender Office Approved by County Legislature*

Cortland County recently approved the creation of a conflict defender office. The county's 2006 adopted budget allocates \$81,000 for the office, although a conflict defender has yet to be appointed.

Source: Cortland County Fiscal Year 2006 Adopted Budget, pp. 25-26.

### **ERIE COUNTY**

#### *Proposal for Expanded Representation by LAB Considered*

Erie County examined alternative models for service and requested the Buffalo Legal Aid Bureau to submit a proposal for expanded indigent representation. After considering it, the County decided to continue to provide indigent defense services through the Assigned Counsel Program for the immediate future.

Source: Letter From Erie County AC Administrator to Assigned Counsel Lawyers, December 4, 2003.

### **ESSEX COUNTY**

#### *Public Defender Office Restructured*

Essex County created a Public Defender Office in January 2003 to replace its Assigned Counsel System. In 2003 the Public Defender Office had one full-time attorney and two part-time defenders with an annual operating budget of \$215,000. Essex County, following the Franklin County model, originally envisioned three separate Public Defender Offices. One office was to handle Family Court matters, the other two to handle criminal matters in different parts of the County. The Family Court position received no applications and so was not created, those cases continuing to be handled by assigned attorneys.

In 2004, NYSDA provided technical assistance to County Attorney Richard Meyers in redrafting the Public Defender local law to provide for only one Public Defender Office. Essex County Public Defender Mark Montanye resigned in the face of high caseload and inadequate staffing.

Sources: County Creates Defense Posts, Press Republican, December 17, 2002; Essex Public Defender on the Job, Press Republican, January 14, 2003; Public Defender Resigns: Unyielding Caseload May Be Spur, Press Republican, July 13, 2004; Essex Priority: New Public Defender, Press Republican, August 12, 2004. Public Defender Leaving, Money Needed, Press Republican, August 21, 2004.

## **PUBLIC DEFENSE SYSTEM CHANGES BY COUNTY 2003-06**

### **GENESEE COUNTY**

#### *Changing Defense Delivery System Considered*

Modifications to the county's public defense system are currently under consideration.

Source: NYSDA Backup Center research.

### **GREENE COUNTY**

#### *Public Defender Position Made Full-Time*

Greene County hired the second assistant district attorney to become the county's first full-time public defender, replacing a part-time public defender who held the position for 27 years.

Source: Greene Lawmakers Appoint First Full-Time Public Defender, Daily Freeman, February 3, 2005.

### **HERKIMER COUNTY**

#### *Changes to Assigned Counsel Plan Voucher Rules*

Herkimer County Assigned Counsel Program rules regarding assigned counsel vouchers in Treatment Court have been modified. Program Administrator Keith Bowers says the nature of the services provided in the court make it practical to allow one attorney to represent all Treatment Court participants rather than having a separate attorney for each. The move would be a cost-saving measure for the County.

Source: County Supports Changes To Assigned Counsel Policy, The Evening Telegram, 2004.

### **LEWIS COUNTY**

#### *Conflict Defender Office for Family Court*

Lewis County contracted with James McCluskey from March 1, 2005 through February 28, 2006 for a total sum of \$56,700 to provide public defender services in those instances where a public defender is authorized to act, but the Lewis County public defender has an actual conflict.

Source: Lewis County Board of Legislators Resolution No. 136-2005.

### **MONROE COUNTY**

#### *New Conflict Defender Office for Rochester City Court and Family Court*

Monroe County modified its current Assigned Counsel Program by creating an office staffed by seven attorneys to handle conflict cases. Although this staffing component is not contemplated under the statutory provisions relating to Assigned Counsel Programs (see County Law § 722(3)), the modified Bar Association plan was approved by the Office of Court Administration. Currently, the Conflict Defender and his seven staff attorneys handle conflict cases from Rochester City Court and Family Court.

Source: The Monroe County Bar Association Sponsored Plan For Conflict Assignments, April 2003.

## **PUBLIC DEFENSE SYSTEM CHANGES BY COUNTY 2003-06**

### **MONTGOMERY COUNTY**

#### *Public Defender Salaries Increased to Retain Staff*

Salaries in the Public Defender's office were increased by "a total of \$60,000."

Source: Montgomery County Supervisors Look Back, Ahead, The Leader-Herald, January 4, 2004.

