

RESOLVING THE  
ASSIGNED COUNSEL FEE CRISIS:

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*An Opportunity to Provide  
County Fiscal Relief and  
Quality Public Defense Services*

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## **PREFACE**

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New Yorkers have before them a great opportunity due to a deepening crisis. The state has not significantly revised or revisited its method of providing public legal representation in over 35 years. Because assigned counsel fees have not been raised since 1986, diminishing numbers of lawyers are able to act as assigned counsel, causing compromised representation, court delays, and chaos in assigned counsel programs. Consequently, people who have a right to public counsel are being denied justice. Reforming how public legal services are provided can serve the interests of everyone, helping to bring fairness to systems that are currently unfair.

People charged with crimes or brought before the Family Court should not be treated differently just because they are poor. If they cannot afford to hire a lawyer, the systems that provide lawyers for them should insure the independence, quality, and scope of the resulting representation.

Counties need fiscal relief and support from the state, and help in improving their systems for public legal representation. The state, accepting its constitutional obligation to provide counsel, needs safeguards in all systems to ensure both quality representation and expenditure control.

Lawyers for low-income people and the private defense bar need the systems for providing public legal services to be adequately financed and politically independent so that they can provide high quality client-centered public representation in every court in this state.

New Yorkers need to know that their government will try to make no meaningful distinction between people of means and those who lack means as it redesigns the systems—or system—of representation. The state should ensure that fairness, important to all, is supported by the provision of adequate legal resources to low-income people.

In what follows we lay out principles that can help New York take advantage of the opportunity that lies before us all.



## **INTRODUCTION TO NEW YORK STATE DEFENSE SERVICES**

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The United States Supreme Court said in *Gideon v Wainwright* that the right to counsel is a constitutional guarantee. That 1963 decision, and cases following it, mandated that states provide counsel to all eligible persons. The New York State Legislature responded by delegating this state responsibility to counties. There the obligation has remained for over 35 years.

Today there are over 115 programs or methods for providing public defense under articles 18-A and 18-B of the County Law. Only about 30 of these are headed by someone in a full-time position. These various, largely part-time programs must face, in our adversary system, 57 full-time district attorneys whose salaries are supported through state financial assistance and who have far more resources. The few state funds that defense programs do receive have for years been stripped from the Executive Budget, then awarded in the Legislature at the last moment, creating chaos rather than coherent planning.

There is no state oversight, no mechanism for assuring that constitutionally required defense services get needed resources. New York State does not guarantee the three factors that American voters recently identified in national focus groups as most important in providing “competent counsel.” Those are: previous experience in similar cases before a lawyer handles a particular matter, a reasonable caseload allowing time to prepare each case, and resources necessary to put on a defense.

Assigned counsel programs exist in all 62 counties, at least for cases that other programs cannot take due to conflicts of interest. Assigned counsel cases are too often viewed as “practice starters” for new lawyers, as charity by the experienced, or the last resort for the unskilled. Of all those programs, only a few require that attorneys meet standards in order to participate.

The statutorily set rates for 18-B lawyers have remained stagnant for 15 years. Worse, lawyers representing clients in some courts see their vouchers cut, not because they did not do the work or the work wasn’t necessary, but merely as a cost-saving measure for the government. Fact-finding hearings held at the end of 1998, by the New York State Defenders Association and the League of Women Voters of New York State and local chapters, revealed that, after vouchers were cut, lawyers were working for \$12 an hour or even \$7 an hour. This has at last driven even the most dedicated lawyers, off assigned counsel panels across the state. Haphazard efforts are being made to stem the flow, as judges desperate to move cases on their docket begin to exceed the statutory rates and total per-case caps.

Meanwhile, public defense plans and programs in every county suffer from ills—some generic, some unique—that deprive clients of representation, clog the courts with cases that cannot be moved, and erode public trust and confidence in the legal system. Unmanageable caseloads, blatant attempts to keep public defense lawyers from doing good work in unpopular types of cases, lack of adequate training, administration of assigned counsel panels by non-lawyers or county officials with conflicts of interest, failure to provide counsel to justice court defendants until they have spent many days in jail, lack of necessary expert and forensic services, and district attorney aspirants who disavow their defense work are but examples of the problems that exist.

Solving New York’s public defense services crisis, highlighted by a growing recognition that assigned counsel fees are too low, will take *not just more money, but money and more*.

- **The decline in numbers of lawyers willing to act as assigned counsel in family court and criminal matters has put the legal system in crisis.** Lawyers are bringing lawsuits challenging the fees currently set by statute and are refusing to accept further assignments. Courts are exceeding statutory fee caps and raising hourly rates because the dearth of assigned counsel and the excessive work for remaining lawyers constitute “extraordinary circumstances.”
- **The leaders of all three branches of state government acknowledge that assigned counsel fees under article 18-B of the County Law must be raised.** The major acknowledged impediment to raising the rates has been the inability to resolve two issues—“how much” and “who pays.”
- **The amount, source, and method of increasing fees can affect whether the crisis ends or recurs.** The current statutory scheme for public defense in New York has created a jumble of over 115 programs in the state’s 62 counties, with all counties relying to some extent on assigned counsel. Any change in the funding of assigned counsel fees in a given county will affect that county’s budget, its courts and other components of the criminal justice system, its other public defense program(s), if any, and its public defense clients. Unconsidered and therefore unforeseen consequences of proposals to deal with the assigned counsel fee issue will, if the wrong choice is made, soon plunge the system back into crisis. The right question, then, is not simply “who pays?” assigned counsel fees or “how much?” but: **How can New York State most efficiently and effectively provide mandated public defense services?**

Experts who have seriously examined this question and jurisdictions that have successfully answered it have created systems that, while taking into account each jurisdiction’s unique circumstances, adhere to common, identifiable principles set out in this position paper. **New York’s current structure for providing public defense services fails to conform to these principles.**

This paper is based on a review of public defense systems in other states and in New York State, national studies and standards, and the accumulated knowledge and experience of this state’s defense services providers. It concludes with recommendations for the efficient and effective provision of public defense services.

**PRINCIPLE I: Reliable and sufficient funding is necessary for the efficient and effective provision of public defense services.** When there are not enough lawyers to represent eligible clients, those clients are not the only ones affected, although they suffer the most direct and irreparable harm. Court resources are wasted when cases must be adjourned because there is no lawyer. More court resources and legal fees must be expended on lawsuits challenging the underfunding. Expensive jail beds, occupied by defendants who if represented would be released on bail or freed outright because they were wrongly charged, cost localities money and erode the public's trust. Reversals based on lawyer inexperience, error, and ineffectiveness lead to expensive retrials and trauma to witnesses forced to testify anew. Families that with proper legal representation would be reunited disintegrate, damaging not only the families but also their communities.

These and other inefficiencies and injustices occur when assigned counsel fees drop so low that experienced lawyers decline appointments and when institutional providers of public defense services are hampered by chronic underfunding.

The waste and ineffectiveness inherent in underfunded services will not be cured—and indeed may be increased—if assigned counsel fees are raised but institutional defense services providers remain or become underfunded as a result. The lack of qualified lawyers on assigned counsel panels will be eased, but counties that established public defender or legal aid offices as the most efficient and effective form of defense service provision for their jurisdiction may be forced to switch systems if the state subsidizes only assigned counsel plans. More assigned counsel lawyers will be needed as a result, with a resulting scramble to cover costs and cases that will deny courts and clients the benefits of having efficient and effective counsel available for every eligible case.

Unreliable or insufficient funding of public defense services creates other waste. Some clients poorly represented at trial prevail on appeal, which means that their cases must be heard again. Some do not prevail on direct appeal, but eventually show that justice was denied, yielding headlines about innocence proven oh-so-late. Some dedicated lawyers willing to work for less than market wages are driven from organized public defense programs by the uncertainties of funding cycles. Some public defense administrators fail to learn of management techniques that would save time and money because they are too busy pleading for the same inadequate budget year after year. Counties unable to predict the state's contribution toward the state mandate of public defense find themselves struggling to meet higher defense costs when a state budget battle or unexpected veto cuts off a traditional subsidy or grant. *Reliable and sufficient funding is necessary for the efficient and effective provision of public defense services.*

**PRINCIPLE II: An independent governing board or commission is necessary for the efficient and effective provision of public defense services.** Fiscal, professional, and political conflicts of interest will interfere with the provision of efficient and effective public defense services unless public defense is overseen by an independent governing body.

The judiciary cannot administer public defense systems. Members of the judiciary are and must remain neutral arbiters of the disputes over which they preside, and must not become entangled—as patron, employer, or administrator—with the advocates who appear before them.

A random appointment system, whereby elected judges arbitrarily decide which attorneys are appointed, has long been discouraged because it leads to the appearance or reality of patronage or bias. But even when patronage is avoided by routine rotation of assignments under an assigned counsel plan overseen by an administrator, as is called for by statute in New York, potential conflicts of interest remain if the administrator is not insulated from judicial pressure. And if payment for public defense services is a part of the judiciary budget, an obvious conflict is created when a scarcity of funds forces court administrators to choose between funding court functions or paying attorneys whose job includes challenging the courts' rulings when clients' cases so demand.

Similarly, public defense services should not be governed in any manner by persons or institutions that may be placed in an adversarial relationship to defense services clients. The direct participation by prosecutors and members of law enforcement in policy-making, governing, oversight, or administrative bodies of public defense services should be prohibited.

The provision of defense services also requires protection from undue political pressures adverse to the interests of public defense clients. Constitutionally and statutorily mandated governmental services, and the job security of those who provide these services, should not be eroded in response to polls or headlines about notorious cases. *An independent governing board or commission is necessary for the efficient and effective provision of public defense services.*

**PRINCIPLE III: Creation and enforcement of standards regarding selection, training, workload, and performance of lawyers, and eligibility of clients, are necessary for the efficient and effective provision of public defense services.** Lack of standards by which to evaluate the performance of state-mandated services and the expenditure of state funds is unacceptable.

Public defense services are unique. They have a constitutional dimension that few if any other governmental services can claim. They are provided to individual clients whose interests diverge from those of the government paying for them, who have a right to the undivided loyalty of the attorneys providing the services, and whose cases present a wide range of facts requiring a wide range of legal responses. Therefore, standards governing defense services cannot be patterned on specifications for governmental services that do not share the unique characteristics of the attorney-client relationship. Standards for publicly funded defense services should be established by the independent governing body referred to in the previous principle.

