

**REPORT OF THE APPELLATE DIVISION FIRST
DEPARTMENT COMMITTEE ON REPRESENTATION OF THE POOR**

CRISIS IN THE LEGAL REPRESENTATION OF THE POOR

**RECOMMENDATIONS FOR A REVISED PLAN TO IMPLEMENT
MANDATED GOVERNMENTALLY FUNDED LEGAL REPRESENTATION
OF PERSONS WHO CANNOT AFFORD COUNSEL**

I. EXECUTIVE SUMMARY

The Committee's mandate is to examine the quality of governmentally funded legal representation of the poor, review the adequacy of the 1966 Plan under which indigent persons accused of crimes in New York City are defended and recommend to the Appellate Division First Department a new Plan for governmentally-funded legal representation of those who cannot afford counsel. The Committee, after lengthy investigations, including a public hearing, unanimously finds that:

(i) Notwithstanding the valiant efforts of many lawyers, too many of New York City's poor are receiving thoroughly inadequate legal representation in such important court proceedings as those relating to child custody and visitation, child abuse and neglect, termination of parental rights, domestic violence, and criminal prosecution, often with serious adverse consequences.

The entire system by which poor people are provided legal representation is in crisis. As a result of shamefully low rates of compensation of assigned counsel, lack of resources, support and respect, inadequate funding of institutional providers, combined with ever-increasing caseloads, New York's poor are too often not being afforded the "meaningful and effective" representation to which they are entitled under New York law and the New York State Constitution. The outmoded, underfunded, overburdened, and organizationally chaotic system in operation today dishonors New York's long-standing commitment to an individual's right to meaningful and effective representation, often with devastating effects on the thousands of children and indigent adults who pass through that system each year.

One of the primary problems is that the needs of the poor have grown dramatically with no corresponding growth of the system or resources designed to meet those needs. The system by which poor people are provided legal representation must be expanded, and the attorneys who strive to meet the legal needs of the poor must be released from the bureaucratic and statutory restraints that currently impede those attorneys from adequately doing their jobs.

(ii) The 1966 Plan, which deals only with legal defense of the indigent in criminal matters, should be expanded to cover the representation of persons who cannot afford counsel in all court proceedings in which governmentally funded lawyers are now required to be provided. As legislative and case law developments add to the types of proceedings in which counsel must be provided, the Plan should apply to such proceedings as well.

(iii) The Committee believes that an immediate increase in the assigned counsel rates, and the elimination of the differential between in-court and out-of-court time, is essential. Shortly after it began its work, the Committee, like so many others, called for a prompt increase in the \$25 an hour (for out-of-court work) and \$40 an hour (for in-court work) rates paid to assigned counsel pursuant to Article 18-B. Since then: (a) there has been a decision in the lawsuit brought by New York County Lawyers' Association to the effect that NYCLA has standing to seek court redress of the Article 18-B rates; (b) in increasing numbers, already overburdened lawyers who previously accepted 18-B assignments have declined to accept more assignments, leading to an increasing inability of the courts to adjudicate pending matters with the result that families remain disrupted, children remain in foster care and persons accused of crimes languish in detention; (c) some courts have signaled that in response to the crisis they will award compensation to assigned counsel at rates in excess of the Article 18-B rates; and (d) the Governor has appointed a task force to consider the crisis relating to assigned counsel rates.

However, raising 18-B rates is by no means enough. As set forth below, the Committee makes a number of recommendations responsive to its mandate from the Appellate Division First Department with respect to governmentally funded legal representation of persons who cannot afford counsel in court proceedings in the First Department.

(iv) The Committee believes that in addition to immediately increasing assigned counsel rates, the New York State Legislature should also reconsider the entire legislative structure relating to governmentally funded legal representation of persons who cannot afford counsel in New York in order to assist counties and New York City in overcoming the current crisis in the legal representation of the poor.

Under the current legislative scheme, New York City is responsible for funding the representation of adults — parents and other adults in family matters, as well as adults accused of crimes. New York State is fiscally responsible for providing counsel to children in Family Court. As a result in many Family Court proceedings counsel for parents are compensated by New York City pursuant to Article 18-B. Counsel appointed for the child in the same proceeding is compensated by New York State pursuant to Family Court Act § 262 and the same Article 18-B rate structure either through the Legal Aid Society's Juvenile Rights Division, another institutional provider or the Appellate Division's Law Guardian Office. **This bifurcation should be eliminated.** A number of changes proposed by the Committee will require funding either by the City or the State and it may be appropriate for the New York State Legislature to consider at what governmental level this funding should be provided.

(v) **The Committee strongly recommends that an institutional provider be established to represent parents and other adults in Family Court matters.** The system of having both assigned counsel and one or more institutional providers that has existed in criminal matters since the adoption of the 1966 Plan should be maintained and extended to court proceedings other than criminal prosecutions in which governmentally funded counsel must be provided to those who cannot afford counsel. While the Juvenile Rights Division of the Legal Aid Society functions as an institutional provider representing children in Family Court matters, there is no institutional provider to generally represent parents in such matters.

(vi) **The Committee also recommends that there be substantial improvements in the resources and support provided to assigned counsel.** The Committee recommends the establishment of one or more resource centers which would provide support and assistance to assigned counsel equal to the support and assistance provided their adversaries and to the lawyers working for institutional providers.

(vii) **The judicial system should take all necessary steps to see to it that assigned counsel and lawyers employed by institutional providers are given the same respect and courtesies accorded to other lawyers.** The time of governmentally funded lawyers should be treated as valuable as the time of privately retained lawyers.

(viii) **Greater coordination among the various agencies that provide input in Family Court matters is required.** Today numerous governmentally funded agencies are involved in providing legal representation to poor people in contexts relating to court proceedings. Often cases cannot be resolved expeditiously because necessary components such as mental health reports, social service assessments and counsel for the diverse parties are not simultaneously available. Greater coordination should result in substantial cost savings.

(ix) Both institutional providers and assigned counsel should have the resources available to broaden representation of indigent persons in areas collateral to the proceeding for which counsel is required to be assigned. A more holistic approach to the representation of persons who cannot afford counsel in court proceedings may not only serve those persons better but will likely also result in ultimately lower cost to government.

(x) The Committee recommends the establishment of an independent permanent oversight commission which would periodically review the adequacy of the revised Plan and would monitor the system under which legal representation of the poor is provided.

II.

THE COMMITTEE AND THE PROCESS

The Committee was appointed late in 1999 pursuant to an Order signed by then Presiding Justice Betty Weinberg Ellerin and by all of the justices of the Appellate Division First Department, including Presiding Justice Joseph P. Sullivan. The Committee's mandate is to "examine the quality of representation afforded to the people of the First Judicial Department who are financially unable to obtain counsel in supreme court, criminal court, and family court as required by statute and caselaw, review the adequacy of the Plan that was drafted by the bar associations and approved by the Judicial Conference on April 28, 1966 pursuant to County Law Article 18-b, report its findings to the Court, and recommend to the Court a new plan for representing the citizens of this department who cannot afford counsel." A copy of the Order is appended as Annex 1.