William Martuscello, the PD, is reported to have warned that the AC increase will make it difficult for him to retain his current staff because the assigned-counsel rates will be higher than what the Public Defenders make as salary.

"He said, 'I hope that is enough to convince them to stay' rather than accept an assignment from a judge for the higher rates."

Source: Defender Requests Funding Increase, The Leader-Herald, October 29, 2003.

### **NASSAU COUNTY**

#### *County Shifts Assigned Counsel Work to Legal Aid Office*

"Six months after the rate increases took effect for so-called 18-B attorneys—named after a section of state law that requires counties and cities to provide lawyers for indigent defendants—the county has begun shifting work it normally handles to the county's Legal Aid Society, a not-for-profit defense organization that already handles the defense of indigent clients for a vast majority of Nassau's cases.

"It's about cost-saving and getting the most for our money,' said Nassau County attorney Lorna Goodman, who brokered the agreement with NCLAS and the judges. She said the county is expected to save more than \$300,000 by directing more of the cases it funds each year to legal aid."

"In order to handle the increasing case load, on June 28 the county Legislature approved an additional \$486,000 to the Legal Aid Society's existing \$3.8 million contract. In 2005, they will add another \$605,000 to that contract to help defray the costs of an additional 1,500 cases the judges will assign."

Source: Nassau Shifts Work from 18-B Attorneys to Cut Costs, Long Island Business News, July 9, 2004.

### **NEW YORK CITY**

#### *City Shifts Assigned Counsel Work to Legal Aid Society*

The City of New York entered into a contract with The Legal Aid Society to handle additional criminal cases and more parole matters. A commensurate amount of funding was reduced from the City's Assigned Counsel Program.

Source: Corporation Counsel's Office Avoids Budget Ax, New York Law Journal, July 5, 2002. Legal Aid Society's Contract Increases Trial-Level Funding, New York Law Journal, December 19, 2002. Legal Aid And City Sign New Pact, New York Law Journal, December 30, 2002.

## **PUBLIC DEFENSE SYSTEM CHANGES BY COUNTY 2003-06**

### **NIAGARA COUNTY**

#### *Considered Creating Conflict Defender Office*

"[T]he Niagara County Legislature's Republicans are considering the idea of creating a new department to provide defense attorneys for cases where public defenders have a conflict of interest."

Source: GOP Resurrects Idea of Creating Department of Conflict Defender, The Buffalo News, January 15, 2004.

### **ONEIDA COUNTY**

#### *Less Reliance on Assigned Counsel*

"The public defenders offices, both civil and criminal, are another example of saving money through increased hiring. Creating a permanent civil division was deemed cheaper than contracting out the work, as had been previously done, said Frank Nebush, the criminal division's chief public defender."

"Also, savings were seen in the criminal division once more lawyers were hired, so fewer outside lawyers were needed to pinch-hit."

Source: The New Sales Tax; There's More Behind It Than Medicaid, Utica Observer Dispatch, February 27, 2005.

### **ONONDAGA COUNTY**

#### *Shift from Institutional Provider to Assigned Counsel*

The Assigned Counsel Program was awarded the county's criminal defense caseload after it submitted the lowest bid, of \$4.2 million.

"After nine hours of negotiating, the Onondaga County Legislature voted Monday to try to save \$1.1 million by ending the Frank H. Hiscock Legal Aid Society's three decades of representing poor defendants in Syracuse city Court."

"Poor defendants charged with misdemeanors and violations in City Court will be represented by lawyers paid through the assigned counsel program as of June 1 under the resolution the Legislature approved 13-4."

"Without changes in the delivery system, the rate increases would add an estimated \$2.9 million to Onondaga County's legal aid bill this year, [the county chief fiscal officer] said."

Source: Legal Aid Out Of City Court, The Post-Standard, March 2, 2004.

### **ONTARIO COUNTY**

#### *Proposal for Public Defender Office Reviewed*

The Ontario County Legislature estimates that the increase in cost for court-appointed representation will rise from \$700,000 in 2003 to about \$1.4 million in 2004. Margaret Cooper of the County Administrator's office prepared a report, which recommends establishing a Public Defender Office. However, after consulting with the Bar Association, the County has decided not

## **PUBLIC DEFENSE SYSTEM CHANGES BY COUNTY 2003-06**

to make any changes in its public defense system for now.

Source: Ontario Might Switch To Public Defender, Finger Lakes Times, May 20, 2003.