National standards for the provision of defense services already exist. Other states have recognized the need for statewide standards. In New York, however, only a few local oversight standards have been established, so that most localities are funding the provision of counsel without any quality control and little fiscal control other than the unguided discretion of administrators and courts. Except for limited standards setting qualifications for capital counsel, New York has no binding statewide standards governing defense services. *Creation and enforcement of standards regarding selection, training, workload, and performance of lawyers, and eligibility of clients, are necessary for the efficient and effective provision of public defense services.*

**PRINCIPLE IV: A formal role for clients and the client community in the oversight of public defense services, and a role for public defense services providers in improving the entire justice system, are necessary for the efficient and effective provision of public defense services.** The paramount ethical and constitutional obligation of attorneys is to provide zealous and quality representation to their clients. Clients are entitled to sufficient information to allow them “to participate meaningfully in the development” of their cases. Clients represented by public defense lawyers have little choice as to the attorneys who will handle their cases. It is reasonable, then, for clients and the client community—persons currently or formerly receiving publicly supported legal representation, their families, geographic neighborhoods in which a significant number of clients live, and organizations dedicated to providing support and/or advocacy to clients and their families and neighborhoods—to have a say in the provision of defense services.

Today, the various components of the criminal justice system are being urged to work together to develop new strategies to meet social problems. The defense perspective is acknowledged to be a vital part of planning new programs such as drug courts. *A formal role for clients and the client community in the oversight of public defense services, and a role for public defense services providers in improving the entire justice system, are necessary for the efficient and effective provision of public defense services.*

Fiscal responsibility and fairness dictate that New York's current statutory scheme for providing defense services be revised to incorporate the preceding principles.

THE LEGISLATURE SHOULD:

1. Raise the rate of compensation set for counsel assigned under Article 18-B, last amended in 1986, to seventy-five dollars per hour.
2. Create an indexing procedure to keep assigned counsel rates in line with increases in the cost of living.
3. Eliminate the in-court/out-of-court differential for such compensation, any felony/misdemeanor and appellate differentials, and per-case caps, because these arbitrary limits do not reflect the professional, ethical, constitutional, and statutory mandates under which counsel must act in all types of cases.
4. Establish a schedule of state appropriations to subsidize the increase that will not simultaneously undermine the provision of public defense services by organized providers (public defenders, legal aid societies and not-for-profit providers).
5. Create an independent and politically insulated statewide Public Defense Commission to oversee both the distribution of state funds and the provision of defense services through an office that would:
  - a. Establish and monitor compliance with standards for the provision of defense services to assure effective, efficient representation;
  - b. Evaluate and improve current methods of providing defense services;
  - c. Administer distribution of state funds to assigned counsel and organized providers;
  - d. Provide direct representation for eligible persons where required or requested; and
  - e. Report to the Governor, the Legislature and the Judiciary annually, making recommendations needed to improve the provision of public defense services in New York State.

## DISCUSSION

Solving New York's public defense services crisis, highlighted by a growing recognition that assigned counsel fees are too low, will take *not just more money, but money and more*.

The decline in numbers of lawyers willing to act as assigned counsel in family court and criminal matters has put the legal system in crisis. Lawyers cannot afford to provide representation to those who have a right to it.<sup>1</sup> Lawyers are bringing lawsuits<sup>2</sup> challenging the fees currently set by statute<sup>3</sup> and are refusing to accept further assignments.<sup>4</sup> As a result, courts are exceeding statutory fee caps and raising hourly rates because the dearth of assigned counsel and the

<sup>1</sup> As one attorney testifying on this issue has said:

“. . . I just think that the assigned counsel fees are extraordinarily low, and I think the result of that is some more established lawyers stop taking the clients. What's the sense of taking a client for \$25 an hour?

One problem that happens a lot is your assigned clients may get in the way of your paying clients, if you have somebody that wants to pay. **So a lot of the more established lawyers do not take assignments** or they take a really lax attitude towards assigned clients. I've heard the phrase, "it's only an assignment," thrown around God knows how many times. I know some lawyers who just basically take the assignments to please the court. And I think, given some resentment towards what the fee is, the client with a broken finger from a rear-end collision gets more attention than the client looking at prison.

Basically, I have a wife and two children I'm supporting. **And after a while you have to make a decision as to whether or not you can actually afford to keep doing this** and whether or not you, sort of, reeducate yourself and start doing estate work or something that you have never had an interest in whatsoever. I think something has to be done about that." (emphasis added)

Testimony of Gregory Kottmeier at a FACT-FINDING HEARING ON PUBLIC DEFENSE SERVICES BEFORE THE LEAGUE OF WOMEN VOTERS AND THE NEW YORK STATE DEFENDERS ASSOCIATION, Albany, NY (LEAGUE FACT-FINDING HEARING) (December 1, 1998), p. 145.

<sup>2</sup> See for example *New York County Lawyers Association v State of New York*, Index No. 102987/00, Supreme Court, New York County, ALPart 38, discussed in "New York County Lawyers' Association Sues Pataki on Behalf of Children and Adults Who Cannot Afford Counsel," NYCLA Press Release (February 18, 2000); *Liotti v State of New York*, Docket No. CV 00-0225 (East. Dist. N.Y. 2000); *Edwin Griffin, John Doe and all other similarly situated v George E. Pataki in his official capacity as Governor of the State of New York, and County of Nassau*, (East. Dist. N.Y. filed Jan. 23, 2001); see also *Matter of New York State Association of Criminal Defense Lawyers v Judith S. Kaye*, discussed in John Caher, "Court to Review Dispute Over Fees It Approved," *New York Law Journal* (online) (December 22, 2000); *Mahoney et al., v Pataki*, 261 A.D.2d 898 (1999).

<sup>3</sup> County Law Article 18-B, § 722-b.

<sup>4</sup> One public defense administrator said that:

"**The enrollment of the panel is down** and we are particularly losing those attorneys who do felony matters . . . \*\*\* This is a big loss of money for an attorney who is skilled enough to be certified to handle administratively any matters on our panel, to have to work for these \$25 and \$40 an hour rates. That's one problem." (emphasis added)

excessive work for remaining lawyers constitute “extraordinary circumstances.”<sup>5</sup> Judges are even arguing among themselves as to which courtrooms will get the too-few lawyers still taking assignments.<sup>6</sup>

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Testimony of Stephen J. Pittari, describing Westchester County, at LEAGUE FACT-FINDING HEARING, Albany, NY (December 1, 1998), p. 91.

Another attorney, then chair of the Criminal Law Committee of the Erie County Bar Association, said:

“The concern we have is that what this is doing is discouraging competent, skilled, and experienced attorneys from taking these type of cases. In fact, a number of attorneys in private practice have taken their names off the assigned counsel program because they just indicate they cannot afford to take these cases at such rates. And what the concern is, is that it’s at the expense of indigent defendant[s]. It’s reducing the access to justice for these defendants...”

Testimony of Daniel Henry at LEAGUE FACT-FINDING HEARING, Rochester, NY (October 20, 1998), p. 20.

This was echoed by many others, including an assigned counsel administrator from Ontario County:

“As far as losing some experienced attorneys, we are also experiencing that. Bob Zimmerman to my left has stayed on, very committed individual, but he can’t take the number of cases he once did. His hourly overhead exceeds what he gets as a participating attorney.”

Testimony of John Kennedy at LEAGUE FACT-FINDING HEARING, Rochester, NY (October 20, 1998), pp. 71–72.

<sup>5</sup> Examples include:

- *People v Davis* (Bronx Supreme Court) (assigned counsel to be compensated at a rate of \$50 per hour) *New York Law Journal* (July 11, 1991);
- *People v Mitrano*, Ind. No. 2000-007 (Livingston County) (attorney assigned during transition at public defender office to be compensated at the rate of \$80 per hour);
- *People v Brown*, Indictment No. 6145/99 (Bronx Supreme Court, January 5, 2001) (assigned counsel to be compensated at a rate of \$70 per hour for in-court work and \$50 per hour for out-of-court work) “Judge OKs Higher Rates For Lawyer Assigned to Rape Case,” *New York Law Journal* (January 18, 2001);
- *People v Herring*, No. 99-437 (Broome County) (assigned counsel to be compensated at a rate of \$50 per hour for out-of-court and \$75 per hour for in-court work), *People v Herring*, No. 87596 (3rd Dept., January 11, 2001) (order granting compensation in excess of maximum not amenable to judicial review on the merits by appellate court);
- *Anthony S. v Patricia S.* (Dutchess County Family Court, January 30, 2001) (all court-appointed attorneys assigned by this judge to be paid at a rate of \$75 an hour) “Today’s News Update,” *New York Law Journal*, (January 31, 2001);
- *Department of Social Services v Mitchell*, Docket Nos. 10171-73/99 (Dutchess County Family Court, January 31, 2000) (assigned counsel to be compensated at a rate of \$75 per hour) “Higher Fees for Family Court Lawyer,” *New York Law Journal* (February 8, 2000);
- *Kevin v Deborah*, No. V0356/57-92M (Monroe County Family Court, January 31, 2001) (assigned counsel to be compensated at a rate of \$75 per hour) “Today’s News Update,” *New York Law Journal* (Friday, February 2, 2001) and
- *Matter of Joshua AA*, No. NA-895-2000 (Clinton County Family Court, February 5, 2001) (assigned counsel to be compensated at a rate of \$75 per hour) “Today’s News Update,” *New York Law Journal* (February 6, 2001).

See also Katie Thomas “NY’s Growing Lawyer Shortage: Court’s low pay leaves children, indigent defenseless,” *Newsday* (online) (February 20, 2001).

<sup>6</sup> *Sweat v Skinner*, No. B-1508-00 (Dutchess County Family Court, January 12, 2001) (all court-appointed attorneys assigned by this judge to be paid at a rate of \$75 an hour), “Dutchess Judge Orders Broad Fee Hike for Assigned Counsel,” *New York Law Journal* (January 23, 2001).

**The leaders of all three branches of state government acknowledge that assigned counsel fees under article 18-B of the County Law must be raised.**<sup>7</sup> The major acknowledged impediment to raising the rates has been the inability to resolve two issues—“how much” and “who pays.”