The members of the Committee were nominated by the Association of the Bar of the City of New York, New York County Lawyers Association, the Bronx Bar Association and by the Presiding Justice of the Appellate Division First Department. The members of the Committee are: Klaus Eppler, Chairman, Bruce Hubbard, John J. Kenney, Robert J. McGuire, Joseph J. Milano, Eve S. Plotkin, Jose Rodriguez, Fern Schair and Peter L. Zimroth. These individuals represent a diverse group of practitioners, including two veteran members of the Assigned Counsel Plan, a long-time executive of an institutional provider, a former New York City police commissioner, three former Bar Association leaders and several experienced litigators.

The Committee has held numerous meetings. The Committee met several times with Presiding Justice Ellerin, and then with Presiding Justice Alfred D.Lerner and with Presiding Justice Sullivan. At some of the Committee's meetings experts were invited to discuss the landscape of indigent representation in New York State and across the country. These experts included Jonathan E. Gradess, Esq. of the New York Defender Association, Inc. and Nancy E.Gist, Esq., Director of Office of Justice Programs, U.S. Department of Justice.

The Committee held a public hearing at the Appellate Division First Department in June 2000 at which representatives of many organizations and a number of other interested parties provided testimony. Copies of the Notice of Hearing are appended as Annex 2, together with a list of the persons who testified at the hearing. In addition to the 22 persons who provided testimony, the Committee received written submissions from a number of organizations. The transcript of the hearing and copies of the written submissions received by the Committee are available at the Appellate Division First Department. The persons testifying represented over a dozen organizations, including institutional providers of legal services and bar associations. Testimony was also received from panel attorneys and a representative of an association of judges. Following the hearing, the Committee continued to meet with experts, practitioners and members of the court system in formulating the findings and conclusions set forth in this Report.¹

III. BACKGROUND; HISTORY OF NEW YORK MANDATED GOVERNMENTALLY FUNDED LEGAL REPRESENTATION

New York has a long and honored history of considering legal representation to be a right of the indigent, pre-dating the U.S. Supreme Court's decision in *Gideon v. Wainwright*.² As noted in the recent decision in *New York County Lawyers' Association v. Pataki*, "[t]he right to counsel in New York State is a 'cherished principle,' rooted in the State's pre-revolutionary constitutional law and developed independent of its federal counterpart."³

A century before *Gideon*, New York directed its courts to appoint private *pro bono* counsel for unrepresented criminal defendants.⁴ In 1961, County Law Article 18-A permitted counties and New York City to establish plans to aid indigent

defendants.⁵ When the New York State Legislature created the Family Court in 1962 it declared in Family Court Act § 262 that a child's right to counsel "is often indispensable to a practical realization of due process. . ."

In 1965, the Legislature enacted New York County Law Article 18-B, requiring local governments to implement their own system for providing legal representation for children in family court proceedings and indigent adults charged with crimes. Pursuant to Article 18-B, representation could be provided in one of the following four forms: 1) by a public defender pursuant to Article 18-A; 2) by a private legal aid bureau or society designated by the county or city; 3) by counsel provided pursuant to a plan of a bar association, or 4) pursuant to a plan that contained a combination of any of the preceding three mechanisms.

At the same time, the legislature enacted Judiciary Law § 35, which allowed courts to assign counsel to indigent parties in certain proceedings (such as habeas corpus proceedings, certain proceedings affecting children, certain proceedings affecting mentally ill people), and charged the Administrator of the Courts with the duty to fund such assignments of counsel.

Under date of November 27, 1965 pursuant to the provisions of Article 18-B, by Executive Order No. 178, New York City Mayor Wagner designated The Legal Aid Society to furnish counsel to persons within the City of New York charged with a crime who were financially unable to obtain counsel. The terms and conditions for the rendering of such services would be established pursuant to an agreement between The Legal Aid Society and the City. The Executive Order also provided that in those cases where, because a conflict of interest or other appropriate reason, The Legal Aid Society declined to represent any such defendant, the person would be represented by counsel furnished pursuant to a joint plan of certain bar associations provided such plan is approved by the Judicial Conference of the State of New York. Thereafter, the five county bar associations and the Association of the Bar of the City of New York proposed and on April 28, 1966, the Judicial Conference of the State of New York approved, an Assigned Counsel Plan (the "1966 Plan"). The 1966 Plan established that The Legal Aid Society would be the primary provider of indigent representation in criminal cases except homicide cases and cases involving conflicts. Those cases were to be handled by private 18-B attorneys ("panel attorneys" or "assigned counsel"). Legal Aid's budget was to be fixed annually through negotiations with the City, and panel counsel were to be compensated at rates authorized by statute. This 1966 Plan remains in place today and has not been amended.

Since Article 18-B became effective and the 1966 Plan was adopted, the legislature has repeatedly expanded the types of proceedings in which counsel must be assigned. Thus, the right to counsel has been extended to all adult respondents in family court

proceedings involving: allegations of abuse and neglect against a child; foster care placement and review; the termination of parental rights; paternity and adoption proceedings; and allegations of family offenses. In this last category of cases, the petitioner, usually a victim of domestic violence, also has the right to be represented by counsel.⁶ Most recently, the right to counsel has been extended to individuals who are the subject of a proceeding commenced under the sex offender registration act.⁷ Under these statutory expansions the assignment of counsel where appropriate is administered under the umbrella of County Law Article 18-B. In addition, Family Court Act §262 and Judiciary Law §35(1a) have been interpreted to authorize representation of adults in Supreme Court actions.⁸

Other statutory schemes for providing counsel to persons lacking financial resources also have been enacted. Pursuant to the Family Court Act §§241, 243, the Office of Court Administration and the Appellate Divisions have authority, respectively, to contract with a private legal aid society and to name a panel of lawyers to serve as law guardians for children in Family Court proceedings. All children in Family Court matters are entitled to counsel when they are the subjects of the proceedings.⁹ Judiciary Law §35(7) extends a child's right to counsel to cases originating in Supreme Court and Surrogate's Court. The Administrative Board of the Courts is authorized to set the standards which guide the Appellate Division in naming a law guardian panel. Separate statutory constructs have been enacted for providing representation to mentally incapacitated persons and individuals charged with a capital offense.¹⁰

Local government, County or City, pays for the assignment of counsel pursuant to County Law Article 18-B. The Office of Court Administration funds the law guardian program and the Mental Hygiene Legal Service office. The executive branch covers the cost of representing defendants in capital cases. Local governments and the Office of Court Administration contract with organizations to provide representation services pursuant to the procurement rules that govern them. The state legislature sets one statewide rate for all the private panel lawyers who represent indigent adults and children.¹¹

When the 1966 Plan was adopted it was envisioned that panel attorneys would receive a tiny proportion of the assignments -- only homicides and conflict cases. It was anticipated that the Legal Aid Society's staff of primarily less experienced attorneys would handle the more numerous misdemeanor cases, while its smaller cadre of seasoned lawyers would handle the felonies. Experienced panel attorneys, assisted by their firms' resources, would handle homicides. These lawyers would also be available to accept the limited number of cases that presented a conflict for the Legal Aid

Society. It was believed that office overhead costs for these cases would be absorbed by the panel lawyers' firms.