### **ORANGE COUNTY**

*Proposal for Conflict Defender Office Considered*

The estimated increase for 2004 for assigned counsel representation is \$3.5 million. This is up \$2.7 million from 2003. These amounts do not include the \$1.73 million already budgeted to cover the Legal Aid Society contract costs. The County is currently considering creating an alternate legal aid provider.

Source: Lawyers for Poor Getting Pay Raise, Times Herald-Record, November 24, 2003.

### **OSWEGO COUNTY**

*Proposal for Public Defender Office Considered*

Oswego County will study whether to replace the County's Assigned Counsel Program with a Public Defender Office. According to George Valette, the Assigned Counsel Administrator, the anticipated assigned counsel budget for 2004 is \$1.2 million. In 2003, the budget was \$480,638.

Source: Assigned Counsel Cost To Be Studied, The Post-Standard, December 15, 2003.

### **OTSEGO COUNTY**

*Public Defender Salaries Increased to Retain Staff*

The County Board of Representatives approved salary increases for the Public Defender and assistant Public Defenders. The Board increased the salaries of assistant Public Defenders who work in criminal court and family court by an average of \$2,500. Both representatives warned that state-mandated increases in the fees paid to attorneys assigned to represent poor people may convince attorneys to leave the employ of the County's Public Defender's Office unless they receive more money. The Public Defender's salary in 2003 was \$43,427.

Source: Otsego Reps OK Budget with Tax Decrease, The Daily Star, December 4, 2003.

### **RENSSELAER COUNTY**

*Conflict Defender Office Created; "Special Appellate Counsel" Hired*

"[A Rensselaer County] budget proposal calls for hiring a special appellate counsel to further reduce the cost of assigned counsel and save the county some \$100,000 and the elimination of seven currently vacant positions that will result in savings of more than \$300,000."

Source: Jimino Sees 6% Hike In 2005 County Budget, Indenews.com, October 22, 2004.

"The County has created a Conflict Defender Office. David Gruenberg was appointed the conflict defender and will make \$45,000 and his two assistant conflict defenders will make \$43,000 each. There is still \$125,000 in the Rensselaer County budget for assigned counselors in case there are multiple defendants. Jimino estimates this new position will save taxpayers an estimated \$500,000."

## **PUBLIC DEFENSE SYSTEM CHANGES BY COUNTY 2003-06**

Source: County Creates New Position, Bennington Banner, December 20, 2003.

### **ST. LAWRENCE COUNTY**

#### *New Conflict Defender Office Created*

"Legislators are at odds over the legality and wisdom of a move to create a second St. Lawrence County public defender's office. Lawmakers at Monday's Operations Committee meeting are expected to discuss an opinion by County Attorney William F. Maginn that the so-called 'conflict defender's office,' which is being created to save money on assigned counsel fees, is allowed by state law."

Source: Lawmakers Disagree On Legality of Second Public Defender's Office, Watertown Daily Times, March 14, 2004

### **SCHENECTADY COUNTY**

#### *Conflict Defender Office Created*

"Schenectady County legislators on Tuesday established an alternate public defender's office for poor defendants, following the lead of other counties that have set up the offices to avoid paying a sharp increase in mandated hourly fees for court-appointed defense lawyers."

"The county estimates the new office will save approximately \$100,000 in fees now paid to outside lawyers for criminal cases."

Source: Public Defending Expanded, The Albany Times Union, May 12, 2004.

### **SCHUYLER COUNTY**

#### *Public Defender Office Created*

"Schuyler lawmakers unanimously approved Watkins Glen lawyer Connie Fern Miller as the County's first full-time Public Defender. Miller's four-year appointment to the position was filled for the last 31 years by James Halpin of Odessa. Halpin is retiring. Miller wants a County employee to fill the secretarial position in her office, Legislature Chairman Thomas Gifford said. Miller, who starts Jan. 1, will be paid \$70,000 a year. She will continue her private practice in a limited capacity, doing only real estate and estate work. Miller will have a part-time staff person in her office, and lawyer Stewart McDivitt of Montour Falls is expected to remain in his position as part-time assistant Public Defender. Miller will continue to work out of her Decatur Street office in Watkins Glen."

Sources: Schuyler County Approves 2004 Budget, Star-Gazette, December 12, 2003; Watkins Lawyer Named Schuyler Public Defender, Star-Gazette, December 9, 2003.