**The amount, source, and method of increasing fees can affect whether the crisis ends or recurs.** The current statutory scheme for public defense in New York has created a jumble of over 115 programs in the state’s 62 counties, with all counties relying to some extent on assigned counsel. Any change in assigned counsel funding will effect not just attorneys who want to receive assignments and not just assigned counsel plans.<sup>8</sup> Any change in the funding of assigned counsel fees in a given county will affect that county’s budget, its courts and other components of the criminal justice system, its other public defense program(s), if any, and its public defense clients. Unconsidered and therefore unforeseen consequences of proposals to deal with the assigned counsel fee issue will, if the wrong choice is made, soon plunge the system back into crisis. One possible scenario is an inability to plan for ballooning assigned counsel budgets if counties downsize institutional providers because of an infusion of state money for public defense limited to covering an assigned counsel fee increase. The right question, then, is not simply “who pays?” assigned counsel fees or “how much?” but: **How can New York State most efficiently and effectively provide mandated public defense services?**

This is not an unstudied or unanswerable question. Experts who have seriously examined it and jurisdictions that have successfully answered it have created systems that, while taking into account each jurisdiction’s unique circumstances, adhere to common, identifiable principles set out in this position paper. **New York’s current structure for providing public defense services fails to conform to these principles.** Changes made to the structure without implementing such principles will at best postpone, and likely intensify, further crises in the provision of public defense services.

This paper is based on a review of public defense systems in other states<sup>9</sup> and in New York State,<sup>10</sup> national studies<sup>11</sup> and

<sup>7</sup> See “Governor Pataki, Majority Leader Bruno, Speaker Silver Reach Agreement to Study Counsel Compensation Rates,” Governor’s Press Release (January 12, 2001); Chief Judge Judith S. Kaye, “State of the Judiciary Address” (January, 2000 and 2001).

<sup>8</sup> See Jonathan E. Gradess, “NYSDA Urges AC Fee Increase—And More,” *Public Defense Backup Center REPORT*, Vol. XVI, #1 (January–February 2001).

<sup>9</sup> Including Colorado, COLORADO REVISED STATUTES §21-1-101 *et seq.*; Georgia, OFFICIAL CODE OF GEORGIA ANNOTATED §17-12-1 *et seq.*; Hawaii, HAWAII REVISED STATUTES ANNOTATED

standards,<sup>12</sup> and the accumulated knowledge and experience of this state's defense services providers. It concludes with recommendations for the efficient and effective provision of public defense services.

**PRINCIPLE I: Reliable and sufficient funding is necessary for the efficient and effective provision of public defense services.**<sup>13</sup> The current shortage of assigned counsel lawyers across New York demonstrates the folly of underfunding public defense services. When there are not enough lawyers to represent eligible clients, those clients are not the only ones affected, although they suffer the most direct and irreparable harm when their cases are delayed while they needlessly sit in jail unable to discuss their case with a lawyer. Court resources are wasted when cases must be repeatedly called and adjourned because there is no lawyer present and prepared to proceed. More court resources and legal fees must be expended on lawsuits challenging the underfunding.<sup>14</sup> Expensive jail beds, occupied for weeks or months by

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§802-1 *et seq.*; Indiana, INDIANA CODE ANNOTATED §33-9-13-1 *et seq.* and §33-9-10-1 *et seq.*; Kansas, KANSAS STATUTES ANNOTATED §22-4501 *et seq.*; Kentucky, KENTUCKY REVISED STATUTES ANNOTATED §31.010 *et seq.*; Louisiana, LOUISIANA REVISED STATUTES 15:144 *et seq.*; Michigan, MICHIGAN STATUTES ANNOTATED §28.1114 (101) *et seq.*; Nebraska, REVISED STATUTES OF NEBRASKA ANNOTATED §23-3401 *et seq.*; North Carolina, GENERAL STATUTES OF NORTH CAROLINA §7A-498 *et seq.*; North Dakota, NORTH DAKOTA RULES OF CRIMINAL PROCEDURE Rule 44; Ohio, OHIO REVISED CODE ANNOTATED §120.01 *et seq.*; Oklahoma, Title 19 OKLAHOMA STATUTES §138.1 *et seq.* and 22 OS § 1355; South Carolina, CODE OF LAWS OF SOUTH CAROLINA ANNOTATED §17-3-310 *et seq.*; Tennessee, TENNESSEE CODE ANNOTATED §8-14-201 *et seq.*; and Utah, UTAH CODE ANNOTATED §77-32-101 *et seq.*

<sup>10</sup> County Law §716 *et seq.* and §722 *et seq.*; Judiciary Law §35-b.

<sup>11</sup> Including Indigent Defense Study Commission, *Report and Recommendations*, Submitted to the North Carolina General Assembly Pursuant to S.L. 1998-212, Section 16.5, as amended by S.L. 1999-237 Section 17.11, May 1, 2000 and The Spangenberg Group, *Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview*, prepared for the American Bar Association (ABA) Bar Information Program (November 1999).

<sup>12</sup> Including: ABA, *Standards for Criminal Justice Providing Defense Services (Providing Defense Services)*, 3rd ed., (1990); National Study Commission on Defense Services (NSC), *Guidelines for Legal Defense Systems in the United States (Guidelines)* (1976), National Advisory Commission on Criminal Justice Standards and Goals (NAC), *Report on Courts* (1973); Chief Defenders of New York State (1999) and the Board of Directors of NYSDA (2000) *Governing Principles for Public Defense Services (Governing Principles)* [Attached as Appendix A].

<sup>13</sup> ABA, *Providing Defense Services*, 3rd ed., (1990), Standard 5-1.6. See also NSC, *Guidelines* (1976), Recommendation 2.17: “. . . Each state should provide adequate funding for all defense services within its jurisdiction regardless of the level of government at which those services are administered.”

See also Chief Defenders of New York (1999) and NYSDA (2000) *Governing Principles*:

“To insure that public defense attorneys in criminal cases provide zealous, high quality representation, free of conflict, the system providing such counsel must. . . Have a hiring and selection process *and a funding or payment system* that assures professional independence.” (emphasis added)

<sup>14</sup> Lawsuits challenging New York's assigned counsel fees are progressing through the courts as listed in note 2, *supra*.

In addition to the problem that governmental resources must be expended defending such suits, legislative and executive branches of government must consider the possibility that successful suits

defendants who if adequately represented would be released on bail<sup>15</sup> or freed outright because they were wrongly charged,<sup>16</sup> cost localities money and erode the public's trust. Reversals based on lawyer inexperience,<sup>17</sup> error, and ineffectiveness lead to expensive retrials and trauma

will take control of defense services costs away from them. For example, Texas State Sen. Rodney Ellis has said, "It's clear if we do not take action to improve our system, the courts will do it for us . . . We've lived through just such a scenario with our prisons and our schools. I don't think we want that for our courts." Jeff Claassen, "Armed with indigent defense study, advocates seek change," *Star-Telegram* (online) (December 6, 2000).

NYSDA warned the New York Executive Branch a decade ago that successful litigation challenging the state of Georgia's functionally defective public defense system (*Luckey v Harris*, 860 F2d 1012 (11th Cir. 1988) *rehearing den.* 896 F2d 479, *cert. den.* 110 SCt 2562 (1990)) could well have implications for New York. Referring to a 1985 monograph on assigned counsel fees, the Association's Executive Director noted that given New York State's lack of a single agency at the state level with responsibility for the administration of public defense services at the state level and its "public defense system with all the ills of a relatively unregulated charity . . ." [t]he stage is set in New York for systemic litigation . . ." Letter from Jonathan E. Gradess to Carole Stone, then Deputy Chief Budget Examiner, Jim Sciacca, and Denise Sheehan at the Division of the Budget, November 8, 1990, quoting "Assigned Counsel Fees in New York State: Time For a Change" (March 1985) at p. ii.

The letter goes on to contrast the governor's expressed intention to avoid by forceful state action any federal judicial intervention in state prison overcrowding with his tacit invitation for such intervention regarding defense services due to state inaction.

- <sup>15</sup> Good public defense lawyers may save not only their individual clients but others from wrongful incarceration by successfully seeking systemic change:

"Before Michelle [Maxian] brought her lawsuit, as a matter of fact, you would be three days in that system. It was more than 72 hours from the time you were arrested, regardless of how minor the allegation was, regardless of your guilt or innocence, you were spending three days in jail simply because you were arrested, and one of the things the Legal Aid Society did through our special litigation unit was to bring litigation to say that that was unconscionable; unconstitutional in a literal sense to be there for three days on mere allegation of a crime regardless of how serious it was. That lawsuit was successful.

A number of things are important about that. First that it was successful because it saved the city millions of dollars because the city had to respond by becoming more efficient. The police had to get people in quicker, corrections had to get people down quicker, the court system had to respond adequately."

Testimony of Daniel Greenberg at LEAGUE FACT-FINDING HEARING, New York, NY (October 14, 1998), p. 270.

- <sup>16</sup> One attorney described several cases where defendants spent needless time in jail, including the following:

"The other case I was involved in that was concerning to me was a man put in jail, never been arraigned before, Albanian immigrant accused of beating up his wife. He was put in jail and never been arrested before. He suffered from severe anxiety attacks and was on about 10 or 12 pills a day for panic attacks.

**He was held in Suffolk County for five days, no attorney, no one to call and ultimately the charges were dismissed** by the district attorney on the grounds that there had been a miscommunication and language barrier between police officers that arrested him."

(emphasis added)

Testimony of Susan Menu at LEAGUE FACT-FINDING HEARING, New York, NY (October 14, 1998), pp. 361–362.

- <sup>17</sup> While new lawyers must obviously begin their practice with little experience, they should do so in situations in which they can obtain training and guidance. Current assigned counsel rates make it difficult or impossible for new attorneys to get the training they need or take the time to find a mentor,

to witnesses forced to testify anew. Families that with proper legal representation would be reunited disintegrate or are torn apart by court decisions based on incorrect or insufficient information, damaging the families, their communities, and society.