Before long, the volume of criminal cases outpaced the Legal Aid Society's capacity and a class of panel attorneys evolved whose entire practice consisted of assigned cases. On the family court side, virtually all cases requiring the representation of an indigent adult were handled by panel attorneys with the result that a group of lawyers soon emerged that was wholly dedicated to that practice.

Increasing numbers of cases and growing numbers of lawyers to handle them soon required the implementation of a more sophisticated method of administration. The Appellate Division adopted rules to replace the informal operation of the 1966 Plan. Membership on a panel which previously had been based upon the referral of a lawyer by a bar association now required the submission of a detailed application. The Central Screening Committee was created in the First Department to review the application and interview the applicant before membership on a panel was awarded. Subsequently, the Central Screening Committee's duties were expanded to include recertifying members, investigating complaints and providing training.¹²

The Appellate Division also developed a parallel administrative structure for overseeing the panel of law guardians for children. The Family Court Advisory Committee was created as the counterpart to the Central Screening Committee.¹³ Until the early 1990s the Assigned Counsel Plan and the Law Guardian Panel shared the same administrator and staff, funded by the Appellate Division. The City of New York then assumed fiscal responsibility for the Assigned Counsel Plan. The Appellate Division retained responsibility for the Law Guardian Panel, now administered by a Director of the Law Guardian Office.

As the volume of criminal cases increased since the adoption of the 1966 Plan, the volume of Family Court matters requiring the assignment of counsel and the number of matters requiring the provision of counsel for children also increased. The growth in the number of criminal defense matters accelerated in the last few years as the volume of misdemeanor arrests grew substantially. Precise statistics documenting the increase in the number of matters for which governmentally funded counsel has been provided in the First Department are hard to come by. Until 1996, The Legal Aid Society's Criminal Division and its Juvenile Rights Division together with the Assigned Counsel Plan and the Law Guardian Panel constituted the only sources of legal representation in the First Department directly funded by State or City government. The Legal Aid Society's contract with the City covers all five boroughs and thus includes case assignments in the Second Department. In 1995, the number of assignments in criminal courts of New York and Bronx County under the Assigned Counsel Plan totaled approximately 62,800. Since that year, the number of such

assignments have increased dramatically: to approximately 84,200 in 1996, approximately 121,500 in 1997 and approximately 177,000 in each of 1998 and 1999. The Legal Aid Society, which received 98,065 assignments in New York and Bronx County in fiscal 1994, received 103,679 assignments in fiscal 2000 (the year ended June 30, 2000), but the number of staff and management attorneys handling that caseload decreased from 301 in fiscal 1994 to 224 in fiscal 2000. The Legal Aid's Criminal Defense Division represented 201,373 indigent clients citywide in 2000.¹⁴

In 1990 approximately 2,500 adults were represented in Family Court under the Assigned Counsel Plan, in each of the last few years approximately 10,000 adults were thus represented in Family Court.¹⁵ Citywide the Juvenile Rights Division represented over 44,000 children in 2000. It noted that as a result of deadlines for the length of time children can remain in foster care imposed by the Adoption and Safe Families Act, within the last year there was a "close to 40 percent rise in termination of parental rights petitions, causing a significant bulge in contested termination hearings."¹⁶

Beginning in 1997 the City contracted with several institutional providers in addition to the Legal Aid Society, including New York County Defender Services and The Bronx Defenders, to provide criminal defense services to indigent persons. While The Legal Aid Society is required to handle an unlimited number of cases with a fixed limited budget, the new providers initially contracted for a set number of cases (10,000 or 12,500) for a fixed contractual amount. Recently these institutional providers have also been asked to expand their caseloads without additional funding. In view of the proliferation of institutional providers, the Appellate Division created the Indigent Defense Organization Oversight Committee to set standards for and monitor the performance of institutional providers of criminal defense services.¹⁷

Meanwhile, the number of lawyers available to handle assignments both in criminal proceedings and Family Court matters has been declining. In 1990 approximately 1,000 lawyers were available to handle assignments under the Assigned Counsel Plan in criminal matters. By the end of 2000 the mailing lists for those panels dwindled to 752 lawyers. Only approximately 400 lawyers accepted more than 10 assignments during the year 2000. The Family Court Assigned Counsel panels in the First Department had 171 members in 1995 and now at the end of 2000 had 110 active members. Clearly the pool of assigned counsel available to provide representation to those who cannot afford counsel is totally inadequate in view of the number of matters that must be handled. With the budgetary limitations imposed on the institutional providers resulting in their inability to take on any substantially greater caseload, panel lawyers have been asked to take up the slack. Today an estimated 40% to 45% of the total assignments to represent persons who cannot afford counsel in criminal and Family Court matters have been made to assigned counsel. With an inadequate

pool of such lawyers, increasing numbers of cases are being adjourned for lack of counsel both in Family Court and in criminal proceedings.

IV.

THE CURRENT CRISIS IN THE COURTS AND IN THE REPRESENTATION OF THE POOR

The lack of adequate funding to permit the Legal Aid Society or other institutional providers to increase their case assignments and the inadequate number of assigned counsel available to handle growing caseloads have created a crisis in the administration of an efficient and fair judicial system in New York City and have severely compromised the rights of children and indigent adults to meaningful representation. Not only are the poor in this state deprived of effective representation, but the operation of the criminal and family court systems have been thrown into disarray by the limited number of lawyers working for institutional providers and the shortage of assigned counsel who are willing to work at the \$25 and \$40 an hour rates. Many of the reports and testimonies reviewed by this Committee have pointed to the "mass exodus" of experienced counsel from the assigned counsel panels and have drawn the logical conclusion that the inadequate rates paid to assigned counsel are in large part to blame.¹⁸ Reports also indicate that it is the more experienced attorneys who are leaving the panels.¹⁹ In fact, as was noted in the May 2000 "Justice Denied" Report, since 1997 the First Department has allowed for partial certification in specific practice areas in Family Court where applicants lack sufficient experience to qualify for full admission to the panel.²⁰

As caseloads in the criminal and family courts rise and as courts continue to assign cases, the shortage of panel attorneys has forced those who remain on panels to take on inordinately large caseloads. The reports and testimonies reviewed by this Committee repeatedly pointed to problems with case preparation and out-of-court case management matters handled by assigned counsel, a situation that directly reflects the disparity between rates for in-court and out-of-court work.²¹ As noted by Kathryn M. Kase in the Statement of the New York State Association of Criminal Defense Lawyers, the "low assigned counsel rates have [a] pernicious effect on the delivery of indigent defense: they create an economic disincentive for lawyers to do a good job of representing their clients. Good legal work requires time, but for the assigned lawyer, the more time spent on the assigned case means that much more negative cash flow. This, in turn, means that the assigned defense lawyer will only make money on 18-B

work if she accepts far too many assigned cases and then resolves them as quickly as possible, regardless of the merits of the individual cases."²² The Justice Denied Report also argued that assigned counsel cannot afford to do necessary out-of-court preparation and cited as evidence of inadequate attention to out-of-court practice a March 1997 study by the Vera Institute of Justice in which only 5% of Family Court case files reviewed in the Bronx and 15% of those reviewed in Manhattan contained at least one motion by a parent's attorney.²³