### **SENECA COUNTY**

#### *Shift of Assigned Counsel Representation to Public Defender Office*

In 2004, The County Board of Supervisors "agreed to increase, to \$50,000 each, the salaries for two part-time public defender positions that have been vacant since the beginning of the year.

"When the board reorganized, it appointed assistant public defender Michael Mirras to lead the office, replacing David Ettman."

## **PUBLIC DEFENSE SYSTEM CHANGES BY COUNTY 2003-06**

“The money to increase the salaries from \$35,000 is included in Mirras’ budget and will be made up through fewer assigned counsel appointments, less secretarial support and training, and less use of county office space, resulting in smaller payments by the county for that space.”

Source: McCann Job May Be Up To Ashby, Finger Lakes Times Online, February 11, 2004.

### **STEBEN COUNTY**

#### *Public Defender Position Made Full-Time*

Steuben County moved from a part-time to a full-time Public Defender. The budget for the Public Defenders Office next year is \$845,000, roughly \$140,000 more than the current budget. The salary range for the full-time position is \$65,000 to \$85,000. Based on current caseloads, the cost of using outside attorneys is estimated at \$485,000 annually. The Public Defender's Office currently consists of several attorneys who work part-time at a rate of nearly \$50 an hour. But the County must occasionally use attorneys outside the office when conflicting interests arise.

Source: Schuyler to Seek Full-Time Public Defender, Star-Gazette, November 10, 2003.

### **SULLIVAN COUNTY**

#### *Alternate Legal Aid Societies Created*

Existing Legal Aid Office was dissolved and two new legal aid offices were created—Sullivan Legal Aid Panel and the Conflict Legal Aid Bureau.

Source: NYSDA Backup Center research

### **TIOGA COUNTY**

#### *Contracts with Private Lawyer for Family Court Representation*

“A four-year contract between the County and an attorney for court-assigned counsel service was renewed Tuesday over the objections of several legislators who questioned the legality of the system and no-bid nature of the contract...”

“Under a system in place in the county for more than 10 years, [Mark] Kachadourian contractually provides all court-assigned counsel in family court matters and in some criminal proceedings, [County Chair Don] Burns said....”

“The current contracted arrangement saves taxpayers between \$400,000 and \$500,000 per year, according to county Budget Officer Ronald McEwen.”

"However, [the County Chair] said two lawsuits over failure to provide legal services have been leveled at the county over the last four years; lawsuits he said were dismissed on "technicalities." He added the contract system may not fall under four specific options outlined in state law governing the provision of court-appointed council. Previous county counsel had described the arrangement as 'creative' but had not weighed in on its legality, Burns said.”

Source: Assigned Counsel Contract Renewed Despite Objections in Tioga County, NY, The Daily & Sunday Review, January 4, 2006.



## **PUBLIC DEFENSE SYSTEM CHANGES BY COUNTY 2003-06**

### **WARREN COUNTY**

#### *New Public Defender Office*

Warren County moved from an Assigned Counsel System to a Public Defender Office. Former Warren County District Attorney Sterling Goodspeed was appointed Public Defender. The office budget will be nearly \$300,000. The Goodspeed salary will be \$55,000 and his first assistant, Marcy Flores' salary will be \$45,000; the other assistant will be paid \$37,000. The office will have an Administrator, Patricia Sheehan, the Director of the County's Assigned Counsel Program and Secretary. Ms. Flores was the first assistant when Goodspeed was the District Attorney for eight years.

"While the nearly \$300,000 budget for the proposed public defender's office is similar to the 2003 assigned counsel budget, Goodspeed said that tab probably would have risen to nearly \$600,000 with the rate increase factored in."

Source: Criminal's Enemy Up to Be Defender, Post-Star, September 27, 2003.

### **WESTCHESTER COUNTY**

#### *Legal Aid Society Resumed Administration of Assigned Counsel Program*

Westchester County Legal Aid Society to resume administering the County assigned counsel program.

Source: Letter from Stephen J. Pittari accompanying 2005 UCS-195 form,

### **YATES COUNTY**

#### *Public Defender Salary Increased*

Approved salary increases for County officials, including \$53,880 for the Public Defender and \$119,800 for District Attorney.

Source: Yates Seeks Property Proposals -- Waterfront Site Available For Redevelopment, Finger Lakes Times, January 13, 2004.