These and other inefficiencies<sup>18</sup> and injustices<sup>19</sup> occur not just when assigned counsel fees drop so low that lawyers decline appointments. The same damage occurs when institutional providers of public defense services are hampered by chronic underfunding. Legal aid and public defender offices cannot effectively handle all the cases in the jurisdiction when budget deficits lead to staff shortages,<sup>20</sup> high

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and the lack of any real, structured assigned counsel program in most counties leaves them with no guidance. As a former Court of Appeals judge recently noted in an article reviewing changes in legal practice in New York:

“. . . It is no secret, however, that today some young lawyers are practicing out of their homes and struggling to get by on the meager hourly rates permitted for 18(b) assignments in criminal and Family Court cases. Most of these lawyers, unable to find a position with a partnership or individual practitioner on being admitted, **were forced to strike out on their own without the mentoring and encouragement of a senior lawyer. . . .**” (emphasis added) Stewart F. Hancock, Jr., “Changes in Practice and on the Bench: Days of Conviviality Preceded Specialization and Globalization,” *New York State Bar Association Journal*, Vol. 73, No. 1, p. 35, 38 (January 2001).

<sup>18</sup> Leigh Jones, “New Head of Nassau’s 18-B Program Readies for Crisis,” *New York Law Journal*, February 5, 2001:

“‘When I was in the district attorney’s office, I tried to run the office efficiently,’ [Patrick McCloskey, 25-year veteran of the District Attorney’s office and the new administrator for the Nassau County Bar Association’s Assigned Counsel Plan] said, adding that **the best way to achieve effective justice is to compensate qualified attorneys fairly.** ‘I don’t need people who are learning on the job.’” (emphasis added)

<sup>19</sup> This paper assumes that its readers are familiar with the importance of the right to counsel, and the injustices inherent in any denial of or damage to that right. As a Touro Law School professor with both practical and academic expertise regarding public defense systems said:

“I’d like to start initially by saying that of course the right to counsel is perhaps the most basic right given to someone who’s charged with a crime, because the other constitutional rights simply don’t get enforced if you don’t have a lawyer there pretrial to raise Fourth Amendment, Fifth Amendment issues and then during the course of the trial to watch the defendant’s rights and make sure there is effective assistance of counsel given to the defendant during the trial.

The adversarial system that we have assumes that there is going to be a [sic] effective assistance of counsel where a lawyer has had enough time to prepare the case in every way that’s meant by that, and if the defense lawyer does not have the tools that are necessary, then the adversary system itself really just simply is not working.”

Testimony of Richard Klein at LEAGUE FACT-FINDING HEARING, New York, NY (October 14, 1998), p. 62.

<sup>20</sup> See Marshall J. Hartman, “Review of the Existing Case Management Practices and Procedures and Recommendations for Improvements for the Oneida County Public Defender’s Office, Utica, NY,” prepared through the Bureau of Justice Assistance Criminal Courts Technical Assistance Project (1999). The report determined that a staffing shortage made it impossible for the defender’s office in question to offer continuity of representation in the City Court, resulting in multiple attorneys successively handling one case, which was inefficient and had led a U.S. District Magistrate Judge to issue findings of fact condemning the practice.

turnover,<sup>21</sup> and low morale.<sup>22</sup>

The waste and ineffectiveness inherent in underfunded services will not be cured—and indeed may be increased—if assigned counsel fees are raised but institutional defense services providers remain or become underfunded as a result. The lack of qualified lawyers on assigned counsel panels will be eased, but institutional providers will find it increasingly hard to retain staff. Counties that established public defender or legal aid offices as the most efficient and effective form of defense service provision for their jurisdiction<sup>23</sup> may be forced to switch systems if the state subsidizes assigned counsel plans but not institutional providers. More assigned counsel lawyers will be needed as a result, with a resulting scramble to cover costs and cases.<sup>24</sup>

<sup>21</sup> In St. Lawrence County, for example, the position of Public Defender was held by only two people from the creation of the office in 1991 to 1998. However, from 1998 to 2001, the office changed directors three times. An Assistant Defender who resigned during the 1998 changeover said publicly that his salary had been frozen since 1995, while his caseload had doubled. He was no longer able to find personal satisfaction in the job, and charged that the county legislature had ignored the recommendations of the previous two public defenders about what was needed to provide proper representation to eligible clients. Ryne R. Martin, “Assistant Defender Resigns,” *Daily Courier-Observer* (May 12, 1998).

<sup>22</sup> One public defender has noted that:

“Morale is a very significant problem for our attorneys. As a result of extraordinarily high case loads, no health insurance benefits, and low salaries, we have a difficult time keeping attorneys on staff. The attorneys that we do have are frequently disgruntled; and again, this is something we need to improve. In my opinion the only thing that’s going to improve this is increased funding. We need to increase our attorney’s salaries. We need to provide health insurance benefits to our part-timers or hire full-timers only, which would be another option; but again, that would involve quite a bit more money. So without more money we’re in rough shape.”

Testimony of Richard Rich at LEAGUE FACT-FINDING HEARING, Rochester, NY (October 20, 1998), p. 141.

<sup>23</sup> Richard J. Bartlett, co-sponsor of the legislation that became Article 18-B of the County Law, said in 1981 that the intention of the flexible approach of the statute as to the types of plans counties could implement was “to address the very different circumstances that prevailed in the small county as opposed to the very large and to accommodate a deliberate choice in the county to go for a public defender as opposed to a [legal aid] contract.” He went on to say that, in hindsight, “I would have at least wanted to explore multi-county arrangements that would have, outside the city of New York, envisioned a drive more toward public defenders serving districts . . .” “An Interview with Richard J. Bartlett,” *The Defender*, Vol. III, #3 (NYS DA, November 1981).

<sup>24</sup> In the current situation, systems remain in flux as shallow-pocket counties trying to meet the state’s obligation continually seek the grail of controlling inestimable costs. See for example, Judy Bernstein, “Legal system studied: Public defender might be hired,” *Glens Fall Post Star* (September 27, 2000):

“. . . Supervisors have been debating for months whether the county should stay with its current approach of using [assigned counsel] lawyers or switch to a public defender, who would do the job full-time and be paid a salary. Washington and Saratoga counties have public defenders.”

Onondaga County has recently experienced upheaval as to provision of defense services. The County Executive has said the county is looking to see if a new system is needed, and is considering four options: “. . . continue using the current Assigned Counsel Program; contracting with another agency to provide the same service; open a public defenders office in the county; or creating a sub-unit within the county attorney’s office to provide counsel for poor people accused of crimes.”

Teri Weaver, “Group to study counsel program,” *Syracuse Online* (February 8, 2001).

In such chaos, courts and clients will be denied the benefits of having efficient and effective counsel available for every eligible case.

Unreliable or insufficient funding of public defense services creates yet other wasteful byproducts. Some clients poorly represented prevail on appeal—or at least require additional proceedings—based on their lawyers’ absence or errors, which means that their cases must be heard again.<sup>25</sup> Some clients poorly represented do not prevail on appeal,<sup>26</sup> but eventually show that justice was denied, yielding headlines about innocence proven oh-so-late.<sup>27</sup>

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However, the county attorney method is not one of the options provided in County Law 722. The Attorney General has said that a county “may not set up a plan for the representation of indigent defendants which is inconsistent with the options provided by section 722(1)-(4) of the County Law.” Informal Opinion of the Attorney General No. 95-16 (1995). Furthermore, the county attorney would have a conflict of interest in administering a public defense program; the duty of a public defense administrator to seek resources needed for the constitutional provision of counsel can come into conflict with the desires of the county, which is the client of a county attorney. For example, a county attorney recently attempted to appeal a court order directing the county to pay an assigned counsel lawyer an amount in excess of the statutory limit due to extraordinary circumstances. *People v Herring*, No. 87596 (3rd Dept. January 11, 2001). Certainly it is a conflict of interest for a county attorney to appoint attorneys to represent individuals in family court matters, or to review and approve those attorneys’ vouchers, because it is possible that the county attorney would be opposing those attorneys in some cases. 1978 Attorney General Opinion (Informal) 277.

When the 18-B system was first created, the Judicial Conference, in an instructive November 16, 1965 letter to county Boards of Supervisors, indicated that an administrator of an assigned counsel plan should not be, among other things, a judge or county attorney.

<sup>25</sup> See for example Kim Martineau, “Hearing ordered over conviction,” *Albany Times Union* (January 5, 2001); “Convicted Rapist Wins New Trial Over Lawyer’s Errors,” *New York Law Journal* (online) (January 8, 2001) and *Lindstadt v Keane*, No. 99-2002 (2nd Cir. 2001) (Defendant denied effective assistance of counsel due to the cumulative effect of four errors: failure to notice a one-year discrepancy in dates of alleged crime and opportunity to commit it; failure to request or challenge unnamed, allegedly scientific, studies relied upon by prosecution witness; making an opening statement that said the defendant would testify only if the prosecution proved its case; and failure to make obvious relevance argument concerning defense witness testimony that was ruled inadmissible.)

<sup>26</sup> The same systemic problems that plague public representation at the trial level contribute to the failure of meritorious cases to receive proper appellate review. See for example the case discussed by John Caher in “Court of Appeals Gets First E-Brief,” *New York Law Journal* (August 1, 2000), in which an “*Anders*” brief (one saying that a case offers no nonfrivolous issues for the court’s consideration) had been filed in the Appellate Division by an **assigned counsel lawyer who had filed 19 of such no-merit briefs in a row**. Ultimately, the Court of Appeals ordered that new counsel be appointed to address the nonfrivolous issues that were apparent in the one case under consideration. *People v Stokes*, No. 3, Court of Appeals (February 8, 2001).

<sup>27</sup> See for example: Ray Sanchez, “The Wrong Man: Former boxer free nearly decade after convicted in error,” *Newsday* (online) (December 16, 2000); Press Release, “Gideon Coalition: Better Public Defense Needed in New York State” (March 16, 1999):

“Betty Tyson, who was released in 1998 after serving 25 years in prison for a murder she did not commit, supports the Coalition’s goals of improved public defense. Lawyers who are inadequately paid may lack time to properly prepare a case—and innocent people may be wrongfully convicted. In Ms. Tyson’s case, it took over 2 decades for evidence in police possession showing her innocence to come to light . . . ;”

Some dedicated lawyers already working for less than market wages are driven from organized public defense programs by the uncertainties of funding cycles that leave them never sure if they will remain employed. Some public defense administrators fail to learn of management techniques that would save time and money, because they are too busy pleading with funders for the same inadequate budget year after year. Counties unable to predict the state's contribution toward the state mandate of public defense find themselves struggling to meet higher defense costs when a state budget battle or unexpected veto cuts off a traditional subsidy or grant.<sup>28</sup> *Reliable and sufficient funding is necessary for the efficient and effective provision of public defense services.*

**PRINCIPLE II: An independent governing board or commission is necessary for the efficient and effective provision of public defense services.**<sup>29</sup> Fiscal, professional, and political conflicts of

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“NY Wrongful Conviction Set Aside After 8 Years,” *Public Defense Backup Center REPORT* (NYS DA, November 1998).