The inadequate assigned counsel rates and resulting excessive caseloads carried by assigned counsel also have led to undue delays in the courts. Multiple adjournments are a matter of course and trial dates often cannot be set because assigned counsel are on trial in other cases. The OCA's recent report cited as one example of this, a murder case in Bronx Supreme Court that had been pending for over 1,000 days and the trial delayed for months "because the assigned defense attorney, who [was] simultaneously handling nearly 50 assigned counsel cases, [had] been tied up on trials of his other cases."²⁴

Because of the shortage of assigned counsel, the criminal arraignment parts and the intake parts in Family Court are in a state of crisis. Many of those who testified before this Committee recounted stories of judges and court staff roaming courthouse halls searching for panel attorneys willing to staff the arraignment parts in order to satisfy the statutory mandate that arraignments occur within 24 hours of arrest. Similar stories emanate from Family Court where judges and staff search the courthouse for lawyers to appear at intake in particularly urgent Family Court cases.²⁵ The Justice Denied Report noted that one judge faced with a delinquency case in Family Court involving six respondents "took to the hallways in her robes, accompanied by a court officer, to try to locate six panel members."²⁶

Even more alarming is the fact, reported by many different sources, that because insufficient assigned counsel are available to staff the Family Court intake parts, cases there are routinely not called at all.²⁷ The Justice Denied Report stated that "[o]n occasion, judges briefly adjourn cases pending assignment of counsel and temporarily remand the children to foster care. Every week in each county, approximately 10-20 cases are adjourned because there are no attorneys available for assignment."²⁸ The New York Law Journal reported that according to several Family Court judges and a Family Court administrator, the shortage of assigned counsel in the intake parts has led to as many as fifty cases a week being adjourned in Bronx Family Court, children in the Queens Family Court being sometimes held in jail overnight without being given a required hearing, and parties in the Brooklyn Family Court sometimes making two or three court appearances before they are assigned a lawyer.²⁹ Most disturbing, such delays in Family Court may occur in situations that should demand immediate

court intervention; the removal of a child from the home, juveniles being held in custody, and domestic violence.³⁰

Not surprisingly, there have been reports of a high-degree of client dissatisfaction with the system. As reported in the Justice Denied Report, C-PLAN conducted a small survey of its clients, parents with cases in New York family courts, in which 43% responded that they were not able to speak to their attorneys before appearing before the judge and only 30% reported that their attorneys adequately represented their views in the courtroom.³¹ Such representation is clearly inadequate by any standard; and certainly falls far short of the "meaningful and effective" right to counsel mandated by New York's constitution.³²

The effects of such inadequate representation reach far beyond the injustices served upon those inadequately represented. Other parties in the judicial system suffer as well. Victims of crime must withstand inordinate delays in seeing their cases come to conclusion. Children languish in foster care because attorneys for their parents do not take the basic steps that would expedite resolution of their cases and possibly bring the children home. The Justice Denied Report cited one particularly egregious example of inadequate representation of the parent leading to a lengthier foster care stay for the children. In that case, the Administration for Children's Services and the foster care agency were prepared to recommend a trial discharge of three children to their mother. Because the mother's court-appointed attorney did not appear at two successive court dates due to calendar conflicts, the proposed discharge was delayed for several months.³³

The shortage of assigned counsel resulting from the low compensation rates also results in significant costs to the public. The longer a child is kept in foster care and the longer a person accused of a crime is kept in detention, the higher the cost to government. The annual cost of maintaining a child in foster care is about \$15,000 per year. Currently an average of 35,000 children are in foster care at any given time, many of them because the court system has not adjudicated a more permanent arrangement either by returning the child to a parent or relative's care or by completing adoption proceedings. Foster care costs New York City nearly \$1 billion a year. The costs of maintaining accused persons in detention are also substantial.

It is possible that raising the amounts expended for institutional providers of legal services and the rates for assigned counsel may actually save money.

The \$25 and \$40 an hour rates mandated by New York State for assigned counsel is far less than the rates paid by other states or paid in New York to other lawyers and experts.³⁴

V. GREATER RESOURCES, SUPPORT AND RESPECT FOR ASSIGNED COUNSEL ARE ESSENTIAL IN PROVIDING MEANINGFUL AND EFFECTIVE REPRESENTATION TO THOSE WHO CANNOT AFFORD COUNSEL

The Committee believes that raising the 18-B rates and eliminating the in-court/out-of-court differential are essential but that without other reforms "meaningful and effective" representation of persons who cannot afford counsel will remain only an elusive goal. In testimony before the Committee, assigned counsel and others spoke of the lack of resources available to assigned counsel, the bureaucratic obstacles they face and the lack of respect for them and their endeavors that they experience, all of which diminish the attraction of an assignment that should be taken on with pride.

Assigned counsel representing victims of domestic violence, for example, usually does not have the resources to research the legal precedents in this very quickly evolving area of the law. The Committee heard testimony that many assigned counsel operate without the benefit of an office or available computer resources. To provide effective representation, assigned counsel must be able to advise the client from thorough knowledge of not just the law but also the facts of the case. Counsel must be able to evaluate and serve the needs of the client in advance, and not just at the time of the court proceeding. To accomplish this and to provide a more level playing field, assigned counsel should have access to resources equivalent to those already available to their opposing counsel, and incidentally, also available to the lawyers employed by the Legal Aid Society and other institutional providers.

The Committee's principal recommendation to achieve this goal is that one or more resource centers be established to provide support and assistance to assigned counsel. The resource center or centers should be available to any and all assigned counsel without any requirement for a prior application to the Court for the utilization of the center. The center should provide administrative and support services which should include access to a case management tracking system. The resource center should have administrators for Family Court and criminal matters who would coordinate the use of secretarial help and the availability of translators, and who would maintain case management records. The resource center should maintain a data base of various other support persons such as investigators, social workers and experts in areas such as DNA, drug testing, ballistics and mental health. Ideally, a branch of the resource center providing at least computer access to the main facility should be provided in each courthouse.

With respect to investigative services, the resource center should be equipped to directly supply or serve as a referral source for professional investigators to ascertain necessary factual information. Similarly, the center should serve as a referral source for experts. The current requirement for prior court approval of expenses for investigators or other experts should be eliminated as assigned counsel are generally competent to determine when investigative or expert assistance is required; but, the administrator of the resource center should be empowered to deny services at the expense of the resource center in appropriate cases. The Committee believes that the resource center should directly supply social workers upon request to assist assigned counsel in appropriate matters.

The resource center should provide assigned counsel with the availability of resources for adequate legal research comparable to the resources available to opposing counsel and counsel who are employees of institutional providers. In this connection, the Committee recommends that the resource center provide unlimited access, at no cost to assigned counsel for research on assigned cases, to Lexis, Westlaw, Westcheck, CRIMS (the OCA Computer System that provides data about cases, prior counsel, co-defendants, etc.) and Internet sites which are of use in obtaining information (e.g., Department of Corrections, Cornell Law School Legal Information Institute, New York Law Journal, etc.). Further, the resource center should develop, maintain and provide free access to assigned counsel to an indexed computerized brief bank.