## Appendix M



A research, training, and policy initiative of the Center for Community Alternatives

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### SENTENCING FOR DOLLARS

Sentencing For Dollars is an initiative of Justice Strategies, the research, training, and policy division of the Center For Community Alternatives.

Prior to any plea, a defense attorney should counsel his or her client regarding the direct and collateral consequences of a criminal conviction. The ever-increasing fees and surcharges associated with a criminal conviction are often overlooked and should be included in a review of the consequences of the conviction.

The information in this pamphlet is designed to assist defense counsel in calculating fees, surcharges and civil penalties that may be applicable based upon the category of the offense, type of sentence, length of sentence and amount of time under probation or parole supervision. This pamphlet includes the fees, surcharges, and penalties in effect on March 1, 2004. For defendants sentenced to probation, additional county fees may be imposed depending upon local county law.

#### JUSTICE STRATEGIES

The Justice Strategies team has helped to draft local legislation, testified before the U.S. Senate Health, Education, Labor and Pensions Committee, published a report on racial disparities in local criminal justice and trained hundreds of attorneys, community leaders, employment and youth counselors, young people, and educators on criminal and juvenile justice issues.

#### EXAMPLE ONE

John, age 20, after refusing a chemical test, was convicted of Driving While Intoxicated, a class E felony, and No Insurance, a misdemeanor. He was sentenced to 5 years probation. The financial consequences of his conviction will include:

Mandatory fine of no less than	\$ 1,000.00
Mandatory Surcharge	\$ 250.00
Crime Victim Assistance Fee	\$ 20.00
Probation Supervision Fee (\$30.00/Month)	\$ 1,800.00
Civil Penalty (Zero Tolerance DWI)	\$ 125.00
Fee for termination of license revocation	\$ 100.00
Surcharge for VTL §1192 conviction	\$ 25.00

Civil Penalty for No Insurance	\$ 750.00
Civil Penalty for chemical test refusal with prior VTL §1192 conviction within 5 years	\$ 750.00
<b>TOTAL</b>	<b>\$ 4,820.00*</b>

\* See note to Mandatory Surcharges table

### **EXAMPLE TWO**

Jane, a 26 year old single mother of 2 children, was convicted of criminal possession of a controlled substance in the second degree, a class A-II felony. She was sentenced to 8 1/3 to life and made parole after serving 8 1/3 years and remained on parole for ten years. The financial consequences of her conviction will include:

Mandatory Surcharge	\$ 250.00
Crime Victim Assistance Fee	\$ 20.00
DNA Bank Fee	\$ 50.00
Incarceration Fee	\$ 433.00
Parole Supervision Fee	\$ 3,600.00
Fee for termination of license suspension	\$ 25.00
<b>TOTAL</b>	<b>\$ 4,378.00</b>

## MANDATORY SURCHARGES

AMOUNT	APPLIES TO	STATUTE
\$250	VTL § 1192 DWI felony*	VTL §1809 (1)(b)(i)
\$140	VTL § 1192 DWI misdemeanor	VTL §1809 (1)(b)(ii)
\$25	VTL Article 9 infraction	VTL §1809 (1)(a)
\$45	Selected VTL offenses	VTL §1809 (1)(c)
\$25	Surcharge for any conviction VTL § 1192	VTL §1809-c
\$250	Felony surcharge	Penal Law §60.35(1) (a)
\$140	Misdemeanor surcharge	Penal Law §60.35(1)(b)
\$75	Violation Surcharge	Penal Law §60.35(1)(c)
\$5	Proceeding in town or village	VTL §1809(9)
Up to \$10	Additional surcharge applies in village justice court, if local legislative body enacts local surcharge for violations also subject to VTL §1809 mandatory surcharge	VTL §1809-d
5% - 10% of total restitution	Designated surcharge paid to agency collecting restitution for collection & administration	Penal Law §60.27(8)

\*Any person convicted of a second DWI within five years shall be required to pay for the installation and monthly maintenance fees for an ignition interlock device (VTL §1193(1-a)(c)(i) and penal law §65.10(2)(k-1))

## FEES

AMOUNT	APPLIES TO	STATUTE
\$20	Felony offense Crime Victim Assistance Fee (CVAF)	Penal Law § 60.35(1)(a)
\$20	Misdemeanor offense CVAF	Penal Law § 60.35(1)(b)
\$20	Violation CVAF	Penal Law § 60.35(1)(c)