<sup>28</sup> When approving the legislation that established the way defense services were to be provided in New York, then-Governor Nelson A. Rockefeller said:

“State per capita aid has been extended to counties this year for the first time, and that assistance far exceeds any cost which may be encountered by counties as the result of the establishment of a program for the legal defense of the indigent—an expenditure which has been traditionally and appropriately a county responsibility.”

“Counsel For Poor Persons,” Memorandum on approving L. 1965, cc 877 and 878 (July 16, 1965). Governor Rockefeller, while recognizing that a State Court of Appeals decision had just made it “unmistakably clear that **every** defendant charged with crime must be afforded a meaningful opportunity to obtain the services of counsel” (emphasis added), failed to note that this was a new obligation. Providing representation to **all** defendants unable to afford counsel had **not** been the tradition in counties prior to *People v Witenski*, 15 NY2d 392 (1965), *Gideon v Wainwright*, 372 US 335 (1963), and cases that followed them.

<sup>29</sup> Other States have commissions with varying degrees of independence that govern or oversee trial level public defense systems or statewide offices. These include: Colorado, CRS §21-1-101; Georgia, OCGA §17-12-33; Hawaii, HRS §802-9; Indiana, ICA. §33-9-13-1 *et seq.*; Kansas, KSA. §22-4519 *et seq.*; Louisiana, LRS §15:144; Nebraska, RRS § 29-3924 *et seq.*; North Carolina, NCGS §7A-498.4 *et seq.*; North Dakota, Administrative Rule 18-1981; Ohio, ORC Ann. 120.01 *et seq.*; Oklahoma, 22 OS §1355.1; and South Carolina, SCCA §17-3-310. See also Tennessee, TCA §8-14-301 *et seq.* and Utah UCA §77-32-401.

States with Commissions that govern or oversee appellate, capital, or other partial or specialized defense services include: Michigan (State Appellate Defender Commission), MSA §28.1114(102); New York (Capital Defender Office Board of Directors), Judiciary Law 35-b[3]; and Illinois, §725 ILCS 105/4 (State Appellate Defender Commission).

See ABA, *Providing Defense Services*, 3rd ed., (1990), Standard 5-1.3. Professional Independence: “(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees . . .” The commentary notes that “During the past decade, boards of trustees or other similar bodies have been adopted in a number of states, even where there are no statewide public defender services.” p. 18.

See also NLADA, *Standards for the Administration of Assigned Counsel Systems (Standards for Assigned Counsel Systems)* (1989) Standard 3.2.1(a): “The Assigned Counsel Program shall be operated under the aegis of a general governing body, the Board.”

interest will interfere with the provision of efficient and effective public defense services unless public defense is overseen by an independent governing body.

Members of the judiciary should not administer public defense systems. Members of the judiciary are, of necessity, concerned with calendar control and speed of their dockets, and the effects of the budget process on their functions. Giving the judiciary responsibility for the defender system would place it in budgeting competition with itself. A judiciary that championed the cause of clients as it should when acting as administrator of public defense services would be roundly criticized as biased in favor of defendants. Yet, if the judiciary as administrator of public defense services did not loudly voice that cause, it would deserve to be criticized for its failure. Examples of how judicial administration interests conflict with those of public defense are readily apparent in the 1999 cut of capital defense fees<sup>30</sup> and the voucher-cutting practices of the Court of Appeals,<sup>31</sup> the Appellate Division<sup>32</sup>

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See also NSC, *Guidelines* (1976). Recommendation 2.10: “A special Defender Commission should be established for every defender system, whether public or private. . . .\*\*\* (a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.” Recommendation 2.11: “Functions of the Defender Commission \*\*\* (d) Assist in ensuring the independence of the defender system by serving as a buffer and educating the public regarding constitutional requirements and the functions of the defenders; (e) serve as liaison between the legislature and the defender system upon request of the Defender Director . . . .” Recommendation 2.13: “An assigned counsel program should be operated under the auspices of a general governing body. The majority of the members of the governing body should be attorneys but should not be judges or prosecuting attorneys. Its composition should conform to the criteria established for the Defender Commission.”

<sup>30</sup> John Caher, “Court to Review Dispute Over Fees It Approved,” *New York Law Journal* (online) (December 22, 2000).

<sup>31</sup> The head of an appellate office in New York said that:

“Well, my understanding is that in New York City that the Second Department has long cut vouchers. The First Department currently cuts vouchers, so an attorney may say, I spent so many hours and that the compensation rate would be a certain amount. That amount is cut. The Court of Appeals regularly cuts the voucher down to the \$1,200 cap.

That happened in one assigned case that I did in the Court of Appeals that I did as an independent 18-b attorney, and friends of mine who appeared in the Court of Appeals have had the same experience. So you are talking about if you do a quality job, you are talking about being paid 10 or \$15 an hour, which is enough to discourage anyone from continuing in that work. You can’t support yourself or your family.”

Testimony of Lynn Fahey at LEAGUE FACT-FINDING HEARING, New York, NY (October 14, 1998), pp. 15–16.

<sup>32</sup> One attorney described writing a letter to the Appellate Division about having had vouchers cut, in which he said:

“After much thought I have concluded that I am no longer willing to be underpaid for assigned appeals for which I am realistically losing money in the first place at a \$40 per hour reimbursement rate. Therefore, I reluctantly request that my name be removed from the list of those attorneys willing to handle to [sic] appeals of indigent defendants. If you have any questions, please contact me.”

and trial courts<sup>33</sup> revealed in fact-finding hearings.

Judges have the same authority to require ethical and professional conduct of public defense lawyers as they have to require it of all other attorneys.<sup>34</sup> But courts are and must remain neutral arbiters of the disputes over which they preside, and must not become entangled—as patron, employer, or administrator—with the advocates who appear before them.<sup>35</sup>

A random appointment system, whereby elected judges arbitrarily decide which attorneys are appointed, has long been discouraged because it leads to the appearance or reality of patronage or bias.<sup>36</sup>

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He then described the court's reaction:

“I received a prompt telephone call in response to my letter from a Deputy Clerk from the Appellate Division, who I must say has always been extremely helpful over the years, answering my procedural requests. He told me that he'd been asked . . . to respond to my letter and to assure me there was no question; that the time I claimed was in fact valid but that what I was experiencing was a process by which all appeals, presumably above a certain limit, were being cut. He told me that it was the practice of the Appellate Division to cut Assigned appeal vouchers and that, frankly, they had hoped that the reimbursement rate would be increased.”

Testimony of John Rowley at LEAGUE FACT-FINDING HEARING, Syracuse, NY (November 10, 1998), pp. 181–182.

<sup>33</sup> One attorney from Binghamton described the effect of trial-level voucher cutting as follows:

“You add, on top of that, some counties have been aggressive in cutting down vouchers.

One of the cases I talked about where an assigned counsel got an acquittal, his voucher got cut, even though it was signed by the judge. That type of attitude is really driving people away from the panels.”

Testimony of Tom Saitta at LEAGUE FACT-FINDING HEARING, Albany, NY (December 1, 1998), pp. 181–182.

<sup>34</sup> 22 NYCRR §100.3. And see NLADA, *Standards for Assigned Counsel Systems* (1989) Standard 2.2(a):

“The Assigned Counsel Program and individual assigned counsel shall be free from political influence and shall be subject to judicial supervision only to the extent that privately retained attorneys are.”

<sup>35</sup> See for example (North Carolina) Indigent Defense Study Commission, *Report and Recommendations* (2000), noting that serious problems arise from giving judges authority over the selection of public defenders and authority over the appointment and compensation of private lawyers.

<sup>36</sup> Concerns about the appearance or actual occurrence of improper patronage are not limited to judicial disbursement of public defense appointments. See for example the findings of a bar association committee that the campaign financing and appointment practices of two New York City Surrogates gave rise “to at least the appearance that their appointments of guardians ad litem may take into account whether an attorney made a campaign contribution, and not solely the qualifications of the attorney appointed.” “Contributions to Campaigns of Candidates For Surrogate, and Appointments By Surrogates of Guardians Ad Litem,” Report of the Committee on Government Ethics of the Association of the Bar of the City of New York (July 1998). See also the remarks of Chief Judge Judith Kaye in her State of the Judiciary remarks in January, 2000 announcing the establishment of an office of the Special Inspector General for Fiduciary Appointments.

See ABA Model Standards, Code of Judicial Conduct (1990, 1999), Canon 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently. This Canon notes that an elected judge should not appoint to any compensated position a lawyer who has contributed significantly and recently to the judge's campaign unless no other acceptable lawyer is available or “(b) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to

Such a system is widely condemned.<sup>37</sup> But even when patronage is avoided by routine rotation of assignments under an assigned counsel plan overseen by an administrator, as is called for by statute in New York,<sup>38</sup> potential conflicts of interest remain if the assigned counsel administrator is not insulated from judicial pressure.<sup>39</sup> Lawyers or defense services administrators whose job or budget is dependent on the judiciary, even in part, may become or appear to be more concerned with pleasing that judiciary than with zealously representing clients.<sup>40</sup> And as already noted, if payment for public defense services

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their having made political contributions . . .” In New York, the Rules of the Chief Judge state only that “(3) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered. A judge shall not appoint or vote for the appointment of any person as a member of the judge’s staff or that of the court of which the judge is a member, or as an appointee in a judicial proceeding, who is a relative within the sixth degree of relationship of either the judge or the judge’s spouse or the spouse of such a person . . .” 22 NYCRR 100.3(c)(3).