Other suggestions that the Committee received that might be implemented by or through the resource center or centers include the following: improving communication between and among assigned counsel and developing a mentoring program so that newly appointed panel attorneys or those who have encountered a new issue will have access to an experienced attorney who has volunteered to be available to assist. The Committee also believes that assigned counsel should have easy access to the training programs now conducted by institutional providers for their attorneys and that the institutional providers be funded to provide this service.

The resource center or centers envisioned by the Committee should be independent of the courts. They should be funded by New York State and/or New York City, and, if available, by federal or other grant money. They probably should be established through a Request for Proposal ("RFP") and a contractual arrangement. It may be desirable to direct the RFP to law schools and social work schools as well as traditional institutional providers of legal services. A cooperative plan under which the entity contracting to provide the resource center would have ties to a law school or school of social work and to other sources of expertise may well produce highly effective resource centers enhancing the efficiency as well as the effectiveness of assigned counsel.

The Committee received considerable testimony and comment about the lack of respect for assigned counsel and the obstacles counsel face in carrying out their duties. The Committee believes that it is essential that the civility and respect paid to assigned counsel by judicial and non-judicial personnel be substantially improved. Many assigned counsel believe that they are not treated by the courts with as much deference as their adversaries or as other private counsel, particularly in matters relating to adjournments and delays in the courtroom. The practice of assigning cases to panel attorneys when they are not present and without their knowledge should in their view and in the view of the Committee be discontinued. A possible exception may be the reassignment of the same counsel in a collateral case although some assigned counsel expressed the view that even this is a sign of disrespect in what is a voluntary assignment process. Since many assigned counsel spend all or most of their working day in the courthouse, the courts should provide certain amenities for them. In addition to the computer access discussed above in connection with the resource center, each courthouse should provide for the use of assigned counsel coatracks (which are currently generally not provided), coin operated copiers and telephone access. Further, assigned counsel should be allocated a secure place in each courthouse to interview their clients and prospective witnesses.

In view of the need to increase the pool of lawyers available to take 18-B assignments in Family Court as well as criminal matters, it is necessary that a concerted effort be made to make the role of assigned counsel more professionally rewarding in every respect.

VI. CURRENT STATUS OF INSTITUTIONAL PROVIDERS OF LEGAL REPRESENTATION TO THE POOR; AN INSTITUTIONAL PROVIDER OF LEGAL SERVICES FOR PARENTS AND OTHER ADULTS IN FAMILY COURT SHOULD BE ESTABLISHED

Following the issuance by New York City of an RFP seeking organizations to contract with the City for indigent criminal defense services, the Appellate Division First Department created the Indigent Defense Organization Oversight Committee ("IDOOOC") to set standards and monitor the performance of institutional providers of criminal defense.³⁵ The IDOOOC has repeatedly noted that while the new institutional providers resulting from the RFP process contract with the City to handle a specified number of cases for a fixed price, the Legal Aid Society is required to represent an unlimited number of indigent persons arrested in the City for a previously agreed upon fixed amount. The new institutional providers have generally met the IDOOOC's

standards, and thus the amounts paid them would appear adequate to provide the required representation. However, the open ended nature of the budgetary arrangements with the Legal Aid Society remains a cause for concern.

In the Family Court context, the child is usually represented by the Legal Aid Society's Juvenile Rights Division pursuant to a contractual arrangement with the Office of Court Administration pursuant to a statutory scheme independent of Article 18-B. In addition, the Office of Court Administration has contracted with Lawyers for Children to represent children in custody proceedings commenced in New York County and a similar agreement with the Children's Law Center for Bronx County is scheduled to be implemented shortly. If there is a conflict that precludes the Juvenile Rights Division or Lawyers for Children from taking on a given case or if there are multiple children with varying interests in a case, a panel lawyer may be assigned. Since there currently is no independent group like IDOOC, the Appellate Division should establish such an entity to set standards and monitor the performance of the institutional providers of legal services in Family Court.

Parents who cannot afford counsel are entitled to the assignment of counsel in child protective, permanent neglect, family offense, custody, adoption, and contempt proceedings in Family Court.³⁶ While assigned counsel are generally dedicated and hard working lawyers who strive against overwhelming odds to represent their client, the lack of an adequate pool of available panel attorneys in Family Court and the need for interdisciplinary services involving at least a social worker in addition to an attorney suggests that an institutional provider to represent parents in Family Court should be established. The Committee strongly recommends prompt establishment of such an institutional provider.

The proper resolution of Family Court cases, particularly those involving abuse and neglect, foster care reviews, and termination of parental rights, needs, at a minimum, the services of both an attorney and social worker. Child advocates maintain that one can not properly practice in Family Court without the vital services of a social worker. To be truly effective, the institutional provider for parents should also have the staffing capability to reach out to community services, mental health facilities, parent education, and drug counseling programs. It should also have access to other attorneys who could advise or represent parents in housing, public assistance, disability, and domestic violence problems. Sometimes a mother's ability to be united with her child is blocked because she, a victim of physical abuse, has been accused of "failure to protect" her child. Both legal and support services are required to stop the victim from being victimized again.

Another important reason for recommending the establishment of a broad based interdisciplinary provider for the parent is that such an organization would provide a

continuity of representation during the duration of a family's involvement in the child welfare system. A panel attorney is assigned to represent a client at a specific proceeding. Although the same attorney may represent the parent in supplemental hearings, the panel attorney's assignment ends after the dispositional hearings. In the child welfare area, often the most important parental advocacy must be done between formal court hearings and after the dispositional hearing. Parents may need advocates to help obtain proper visitation and obtain the mandated services that are necessary for reunification of the family. Currently it is not easy for the indigent parent who is seeking to get back a child removed from the home and in foster care to obtain legal representation. Continued representation should be provided in these matters.³⁷

The need for an institutional provider for parents has been exacerbated by the passage of the Adoption and Safe Families Act which provides that if a child is in foster care for 15 of the last 22 months, the agency may be required to terminate parental rights. The commendable purpose of the bill was to shorten stays in foster care - but it places parents at risk of losing their children. In New York the average stay in foster care is four years. Without a parental provider constantly alert to the consequences of inaction or delay in the resolution of child welfare cases, a parent's rights may well be jeopardized.

The institutional provider recommended by the Committee would in no way obviate the need for assigned counsel to represent adults in Family Court matters. There will be many situations where different interests will require that each parent be separately represented. Also, foster parents and other persons having physical or legal custody of a child may require separate representation. Thus, even after the establishment of the institutional provider recommended by the Committee, there will be a continuing need for assigned counsel and for such counsel to have access to the resources discussed in the prior section of this Report.

The Committee recommends that the institutional provider should be authorized to represent not just parents but also other adults entitled to governmentally funded representation in Family Court such as foster parents. The institutional provider should also serve as a training resource both for in-house attorneys and for panel attorneys. We also recommend exploring the possibility that a cooperative training program could be established between the new institutional provider and the existing agencies representing the City and the child. Such a program would encourage more understanding and appreciation of their respective perspectives, and focus each agency on its common goal, which is the welfare of the child. Funding should be made available to assist the institutional provider in providing this additional training.