\$20	For VTL § 1192 felony offense CVAF	VTL § 1809(1)(b)
\$20	For VTL § 1192 misdemeanor offense CVAF	VTL § 1809(1)(b)
\$5	For VTL Art 9 traffic infraction CVAF	VTL § 1809(1)(a)
\$5	VTL offenses covered by 1809(1)(c) CVAF	VTL § 1809(1)(c)
\$1000	Supplemental Sex Offender Victim Fee	Penal Law §60.35
\$50	DNA Databank Fee: a person convicted of a designated offense as defined by Executive Law §975 (7) shall, in addition to a mandatory surcharge and crime victim assistance fee, pay a DNA databank fee	Penal Law § 60.35(1)(e)
\$50	Sex offender registration fee (SORA): a person convicted of a sex offense as defined by Correction Law §168-a(3) or a sexually violent offense as defined by Correction Law §168(3)	Penal Law § 60.35(1)(d)
\$10	SORA change of address fee	Correction Law §168(b)(8)
\$50	Termination of license revocation fee. If drivers license is revoked-- application for re-issuance	VTL §503 (2)(h)
\$100	Termination of license revocation fee. If drivers license is revoked for an alcohol-related offense and driver is under 21	VTL §503 (2)(j)
\$25	Termination of license suspension Fee	VTL §503 (2)(j)
\$100	Termination of suspension fee--Zero Tolerance. If driver is under 21, license is suspended for an alcohol- related offense	VTL §503 (2)(j)

\$35	Termination of suspension fee where suspension is for failure to appear, pay fine, penalty, or mandatory surcharge	VTL §503 (2)(j-1)(i)
\$30/month	Fee for parole supervision	Executive Law §259-a(9)(a)
\$30/month	Fee for probation supervision (DWI-related)	Executive Law § 257-c
\$1/ week	Incarceration Fee: The commissioner may collect from the compensation paid to a prisoner for work performed while housed in a general confinement facility an incarceration fee	Correction Law §189(2)

**NON-STATUTORY COUNTY IMPOSED PROBATION FEES  
(VARIES BY COUNTY)**

AMOUNT	APPLIES TO	STATUTE
\$10/test or \$50 one time fee	Drug testing	County
\$350	Probation pre-sentence investigation report	County
\$3-\$8/day	Electronic Monitoring fee	County
\$30/month	Supervision	County
\$30/session	Victim Impact Panel	County

**CIVIL PENALTIES**

AMOUNT	APPLIES TO	STATUTE
\$125	Zero Tolerance Law: For offenders under age 21 for alcohol-related offense	VTL §1194-a(2)

\$750	Operating with no insurance or underinsured	VTL §319(5)
\$300	Chemical test refusal	VTL §1194(2)(d)(2)
\$750	Second Chemical test refusal with alcohol within 5 years	VTL §1194(2)(d)(2)
\$750	Chemical test refusal with prior VTL §1192 conviction within 5 years	VTL §1194(2)(d)(2)
\$250 per year for three years	Driver Responsibility Assessment applicable to any person convicted of a DWI, DWAI or chemical test refusal	VTL §1199
\$100 for three years plus \$25 for each additional point	Driver Responsibility Assessment applicable to any person who accumulates 6 points or more within an 18 month period	VTL §503

**NB**

1. If restitution is paid in full prior to sentencing the CVAF and surcharges are waived. VTL §1809(6) and Penal Law §60.35(6).
2. Charges occurring prior to November 11, 2003 had lower surcharges and Crime Victim Assistance fees.
3. Youthful offenders are subject to all fees, penalties and surcharges as their adult counterparts by an amendment to Penal Law §60.35 and Vehicle and Traffic Law §1809.

Revised September 16, 2004

*The Center for Community Alternatives (CCA) is a leader in the field of community-based alternatives to incarceration. Through pioneering services as well as the innovative research, policy analysis and training of its Justice Strategies division, CCA fosters individual transformation, reduces reliance on incarceration and advocates for more responsive juvenile and criminal justice policies*