<sup>37</sup> See for example, ABA, *Providing Defense Services* (3rd ed. 1990, commentary 1992), Standard 5-2.1, Commentary p. 30:

“ . . . In the ad hoc system, selection of the attorney is either completely within the discretion of the judge or is from a frequently ignored ‘list’ of attorneys kept by the judge or other court personnel. The assignment of criminal cases on this informal basis also has been condemned by the National Legal Aid and Defender Association and the National Advisory Commission on Criminal Justice and Goals. Among the reasons frequently mentioned for the unsuitability of the random approach are the following:

‘undue reliance on inexperienced counsel and overall lack of quality control; the potentiality of patronage or its counterpart, discrimination, in the selection process and the corollary possibility of political control or undue influence intruding upon the independence of counsel; unavailability of lawyers resulting in waivers of counsel; inadequate or, at best, uneven provision of compensation for services and general lack of fiscal controls; the lack of training and continuing education in criminal law and procedure; and the inability of the approach to develop a skilled and vigorous defense bar able and willing to seek reforms in the criminal justice system [quoting NSC, *Guidelines* (1976), Commentary at 142].”

See also NSC, *Guidelines* (1976), Commentary to Recommendation 2.13, The Governing Body for Assigned Counsel Programs, p. 235:

“ . . . The coordinated assigned counsel approach constitutes a move away from the random appointment system whereby judges exercised their power over the assignment of counsel. All semblances of the random appointment approach should be excluded from the assigned counsel system, and particularly from its governing board...”

See also NLADA, *Standards for Assigned Counsel Systems* (1989) Standard 4.1 (d) and (e).

<sup>38</sup> County Law § 722(3):

“Representation by counsel furnished pursuant to a plan of a bar association in each county or the city in which a county is wholly contained whereby the services of private counsel are rotated and coordinated by an administrator, and such administrator may be compensated for such service. Any plan of a bar association must receive the approval of the state administrator before the plan is placed in operation. . . .”

<sup>39</sup> The Judicial Conference letter of November 16, 1965 to county Boards of Supervisors (see note 24, *supra*) said that an administrator of an assigned counsel plan should not be, among other things, a judge or county attorney.

<sup>40</sup> See for example (North Carolina) Indigent Defense Study Commission, *Report and Recommendations* (2000), which says that giving judges authority over appointment of public defenders, or over

is a part of the judiciary budget, an obvious conflict is created when a scarcity of funds forces court administrators to choose between funding court functions or paying attorneys whose job includes challenging the courts' rulings when clients' cases so demand.

To avoid such fiscal and professional conflicts, some states' statutes governing public defense services specifically prohibit direct participation by judges or courts in policy-making, governing, oversight, or administrative bodies of public defense services.<sup>41</sup>

Similarly, public defense services should not be governed in any manner by persons or institutions that may be placed in an adversarial relationship to defense services clients.<sup>42</sup> The direct participation by prosecutors in policy-making, governing, oversight, or administrative bodies of public defense services should be prohibited.<sup>43</sup> By extension, the same prohibition should apply to members of law enforcement.<sup>44</sup> The Legislature recognized these constraints when it established the Board for the Capital Defender Office in 1995.<sup>45</sup>

In addition to protection from professional conflicts of interest, the provision of defense services requires protection from undue political pressures adverse to the interests of public defense clients.<sup>46</sup>

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appointment and compensation of assigned counsel, compromises the independence defense lawyers need. "A lawyer dependent on the judge for the fact and amount of compensation can face constraints on zealous representation which do not exist for prosecutors or lawyers representing non-indigent clients."

See also NAC, *Report on Courts* (1973), Commentary to Standard 13.8, Selection of Public Defenders, p. 7:

"Adequate defense services can be provided only by an independent attorney who is free to defend his client without threat to his position because of popular or political pressures. Appointment of the defender by a judge may impair the impartiality of the defender, because the defender becomes an employee of the judge. Moreover, such a system will create a potentially dangerous conflict, because the defender will be placed in a position where occasionally he must urge the error of his employer on behalf of his client. Such dual allegiance, to judge and client, will cripple seriously any system providing defender services."

For the duty of lawyers to represent clients zealously and without any conflicting interest, see generally 22 NYCRR §§1200.20 and 1200.32.

<sup>41</sup> See for example Colorado, CRS §21-1-101; Indiana, ICA §33-9-13-1; Kansas, KSA §22-4519[e]; Michigan, MSA §28.1114(102); Nebraska, RRSN §§23-3405, 29-3924; South Carolina, ([all members must be public defenders] SCCA §17-3-310).

<sup>42</sup> See for example the 1965 Judicial Conference letter to county Boards of Supervisors, *supra* note 39, saying that an assigned counsel administrator should be an attorney, but not one who was, among other things, a county attorney or judge.

<sup>43</sup> See for example Colorado, CRS §21-1-101; Michigan, MSA §28.1114(102); Nebraska, RRSN §§23-3405, 29-3924; and North Carolina, NCGS §7A-498.4[d]).

<sup>44</sup> See for example Colorado, CRS §21-1-101; Indiana, ICA §33-9-13-1; Kansas, KSA § 22-4519[e]; Michigan, MSA §28.1114(102); Nebraska, RRSN §§23-3405, 29-3924 and North Carolina, NCGS §7A-498.4[d]).

<sup>45</sup> Judiciary Law §35-b(3).

<sup>46</sup> Indigent Defense Organization Oversight Committee, "General Requirements for all Organized

Public fear of crime, or public outrage about a particular crime or type of crime, should not be the measure of public defense management or funding.<sup>47</sup> Constitutionally and statutorily mandated governmental services, and the job security of those who provide these services, should not be eroded in response to polls or headlines about notorious cases. *An independent governing board or commission is necessary for the efficient and effective provision of public defense services.*

**PRINCIPLE III: Creation and enforcement of standards regarding selection, training, workload,<sup>48</sup> and performance of**

Providers of Defense Services to Indigent Defendants” (July 1, 1996), approved by the New York State Supreme Court Appellate Division, First Judicial Department, I(A):

“Performance Standard: In order to guarantee the integrity of the attorney-client relationship, defense organizations and the lawyers they employ should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as all other practicing lawyers.”

<sup>47</sup> For example, a lawyer whose position as county public defender had been renewed annually for twenty-one years told the following story in 1998:

“Recently, however, it’s become far more politicized. We have had a number of high-profile cases in our county that involved correction officers. We have two correctional facilities in our county. We had a number of assaults. And it’s been told to me that we represent them too well.\*\*\*

We do what I consider to be more than adequate, fair and zealous representation of our clients. As a result, political pressure has been brought to some members of the legislature and political pressure is therefore coming to my county. In many years, it hasn’t made a difference, depending upon who happens to be leading the county at a certain point in time. But at this point, two or three years ago, I don’t recall, my reappointment was held up until literally December 31st.”

Testimony of Greg Lubow at LEAGUE FACT-FINDING HEARING, Albany, NY (December 1, 1998), pp. 209–210.

<sup>48</sup> Caseload or workload limits are essential in ensuring that lawyers can provide the quality and quantity of services that their obligations to clients require. A renowned private lawyer has said:

“I guess, when my caseload is heavy, I am handling approximately 40 to 60 cases a year. I do not see, really, how any criminal defense attorney worth her or his salt can do really much more than that, and really be totally effective. I know that many of us have to work under conditions which do not allow for that, but I really fail to see how one can be effective as I understand the Constitution requires us to be.”

Testimony of Jack Litman at LEAGUE FACT-FINDING HEARING, New York, NY (October 14, 1998), pp. 213–214.

Lawyers in New York are ethically bound not to handle matters they are incompetent to handle without associating with a lawyer who is, and not to handle a matter without adequate preparation, 22 NYCRR §1200.30 (a) (1) and (2).

The only national numerical caseload standards that exist for public defense providers set a limit significantly higher than Litman’s recommended standard (see NAC, *Report on the Courts* (1973), Standard 13.12 requiring that a lawyer handle no more than 150 felonies a year, or more than 400 misdemeanors). The ABA Standards state that “Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.” ABA, *Providing Defense Services*, 3rd ed., (1990), Standard 5-5.3(b). Other national standards have similar caseload restrictions. See NLADA, *Performance Guidelines for Criminal Defense Representation* (1994), Guideline 1.3; NLADA, *Standards for Defender Services*, IV.1, IV.1.a.iii., IV.1.b; and NSC, *Guidelines* (1976), Recommendation 5.1.

lawyers,<sup>49</sup> and eligibility of clients,<sup>50</sup> are necessary for the efficient and effective provision of public defense services. Lack of standards by which to evaluate the performance of state-mandated services and the expenditure of state funds is unacceptable.

Standards—specifications—are applied by the state to a wide range of services as well as products that it must procure.<sup>51</sup> The state needs to apply standards to the provision of defense services as well.

Public defense services are unique. They have a constitutional dimension<sup>52</sup>

The hearings held by the League of Women Voters and NYSDA in late 1998 revealed unconscionable caseloads of enormous magnitude across the state, including :

- Chemung County (Attorney handling 1200 city court and justice court cases per year). Testimony of Richard Rich at LEAGUE FACT-FINDING HEARING, Rochester, NY (October 20, 1998), pp. 136–137.
- Monroe County (1000 misdemeanors per attorney). Testimony of Ed Nowak at LEAGUE FACT-FINDING HEARING, Syracuse, NY (November 10, 1998), p. 3;
- New York City (650 cases per attorney). Testimony of Adele Bernard at LEAGUE FACT-FINDING HEARING, New York, NY (October 14, 1998), p. 248.

And see *Wallace v Kern*, 392 F. Supp. 834 (1973) (saying Legal Aid Society caseloads too high, finding, “that an average caseload of 40 felony indictments pending in a trial Part strains the utmost capacity of a Legal Aid attorney under existing conditions, that the present average caseload is substantially in excess of that number, and that acceptances of any additional felony indictments by Legal Aid would prevent it from affording its existing clients their constitutional right to counsel), rev’d on other grounds, 481 F.2d 621 (1973).

<sup>49</sup> Performance standards are the core of any systematic guarantee of effective representation. They are inextricably intertwined with caseload/workload standards—numbers alone are meaningless. What is important is that standards be set for what lawyers must do, and then workload limits be set to ensure that lawyers have the time to do those things. See for example the comments of an expert in public defense about one performance standard that many New York public defense lawyers cannot currently meet because caseloads are too heavy:

“The [ABA] criminal justice standard 4-6.1 says under no circumstances should a lawyer recommend to a defendant acceptance of a plea unless a full investigation and study of the case has been completed. The irony is that in New York State, I think, lawyers are forced to look upon pleas as the way to get out of having to prepare for a case, that **the lawyer has so many cases that the only way they can deal with getting rid of some of those cases is to recommend to their client that they take a plea**, even though that lawyer simply has not done the preparation and investigation of the case that really is mandated to be done.” (emphasis added) Testimony of Richard Klein at LEAGUE FACT-FINDING HEARING, New York, NY (October 14, 1998), p. 65.