We also recommend that the institutional provider for adults in Family Court be authorized and funded to handle appeals. Today appeals from orders issued in Family

Court on behalf of children are typically handled by an institutional law guardian. However, there are few appellate lawyers to appeal on behalf of adults or simply to appear on their behalf as respondents. In the entire First Judicial Department there are 13 lawyers who regularly represent adults in Family Court appeals. In 1999, there were approximately 40,200 dispositions involving substantial rights of adults in New York and Bronx Counties. Support, paternity, USDL and juvenile delinquency cases are omitted from that number. However, that year the Appellate Division decided only 79 appeals in those categories of Family Court matters. An institutional provider for adults in Family Court should have an appeals bureau. Such a bureau would help to assure parents and other adults that they can expect some protection from the possible abuses occasioned by overburdened courts and an overwhelmed child welfare structure.

We recommend the prompt establishment of a legal services organization with broad interdisciplinary staffing to represent parents and other adults in Family Court. Funding should be provided on a formula basis so that as caseloads expand or contract the amount of funding also expands and contracts. Such a mechanism will provide the institution with the means to provide that its clients receive meaningful and effective representation.

VII. BOTH INSTITUTIONAL PROVIDERS AND ASSIGNED COUNSEL SHOULD HAVE THE AUTHORITY AND CAPACITY TO MEET THE BROADER LEGAL NEEDS OF THEIR CLIENTS

The Committee's review of the current system for representation of the indigent shows a strong need for more holistic representation.³⁸ The outcome of a family or criminal law matter, whether handled by an institutional provider or assigned counsel, often has direct, extremely time-sensitive, collateral effects on other areas. For example, in the area of family law, child abuse and neglect cases may be closely associated with divorce, custody, child support, domestic violence, or criminal matters. For many women charged with neglect, domestic violence may be an issue. By assisting mothers in obtaining orders of protection, attorneys can enable them to regain custody of their children and provide a safe home environment. A criminal conviction will often have repercussions on a defendant's custody, housing, or immigration status. The Committee heard testimony and received statements from many sources commenting on the inefficiency and ineffectiveness of a system in which counsel is

provided only for a specific court proceeding. Moreover, instances abound where counsel is not authorized or compensated for and is not equipped to provide the legal and other assistance which may be essential for the indigent client. Broadening the governmentally funded legal representation of clients involved in proceedings in which such representation is mandated would avoid the misallocation of judicial resources and would likely, ultimately, save money.

Several institutional providers have experimented with a more holistic representation with promising results. The Neighborhood Defender Service of Harlem, initially funded by the Vera Institute for Justice, pioneered in providing a wide range of legal and other services to its criminal defense clients. Legal Services of New York utilizes an interdisciplinary approach to foster care, domestic violence, housing, and public assistance issues. The Family Reunification Justice Project, Inc., in Bronx Family Court, provides social work services to clients represented by assigned counsel. Judge Lee Elkins in Brooklyn Family Court has started a pilot project that pairs assigned counsel with social workers.³⁹ The court system is also experimenting with approaches that deal with varied problems affecting a given litigant, e.g., The Red Hook Community Court project.

Specific suggestions which were made to the Committee and which the Committee endorses are the following: Compensation is not now available to assigned counsel in pre-arrest representation. Such representation is counted towards institutional provider's case assignment statistics only if the institutional provider then represents the defendant post-arrest. While there may be difficult administrative issues related to compensating assigned counsel for pre-arrest representation, an effort should be made, perhaps through a resource center or a referral mechanism, to make pre-arrest representation generally available to indigent persons. At a minimum, panel attorneys should be compensated for pre-arrest representation in matters where they are subsequently designated as assigned counsel. Further, in the criminal defense area, since the resolution of a criminal case may have direct collateral effects on immigration status, both institutional providers and assigned counsel should be compensated for providing counseling and assistance, at least in the early stages of an immigration proceeding, with respect to such matters. No such compensation is currently available. Institutional indigent defense providers are authorized under their contracts with the City to provide assistance on *habeas corpus* petitions where appropriate. The ability to file a *habeas corpus* petition may be crucial to a criminal case's outcome and requires attention to numerous time sensitive procedure rules. Assigned counsel, however, receive no payment under Article 18-B for their work on such petitions if the petition is filed in federal court.⁴⁰

The need for more holistic representation is acute in the area of family law. Families involved in the child welfare system often have other needs that affect their ability to resolve the Family Court proceedings successfully. Assigned counsel are currently appointed for a specific proceeding rather than for the duration of a family's involvement in the child welfare system; thus, there are critical periods when parents are often left without an advocate.⁴¹ Reunification of a family may require attention to entitlement issues, landlord-tenant issues, as well as domestic violence or other family related issues that are collateral to the proceeding for which counsel has been assigned. Both institutional providers and assigned counsel should be equipped to counsel with respect to drug treatment programs and the availability of other social services that may have a bearing on the successful outcome of the proceeding for which counsel was provided. Similarly, issues arise in relation to representation and treatment of mentally ill persons. Institutional providers should be funded and assigned counsel should have access through a resource center to provide representation and counseling in this area as well.

Based on some of the testimony and statements received by the Committee, it would appear that a full holistic approach might suggest that the same institutional provider should be authorized to represent a person who cannot afford counsel both in criminal and Family Court matters. In many cases an arrest or a criminal court proceeding has effects which may lead to or affect a pending Family Court matter. The Committee believes that a pilot project or contractual arrangement on an experimental basis would be useful to test this concept.

VIII.

GREATER COORDINATION AMONG GOVERNMENTAL AGENCIES INVOLVED IN FAMILY COURT PROCEEDINGS SHOULD RESULT IN COST EFFICIENCIES

Delays in Family Court cases, particularly termination of parental rights and foster care proceedings exact an enormous cost in terms of the family's loss of stability and through the dissipation of public funds. In addition to delays caused by lack of available counsel there are many delays that can be attributed to a lack of coordination among the governmental agencies necessarily involved in Family Court proceedings. The New York City Division of Legal Services represents the Administration for Children's Services (ACS). Through the Office of Court Administration, the Legal Aid Society's Juvenile Rights Division represents children in Family Court. Social

workers and mental health professionals also are involved in most foster care and termination of parental rights cases. If any legal representative does not appear on the scheduled court date, or if a social worker or mental health professional either does not appear or does not submit the evaluations mandated by the Court, the case is adjourned, the cost of foster care placement continues, and a child's life remains in limbo. The monthly cost of continued foster care placement is approximately \$1,250 per child. Hundreds of such cases are adjourned each month.

Family Court deals with the most difficult and sensitive areas of family life. Here justice delayed is truly justice denied. There is no doubt that judges and court personnel are aware of the difficulties resulting from the poor coordination among the various agencies involved in Family Court proceedings. The Committee recommends that the inadequate coordination among the agencies involved and consequent destructive delays be revisited and evaluated with the urgency they demand.

IX.

ADOPTION OF A NEW STATUTORY SCHEME AND PLAN; ESTABLISHMENT OF A PERMANENT OVERSIGHT COMMITTEE.