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## Appendix N

### Total Number of Town and Village Courts by County<sup>1</sup>

Albany 14	Herkimer 27	Otsego 29
Allegany 36	Jefferson 35	Putnam 9
Broome 19	Lewis 20	Rensselaer 17
Cattaraugus 38	Livingston 22	Schuyler 11
Cayuga 28	Madison 21	Seneca 12
Chautauqua 31	Monroe 22	Steuben 39
Chemung 15	Montgomery 14	Suffolk 31
Chenango 28	Nassau 61	Sullivan 20
Clinton 19	Niagara 13	Tioga 13
Columbia 22	Oneida 38	Tompkins 11
Cortland 17	Onondaga 28	Ulster 24
Delaware 23	Ontario 18	Warren 11
Dutchesss 29	Orange 32	Washington 24
Erie 37	Rockland 20	Wayne 21
Essex 19	St. Lawrence 35	Westchester 38
Franklin 22	Saratoga 24	Wyoming 21
Fulton 9	Schenectady 6	Yates 12
Genesee 16	Schoharie 18	New York City 0
Greene 19	Orleans 12	<b>Total: 1,284<sup>2</sup></b>
Hamilton 11	Oswego 23	

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<sup>1</sup> Information gathered from City, Town and Village Resource Center. *Available at* [http://www.courts.state.ny.us/ea/XML/ASP\\_Transform/Court\\_transform.asp](http://www.courts.state.ny.us/ea/XML/ASP_Transform/Court_transform.asp).

<sup>2</sup> The Education and Administration Office overseeing T& V courts reported to us that there are 1,281 courts: 924 town courts and 357 village courts.



## Appendix O

### Onondaga Town and Village Assignments

Assignments from town and village courts accounted for 31% of the Assigned Counsel Program Assignments. The number of assignments from justice courts varied substantially, from a high of 660 for the Town of Dewitt to a low of 4 for the Town of Spafford. Justice Court Assignments for 2004 were as follows:

#### Assigned Counsel Program 2004 Justice Court Assignments

<b>Court</b>	<b># Felony</b>	<b># Misd.</b>	<b># Viol.</b>	<b># Traffic<sup>1</sup></b>	<b># Other</b>	<b>#Total Cases</b>
Camillus Town Court	56	161	2	71	8	298
Cicero Town Court	65	118	10	107	8	308
Clay Town Court	96	244	31	148	20	539
Dewitt Town Court	112	281	35	217	15	660
Elbridge Town Court	5	23	2	14	5	49
Fabius Town Court	3	5	3	0	0	11
Geddes Town Court	51	105	6	62	6	230
Lafayette Town Court	13	16	3	6	0	38
Lysander Town Court	15	18	4	17	0	54
Manlius Town Court	43	57	1	49	3	153
Marcellus Town Court	6	15	0	23	1	45
Onondaga Town Court	33	45	0	46	8	132
Otisco Town Court	3	3	0	0	0	6
Pompey Town Court	2	5	0	4	0	11
Salina Town Court	88	201	31	144	17	481
Skaneateles Town Court	8	12	0	10	1	31
Spafford Town Court	1	2	0	1	0	4
Tully Town Court	8	9	3	3	0	23
Van Buren Town Court	8	30	3	29	5	75
Baldwinsville Village Court	24	37	8	38	7	114
East Syracuse Village Court	54	91	9	82	8	244
Fayetteville Village Court	3	16	1	20	3	43
Jordan Village Court	1	6	0	6	0	13
Liverpool Village Court	8	12	6	22	1	49
Manlius Village Court	5	13	0	13	1	32
Minoa Village Court	5	10	2	5	0	22
North Syracuse Vill. Court	21	69	18	66	2	176
Solvay Village Court	32	60	19	29	2	142
<b>Total</b>	<b>769</b>	<b>1164</b>	<b>197</b>	<b>1232</b>	<b>121</b>	<b>3983</b>

<sup>1</sup> Does not include traffic felonies.

**Washington County Public Defender Caseload by Court for 2004**

<b>Court</b>	<b>Case Assignments</b>
Argyle Town	19
Argyle Village	-
Cambridge Village	24
Cambridge Town	1
Dresden	1
Easton	20
Fort Ann	32
Fort Edward Village	113
Fort Edward Town	73
Granville Town	23
Granville Village	70
Greenwich Town	21
Greenwich Village	21
Hampton	2
Hartford	22
Hebron	5
Hudson Falls	295
Jackson	7
Kingsbury	78
Putnam	6
Salem Town	9
Salem Village	10
White Creek	8
Whitehall Town	5
Whitehall Village	52
County Court	73
Family Court	119
Drug Court	-

Information obtained from Washington County's UCS 195 form submitted with the Indigent Legal Services Fund 2004 Annual Report.