<sup>50</sup> “There are also no uniform guidelines for counties to follow while implementing the disparate procedures for making eligibility determinations. . . .” and what entity makes the determination of whether a person is financially eligible to receive publicly-funded counsel varies from county to county. *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center* (NYSDA 1994). This situation has not changed since the report was written.

<sup>51</sup> See for example State Finance Law, Article 11 (State Purchasing), which reads in pertinent part: “2. Operating principles. The objective of state procurement is to facilitate each state agency’s mission while protecting the interests of the state and its taxpayers and promoting fairness... The state’s procurement process shall be . . . based on clearly articulated procedures which require a **clear statement of product specifications, requirements or work to be performed**; . . . and a regular monitoring of vendor performance. . . .” (emphasis added)

<sup>52</sup> See for example *In re St. Luke’s-Roosevelt Hosp. Ctr.*, 159 Misc. 2d 932, modified and remanded by *In re St. Luke’s-Roosevelt Hosp. Ctr.*, 215 A.D.2d 337 (1995):

that few if any other governmental services can claim. They are provided to individual clients whose interests diverge from those of the government paying for them, who have a right to the undivided loyalty of the attorneys providing the services,<sup>53</sup> and whose cases present a wide range of facts requiring a wide range of legal responses. Therefore, standards governing defense services cannot be modeled on

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“Although the constitutional right to counsel originated in the criminal area *see, e.g., Gideon v Wainwright*, 372 U.S. 335 (1963) and *People v Witenski*, 15 NY2d 392, 259 N.Y.S.2d 413, 207 N.E.2d 358 (1965), it has been extended to a large number of quasi-criminal and civil proceedings. *See, e.g., Rivers v Katz*, 67 NY2d 485, 504 N.Y.S.2d 74, 495 N.E.2d 337 (1986) (right to counsel in hearing re: involuntary administration of psychotropic medication); *Matter of Ella B.*, 30 NY2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972) (right to counsel in neglect proceeding where person faces loss of a child’s custody and control); *In re Guardianship & Custody of Orneika v Harriet J.*, 112 AD2d 78, 491 N.Y.S.2d 639 (1st Dept. 1985) (right to counsel in termination of parental rights proceeding); *People ex rel. Silbert v Cohen*, 29 NY2d 12, 323 N.Y.S.2d 422, 271 N.E.2d 908 (1971) (right to counsel for juvenile delinquents in revocation of probation proceedings); *People ex rel. Menechino v Warden*, 27 NY2d 376, 318 N.Y.S.2d 449, 267 N.E.2d 238 (1971) (right to counsel for adults in revocation of probation proceedings); *People ex rel. Woodall v Bigelow*, 20 NY2d 852, 285 N.Y.S.2d 85, 231 N.E.2d 777 (1967) and *People ex rel. Rogers v Stanley*, 17 NY2d 256, 270 N.Y.S.2d 573, 217 N.E.2d 636 (1966) (right to counsel in involuntary commitment proceeding to civil mental hospital); *In Matter of Andrea B.*, 94 Misc 2d 919, 405 N.Y.S.2d 977 (Fam. Ct. New York Co. 1978) (right to counsel in Family Court proceeding to extend temporary commitment of minor to mental hospital); *Matter of Madeline G. v David R.*, 95 Misc 2d 273, 407 N.Y.S.2d 414 (Family Ct. Rensselaer Co. 1978) (indigent alleged father has right to counsel in paternity proceeding); *Matter of Daley*, 123 Misc 2d 139, 473 N.Y.S.2d 114 (Surr. Ct. Bronx Co. 1984) (right to counsel for indigent mother in proceeding where infant’s sister seeks guardianship of infant); *444 W 54th Street Tenants Assoc. v Costello*, 138 Misc 2d 5, 523 N.Y.S.2d 374 (Civ. Ct. New York Co. 1987) (right to counsel in eviction proceeding for tenant who is absent due to military service). Significantly, a number of these cases rest not only on the federal constitution, but also on the state constitution. *See, e.g., People ex rel. Menechino v Warden, supra* at p 383; *People ex rel. Silbert v Cohen, supra*, at pp 14–15; *Rivers v Katz, supra* at p 488; *Matter of Madeline G. v David R., supra* at p 275.”

<sup>53</sup> ABA, *The Defense Function* (3rd ed.) (1991) Standard 4-1.2 (h): “. . . Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program.” *See too* 22 NYCRR (Judiciary) 1200.26:

“(b) Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, or to cause the lawyer to compromise the lawyer’s duty to maintain the confidences and secrets of the client under section 1200.19(b) of this Part.”

See also *Sanchez v Murphy*, 385 F Supp 1362, 1365 (Dist. Nev., 1974):

“The office of public defender is *sui generis*. Unlike other public offices, it is not established to serve the public generally. Such offices have been created in implementation of the obligations created by the Sixth and Fourteenth Amendments to the United States Constitution, to the end that every person charged with crime shall have an opportunity to be represented by counsel and to receive a fair trial . . . [T]he relationship thus created is a strictly professional one. It is a personal relationship of trust and confidence governed by the canons of professional ethics under which the attorney owes an obligation of unswerving loyalty and devotion to the interests of his client.”

And see *Polk County v Dodson*, 454 US 312 (1981).

specifications for other governmental services that do not share the unique characteristics of the attorney-client relationship.<sup>54</sup> Standards for publicly funded defense services should be established by the independent governing body referred to in the previous principle. The standards should address the unique facets of public defense services to ensure the prudent expenditure of public monies, the achievement of constitutional mandates, and the delivery of fairness that is essential to public trust and confidence in the legal system. National standards for the provision of defense services already exist.<sup>55</sup> Other states have recognized the need for statewide standards.<sup>56</sup> In New York,

<sup>54</sup> The professional, ethical, and constitutional obligations inherent in providing defense services make the low-bid contracts used for procuring other types of services unacceptable in this context. See ABA, *Providing Defense Services* (3rd ed. 1990). Standard 5-3.1 says that while contracts for defense services may be a component of a legal representation plan, any such contracts must “ensure quality legal representation” and should not be awarded “primarily on the basis of cost.” In 1985, the ABA went on record opposing “the awarding of governmental contracts for criminal defense services on the basis of cost alone, or through competitive bidding without reference to quality of representation” and urging jurisdictions that contract for defense services to do so in accordance with ABA standards and the National Legal Aid and Defender Association’s “Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services” (1984). NLADA’s Guideline IV-3 specifically prohibits the awarding of a contract for defense services on the basis of cost alone.

And see *Smith v Arizona*, 681 P.2d 1374 (Sup. Ct. Ariz., 1984). (Low bid procedure violated defendant’s right to due process and right to counsel guaranteed by Arizona and federal constitutions.)

<sup>55</sup> See standards listed in note 12, *supra*.

<sup>56</sup> The *Compendium of Standards For Indigent Defense Systems*, prepared by the Institute for Law and Justice for the Bureau of Justice Assistance, United States Department of Justice (2000) [available on the Internet at <http://www.ojp.usdoj.gov/indigentdefense/compendium/>] lists state standards outside New York as follows:

Standards for the provision of indigent defense include: Connecticut Public Defender Services Commission, *Guidelines on Indigent Defense: Guidelines Relating to the Representation of Indigent Defendants Accused of a Criminal Offense* (1997); Georgia Indigent Defense Council, *Guidelines for the Operation of Local Indigent Defense Programs* (1999); Indiana Public Defender Commission, *Standards for Indigent Defense Services in Non-Capital Cases* (1995); Kansas Board of Indigents’ Defense Services, *Permanent Administrative Regulations* (1999); Minnesota Office of the State Public Defender, *Caseload Standards for District Public Defenders in Minnesota* (1991); Nebraska Commission on Public Advocacy, *Standards for Indigent Defense Services in Capital and Non-Capital Cases* (1997); North Dakota Legal Council for Indigents Commission, *Indigent Defense Guidelines and Procedures* (1998); Oregon State Bar, *Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases* (1996); and Washington Defender Association, *Standards for Public Defense Services* (1989).

Other Standards (Attorney Performance, Capital Case Representation, Appellate Representation, and/or Juvenile Justice Defense) include: Louisiana Indigent Defender Board, *Standards on Indigent Defense* (1995); Massachusetts Committee for Public Counsel Services, *Assigned Counsel Manual: Policies and Procedures* (1999); Michigan Appellate Assigned Counsel System, *Minimum Standards for Indigent Criminal Appellate Defense Services* (1981); New Mexico Public Defender Department, *Performance Guidelines for Criminal Defense Representation* (1998); New Mexico Public Defender Department, *Performance Guidelines for Appellate Criminal Defense Representation* (2000); Ohio Public Defender, *Standards and Guidelines for Appointed Counsel Reimbursement (2d)* (1996); Virginia Public Defender Commission, *Standards for the Qualifications of Appointed Counsel in Capital Cases* (1999).

however, only a few local oversight standards have been established,<sup>57</sup> so that most localities are funding the provision of counsel without any quality control and little fiscal control other than the unguided discretion of administrators and courts.<sup>58</sup> Except for the limited standards setting qualifications for capital counsel which the Capital Defender Office is required to establish under Judiciary Law 35-b (4)(b)(iv), New York has no binding statewide standards at all governing defense services. *Creation and enforcement of standards regarding selection, training, workload, and performance of lawyers, and eligibility of clients, are necessary for the efficient and effective provision of public defense services.*

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(Standards that appeared in both the “indigent defense” standards list and the “other standards” lists in the *Compendium* are only noted once here.)

<sup>57</sup> See for example Indigent Defense Organization Oversight Committee [First Department], “General Requirements for all Organized Providers of Defense Services to Indigent Defendants” (July 1, 1996); Central Screening Committee, “General Requirements for Certification to the Criminal Panels of the Assigned Counsel Plan in the Appellate Division, First Judicial Department” [application packet]; Erie County Bar Association Aid to Indigent Prisoners Society Inc. Assigned Counsel Program, “Standards of Professional Conduct” (1995); Onondaga County Bar Association Assigned Counsel Program, “Handbook of Rules, Regulations, Policies and Instructions,” (November 1988 with updates); Monroe County Assigned Counsel Program Bar Association Plan & Program Regulations (1990; Trial Mentor Program added 1999; regulation updates periodically).