The Committee believes that as 35 years have passed since the adoption of New York County Law Article 18-B and Judiciary Law §35, it is time for the New York State Legislature to reconsider the entire legislature structure relating to governmentally funded legal representation of the poor. We believe that the state as opposed to the localities should bear a somewhat greater portion of the fiscal burden of such representation. We recognize that any increased fiscal responsibility would and should entail more supervision and control by the governmental entity that bears it. Several avenues are available to the legislature to accomplish such a restructure. For example, the state, acting through the Judiciary budget, could accept responsibility for the representation of all parties in Family Court, not just children. Further, the state could assume responsibility for the funding and administration of the resource centers the Committee recommends and for the related support services to be provided for assigned counsel in both criminal and Family Court matters. Both the state and New York City should amend the current restrictive rules which preclude compensating assigned counsel and institutional providers for collateral services such as pre-arrest counseling and representation of parents following a dispositional hearing in Family Court matters.

The Committee's mandate is to propose a revision to the 1966 Plan. The redrafting of such a plan for the First Judicial Department or for that matter for New York City

should probably await action by the State Legislature in response to the current crisis in the representation of the poor and in particular in the assigned counsel compensation arrangements.

In the absence of statewide legislative changes, the Committee would propose a plan to replace the 1966 Plan which would extend its application beyond criminal defense to all proceedings and situations in which governmentally funded legal representation is now or hereafter mandated by statute or case law. The Committee expects to provide to the Court a plan which meets this limited objective.

The Committee recognizes that under New York County Law Article 18-B, New York City could establish a public defender office to represent indigent persons in criminal matters. In view of the desirability of insulating the provision of criminal defense as much as possible from the political process and from the agencies entrusted with the prosecution of persons accused of crimes, as well as maintaining criminal defense and Family Court representation independent of the Court, and in view of the magnitude of the criminal defense burdens, we do not believe that the establishment of a public defender system is appropriate in the First Department. The Committee received no testimony or other comment favoring the establishment of such a system. On the other hand, we did receive some testimony proposing the elimination of the assigned counsel alternative principally because the typical assigned counsel, without office or other support, is arguably unable to provide quality representation. We believe that recommendations we have made, including the establishment of a full service resource center, should blunt this criticism and that it is preferable to retain the flexibility and diversity that the present system of institutional providers as well as assigned counsel provides. In addition, panel lawyers will always be required because of the need to provide counsel where there are multiple parties with conflicting interests. Thus, a new plan should encompass both institutional providers and assigned counsel and indeed should extend that dual availability to Family Court matters as well.

The proposed plan further envisions that a permanent independent Commission be appointed to oversee the entire area of legal representation of the poor. The mandate of such a group would be to recommend changes or improvements that may be appropriate to avoid the kind of crises that currently afflict the representation of the poor. The Commission would file with the Appellate Division, at substantial intervals, a report regarding the quality of representation afforded to persons who cannot afford counsel.

The existence of a permanent Commission would accomplish several objectives. First, it would serve as an institutional focus, providing a communal and historical reference point for all issues relating to this subject. Second, it would serve an oversight

function to ensure that legal services are: properly funded; provided to clients at an appropriate level of quality and professionalism; and are provided in a manner that takes into account the continuously evolving and changing legal needs of the poor. Third, such a Commission would serve both as a clearinghouse for ideas and new approaches and as a bully pulpit to keep a spotlight on this issue. Finally, it would be able to benchmark the level and quality of legal services for the poor.

We believe that the Commission should to the greatest extent possible be independent of political forces. While some of its members should be appointed by elected officials, other members should come from bar associations and there should be client representatives and lawyers actively practicing in the area. It would not be inappropriate if such a Commission, like this Committee, be created by and report to the Court.

It is not the view of this Committee that the Commission we propose would supersede the IDOOC, the Central Screening Committee or the Family Court Advisory Committee. We would recommend, however, that these committees periodically meet with or otherwise advise the Commission of their findings and concerns. We see no reason why members of these committees could not also serve on the proposed Commission.

We recognize that the appointment of another Commission is neither a panacea nor a guarantee of improvement in the delivery of quality legal services to the poor. However, we are convinced that there is a compelling need for an institutionally grounded oversight commission to ensure that issues relating to the delivery of legal services to the poor are not permitted to be neglected, but rather are advanced in an aggressive and professional manner.

It remains a fundamental truism that the measure of any society is in direct proportion to how it treats the least fortunate of its people. Providing access to justice is as fundamental a right as any in our society. That access is illusory without "meaningful and effective" legal representation.

The Committee hopes that this Report illuminates the current debate taking place locally and in Albany. The objective is noble and demonstrates New York's historic commitment to the disenfranchised among us. This Committee will remain available to assist the Court in addressing this crisis.

**REPORT OF THE APPELLATE DIVISION FIRST
DEPARTMENT COMMITTEE ON REPRESENTATION OF THE POOR**

CRISIS IN THE LEGAL REPRESENTATION OF THE POOR

**RECOMMENDATIONS FOR A REVISED PLAN TO IMPLEMENT
MANDATED GOVERNMENTALLY FUNDED LEGAL REPRESENTATION
OF PERSONS WHO CANNOT AFFORD COUNSEL**

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¹ The members of the Committee thank all those who have given of their time and expertise in providing testimony, submitting statements or meeting with the Committee. In addition, the Committee thanks the following persons for their

assistance in the preparation of this Report: Arline Lebov, Monica Bhattacharyya, Esq., Harvey Simon, Esq., Jenifer deWolf Paine, Esq. and Dain C. Landon.

² 372 U.S. 335, 83 S.Ct. 792, 9 L.E.2d 799 (1963).

³ Decision and Order of Lucindo Suarez, J.S.C., January 16, 2001, N.Y. Sup. Ct. Index No. 102987/00, at 3 (citations omitted).

⁴ N.Y. Crim. Proc. Law. § 308 (McKinney 1998).

⁵ N.Y. County Law Art. 18-A, (L. 1961, Ch. 365).

⁶ N.Y. Fam. Ct. Act § 262. (Consol. 2001).

⁷ N.Y. Correct. Law §168-n. (Consol. 2001).

⁸ *Borkowski v. Borkowski*, 90 Misc. 2d 957 (Sup. Ct. Steuben County 1977); *Matter of Petkovsek*, 251 A.D.2d 1085 (4th Dept. 1998).

⁹ N.Y. Fam. Ct. Act § 241 (Consol. 2001).

¹⁰ See N.Y. Mental Hyg. Law § 47.01 (Consol. 2001) (establishment of Mental Hygiene Legal Services office); N.Y. Judiciary Law § 35-b (Consol. 2001) (establishment of the Capital Defender Office and screening committee for the naming of a panel of private lawyers to accept assignments).

¹¹ There are also many programs which provide legal representation to persons who cannot afford counsel other than those funded by state or local government and described above. Funds are provided by the federal government through several programs, including the program administered by the Legal Services Corporation. Private sources also fund a variety of legal assistance programs and City and State funds implement programs such as those seeking to avoid homelessness. While the Committee made some effort to understand the scope and impact of these programs, this report does not seek to evaluate or comment on them.

¹² See N.Y. Comp. Codes R. & Regs. tit. 22, § 612 (2000).

¹³ See N.Y. Comp. Codes R. & Regs. tit. 22, § 611 (2000).

¹⁴ The Legal Aid Society of New York, Annual Report (2000). Legal Aid's Criminal Defense Division has represented about 200,000 defendants in each of the last five years. It has done so despite an over \$25 million loss of City funding since 1995.