<sup>58</sup> Following are two examples. The late Delores Denman, then-presiding justice of the Appellate Division, Fourth Department, made the following statement during a fact-finding hearing concerning vouchers for defense representation provided on appeal:

“We review those vouchers very carefully. These are for assigned counsel. If there’s a conflict and the Public Defender’s Office is not able to handle it for some reason, then we assign counsel. What we have found recently—and it’s sort of an interesting result—is that we are not getting the excessive vouchers that we once did. We did a lot of cutting back on vouchers because assigned counsel have to understand that there is some pro bono component to what they’re doing. We pay them, but not the way you would pay a retained private counsel. So we were cutting back a lot on those vouchers and explaining to them why we were doing that; that it wasn’t that they didn’t do the work that they were claiming, it was just that we felt we couldn’t pay that kind of money. Now we’re finding as a result of that, that the attorneys who want the assignments are not putting in the excessive vouchers. They’re keeping the vouchers within the limits so that we don’t cut it back, and they feel that they are more likely to get the assignments if they don’t overcharge.”

Testimony of Delores Denman at LEAGUE FACT-FINDING HEARING, Rochester NY (October 20, 1998), pp. 18–19.

The County Administrator of Livingston County said at the same hearing that his county had turned to a public defender office in part because of the way in which assigned counsel vouchers had previously been handled:

“In reviewing that system what we had was an assigned counsel program, an exclusively assigned counsel program with a part time—and I stress the words ‘part time’—administrator of the assigned counsel program. What I observed was in general the attorneys who took these assignments routinely handed in vouchers to the clerk of the board, and if the assigned counsel administrator was available he would come in before a board meeting and spend a few minutes scribbling his signature on vouchers on top of a file cabinet, and that was the extent of any review that took place, and the bills were simply paid.”

Testimony of Dominic Mazza, *supra* pp. 44–45.

**PRINCIPLE IV: A formal role for clients and the client community in the oversight of public defense services, and a role for public defense services providers in improving the entire justice system, are necessary for the efficient and effective provision of public defense services.** The paramount ethical and constitutional obligation of attorneys is to provide zealous and quality representation to their clients.<sup>59</sup> Clients are entitled to sufficient information to allow them “to participate meaningfully in the development” of their cases.<sup>60</sup> Clients represented by public defense lawyers have little choice as to the attorneys who will handle their cases. It is reasonable, then, for clients and the client community—persons currently or formerly receiving publicly supported legal representation, their families, geographic neighborhoods in which a significant number of clients live, and organizations dedicated to providing support and/or advocacy to clients and their families and neighborhoods—to have a say in the provision of defense services.<sup>61</sup>

Public defenders and other dedicated providers of public defense services have experiences that put them in a unique position to comment on criminal justice issues and seek improvement in the criminal justice system.<sup>62</sup> Today, the various components of the criminal justice are

<sup>59</sup> See NLADA, *Performance Guidelines for Criminal Defense Representation* (1994), Guideline 1.1(a); ABA Model Code of Professional Responsibility, Canon 7 “A Lawyer Should Represent a Client zealously Within the Bounds of the Law;” and see 22 NYCRR § 1200.32; see also NYSDA, “Statement on Client Involvement and Satisfaction, Quality Representation and Vigorous Advocacy,” adopted by the Board of Directors on July 27, 2000, which includes the following: “In providing quality representation, a defender or defender administrator must be free to advocate for the rights of clients even to the disadvantage of court apparatus, prosecutors or government treasuries.”

<sup>60</sup> See “Statement of Client’s Rights, 22 NYCRR (Judiciary) 1210.1.

<sup>61</sup> See Chief Defenders of New York (1999) and NYSDA (2000) *Governing Principles*:

“To insure that public defense attorneys in criminal cases provide zealous, high quality representation, free of conflict, the system providing such counsel must: \*\*\* Assure a role for the client community in its design, maintenance and evaluation of quality.”

See also NLADA, *Standards for Defender Services* (1976), Standard 8 and 8(f), calling upon the defender to be sensitive to the problems of the client community and to, among other things, “maintain close relationships with legal service groups within the community, with public interest groups, and with organized groups within the client community.” And see NAC, *Report on the Courts* (1973), Standard 13.13.

<sup>62</sup> See ABA, *Providing Defense Services*, Commentary to Standard 5-1.2 p. 7 (1992): “By virtue of their experience, full-time defenders also are able to work for changes in laws and procedures aimed at benefiting defendants and the criminal justice system.”

See also NSC, *Guidelines* (1976), Recommendation 5.13, “Role in the community and the Criminal Justice System,” calling upon defense system attorneys to consult regularly with the judiciary: “. . . to promote understanding and resolution of problems . . . develop areas of mutual cooperation with fellow members of the legal community and organized bar, recognizing that bar support can assist the defense system in securing an appropriate budget, resisting political pressures, instituting criminal justice reforms, and gaining the support of the legal community. Defense attorneys should involve themselves in programs and committees of the bar.”

being urged to work together to develop new strategies to meet social problems.<sup>63</sup> The defense perspective is acknowledged to be a vital part of planning new programs such as drug courts.<sup>64</sup> *A formal role for clients and the client community in the oversight of public defense services, and a role for public defense services providers in improving the entire justice system, are necessary for the efficient and effective provision of public defense services.*

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<sup>63</sup> See for example Drug Courts Program Office, Office of Justice Programs, U.S. Department of Justice, *Defining Drug Courts: The Key Components* (1997):

“. . . Realization of these goals [of drug courts] requires a team approach, including cooperation and collaboration of the judges, prosecutors, **defense counsel**, probation authorities, other corrections personnel, law enforcement, pretrial services agencies, TASC programs, evaluators, an array of local service providers, and the greater community. . . .” [emphasis added]

The Division of Criminal Justice Services sponsored a conference entitled, "The Future-Criminal Justice Through Collaboration," in Saratoga Springs, NY, on November 28, 2000.

<sup>64</sup> New York State Commission on Drugs and the Courts, *Confronting the Cycle of Addiction & Recidivism: A Report to Chief Judge Judith S. Kaye* (June 2000), at note 88:

“ It should be recognized that these programs can sometimes put defense counsel in the difficult position (particularly in misdemeanor cases, where a short jail sentence might be available) of having to weigh the short-term interests of a client in being free from ongoing supervision against the client’s need for effective treatment. Defense counsel who work with Drug Treatment Courts (and other such programs) stress the importance of explaining these issues to the client and ensuring that the decision as to whether to participate in treatment is in fact the client’s decision. These client discussions are not always easy, however, as such clients are often in the throes of addiction. Defense counsel can also have a difficult time making judgments in some cases about the strength of the prosecution’s case, especially in programs which require an up-front guilty plea. This is because such pleas are often required very soon after arraignment, when lab reports and other evidentiary information about a case may not yet be available. **Care must be taken in designing these programs to be sensitive to this dilemma.**” (emphasis added)

And see Drug Court Clearinghouse and Technical Assistance Project, *1997 Drug Court Survey Report: Executive Summary* (1997), p. 36:

“In terms of advice to colleagues contemplating the establishment of drug courts in other jurisdictions, responding defense counsel, like their counterparts in other agencies, urged them to ‘just do it.’ However, they also urged that attention to maintaining defendants’ legal rights and close coordination with other participating agencies were essential to both the planning and conduct of a successful drug court. . . .”

Fiscal responsibility and fairness dictate that New York's current statutory scheme for providing defense services be revised to incorporate the preceding principles.

THE LEGISLATURE SHOULD:

1. Raise the rate of compensation set for counsel assigned under Article 18-B, last amended in 1986, to seventy-five dollars per hour.
2. Create an indexing procedure to keep assigned counsel rates in line with increases in the cost of living.
3. Eliminate the in-court/out-of-court differential for such compensation, any felony/misdemeanor and appellate differentials, and per-case caps, because these arbitrary limits do not reflect the professional, ethical, constitutional, and statutory mandates under which counsel must act in all types of cases.
4. Establish a schedule of state appropriations to subsidize the increase that will not simultaneously undermine the provision of public defense services by organized providers (public defenders, legal aid societies and not-for-profit providers).
5. Create an independent and politically insulated statewide Public Defense Commission to oversee both the distribution of state funds and the provision of defense services through an office that would:
  - a. Establish and monitor compliance with standards for the provision of defense services to assure effective, efficient representation;
  - b. Evaluate and improve current methods of providing defense services;
  - c. Administer distribution of state funds to assigned counsel and organized providers;
  - d. Provide direct representation for eligible persons where required or requested; and
  - e. Report to the Governor, the Legislature and the Judiciary annually, making recommendations needed to improve the provision of public defense services in New York State.

APPENDIX A

*Governing Principles for  
Public Defense Services*



## GOVERNING PRINCIPLES FOR PUBLIC DEFENSE SERVICES\*

To insure that public defense attorneys in criminal cases provide zealous, high quality representation, free of conflict, the system providing such counsel must:

- Have a hiring or selection process and a funding or payment system that assures professional independence.
- Effectively and efficiently screen for eligibility for the appointment of counsel.
- After a request for counsel has been made, immediately appoint and notify counsel of the appointment.
- Assure that the complexity of a case shall be matched to the ability of the attorney appointed.
- Assure that counsel's workload will be matched to his or her capacity and that provisions will be made for overload.
- Allow counsel to have timely and confidential access to his or her client.
- Assure that counsel has access to adequate research materials, investigators, expert witnesses, and sentencing specialists.
- Assure a role for the client community in its design, maintenance and evaluation of quality.
- Assure that counsel is reasonably and timely compensated.
- Provide adequate training and continuing legal education for all appointed counsel.
- Allow counsel to participate in all aspects of improving the quality, cost, and effectiveness of the entire justice system.

\* Adopted by the Chief Defenders of New York State on December 16, 1999 and by the Board of Directors of the New York State Defenders Association on July 27, 2000







**RESOLVING THE ASSIGNED COUNSEL FEE CRISIS:**  
*An Opportunity to Provide County Fiscal Relief  
and Quality Public Defense Services*