¹⁵ Attached as Annex 3 are graphs for criminal court filings in New York and Bronx County. During the period from 1995 through 1999, the number of felony assignments dropped somewhat while the number of misdemeanor, violation and summons assignments increased dramatically. It must be added that a substantial majority of these assignments were concluded at arraignment.

¹⁶ The Legal Aid Society of New York, Annual Report (2000).

¹⁷ See N.Y. Comp. Codes R & Regs. tit. 22, § 613 (2000).

¹⁸ See, e.g., *Committee on the Representation of the Poor*, First Judicial Department (June 14, 2000) (statement of Richard M. Greenberg, Office of the Appellate Defender), at 3 ("The inadequacy of the rates is reflected in the growing number of attorneys who are leaving the panels, citing the rates as the primary factor."); Mark Green, Public Advocate for the City of New York, & C-PLAN: Child Planning and Advocacy Now, a special project of The Accountability Project, Inc., *Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Welfare Proceedings* 29 n.119 (May 2000) [hereinafter "Justice Denied"] ("Several individuals recounted stories of assigned counsel leaving the panel because they simply could not afford to continue with their practice and were overwhelmed with the challenges they faced in representing parties in Family Court.") ; *Committee on the Representation of the Poor*, First Judicial Department (June 14, 2000) (testimony of Monica Drinane, Attorney-in-Charge, Juvenile Rights Division) [hereinafter "Juvenile Rights Division Testimony"], at 4-5 ("The current fees ... are completely out of line with today's economic realities. The resulting acute shortage of appointed counsel for parents severely undermines the Family Court process to the greater detriment of children and their families.") .

¹⁹ See, e.g., Hon. Jonathan Lippman, Chief Administrative Judge of the Courts, & Hon. Juanita Bing Newton, Deputy Chief Administrative Judge for Justice Initiatives, *Assigned Counsel Compensation in New York: A Growing Crisis* 13 (Jan. 2000) [hereinafter "OCA Report"] ("[J]udges and program administrators confirm that all of the panels have lost many, if not most, of their experienced attorneys. Even those panels that have managed to replace departing attorneys have generally done so with far less experienced attorneys."); Juvenile Rights Division Testimony, at 4 ("The large numbers of experienced attorneys who are no longer willing to take on assigned cases have been replaced, if at all, by far less experienced attorneys who are handling far larger case loads.")

²⁰ Justice Denied, at 17.

²¹ See, e.g., OCA Report, at 16; Juvenile Rights Division Testimony, at 3-4.

²² *Committee on the Representation of the Poor*, First Judicial Department (June 14, 2000) (statement of Kathryn M. Kase, New York State Association of Criminal Defense Lawyers), at 2. Many others who testified also argued against the discrepancy between the rates for in-court and out-of-court-time, pointing to the importance of out-of-court time in adequate representation. *See, e.g., Committee on the Representation of the Poor*, First Judicial Department (June 14, 2001) (prepared testimony of Carolyn P. Wilson, NY County Defender Services), at 3 ("Anyone who practices law knows that the time an attorney spends in the office preparing for a hearing or trial has far more impact on the outcome of the case than the time an attorney spends in a part. . . waiting for a case to be called. The current system actually provides a disincentive to thorough case preparation.); Letter from Carol Sherman, the Children's Law Center, to Klaus Eppler (June 13, 2000) ("[T]he present rate structure, which mandates that a lower rate be paid for out-of-court work than in-court work discourages attorneys from spending sufficient time on case preparation such as interviewing, research, trial preparation and motions and negotiations.").

²³ *See Justice Denied*, at 30-31.

²⁴ OCA Report, at 14.

²⁵ *Id.*, at 14-15.

²⁶ *Justice Denied*, at 18. Supreme Court Justice Marjory D. Fields also reported that "[t]he current shortage [of panel attorneys] is so bad that we were forced to have someone 'stand in for arraignment only.' The next day we renewed the search for an attorney to assign." Letter from Hon. Marjory D. Fields, Supreme Court of the State of New York, to Klaus Eppler (May 19, 2000); *see also* OCA Report, at 16.

²⁷ *See, e.g., OCA Report*, at 15.

²⁸ *Justice Denied*, at iv.

²⁹ Daniel Wise, "In Family Court, Representing the Indigent Is Daily Struggle," N.Y.L.J., June 14, 2000, at 1.

³⁰ *See Juvenile Rights Division Testimony*, at 3 ("[Cases not being called in the intake part] is a regular occurrence in Family Court even though immediate court intervention may be necessary in these cases, which include child abuse and neglect proceedings and matters in which juveniles were being held in custody."); OCA Report, at 16 (noting trend, observed by former Presiding Justice Betty W. Ellerin of the Appellate Division, First Department, of attorneys not always being assigned to represent indigent parties in family offense proceedings and the result that "victims of

domestic violence must make critical decisions on their own that may affect their future physical safety").

³¹ Justice Denied, at vi-vii and Appendix G.

³² See *People v. Witenski*, 15 N.Y.2d 392, 395 (1965) (stating that in New York the "right to counsel must be made 'meaningful and effective' in criminal courts on every level") (citation omitted); *Matter of Alfred C.*, 237 A.D.2d 517 (2d Dept. 1997); *Matter of James R., Jr.*, 238 A.D.2d 962 (4th Dept. 1997)

³³ Justice Denied, at 17.

³⁴ The rates of \$40 per hour for in-court work and \$25 an hour for out-of-court work were established by the New York State Legislature in 1986. The Legislature also imposed an \$800 cap on the amount assigned counsel may receive for misdemeanor cases and all family court matters, and a \$1,200 cap for felony cases and all appellate matters. N.Y. County Law Art. 18-B, § 722-b (Consol. 2001). Exceptions to the rates and caps may be made only in "extraordinary circumstances" upon application to the court. In 1987, the Legislature eliminated the in- court/out-of-court differential for assigned counsel appellate work. Thus, attorneys handling appeals in criminal and family court cases are compensated at a flat rate of \$40/hour. *Id.*

The current assigned counsel rates fall short of virtually every benchmark. New York's assigned counsel rates are the second lowest in the nation. States with substantially lower per capita income levels pay close to, if not more than, two times the rates that New York pays to its assigned counsel. See The Spangenberg Group, Rates of Compensation for Court-Appointed Counsel in Non-Capital Felonies at Trial, 1999 (Nov. 1999) [hereinafter "Spangenberg Report"]. The Spangenberg Report indicates that the typical rate in Arkansas is \$80-\$85. In Georgia the out-of-court rate is \$45 and the in-court rate is \$60. In Montana the typical rate is \$60. In North Dakota the typical rates range from \$50 to \$85. Only New Jersey has lower rates and the state for the most part relies on an extensive public defender system, using assigned counsel in no more than 10% of its indigent criminal cases. New Jersey pays \$25 for out-of-court representation and \$30 for in-court representation. See Spangenberg Report, at 8; OCA Report, at 6. The Federal Criminal Justice Act program, which was praised by several of those who testified to this Committee, pays \$75 per hour for both in-court and out-of-court work. See, e.g., Letter from Leonard J. Levenson, New York Criminal Bar Association, to Klaus Eppler (June 8, 2000) ("[T]he federal program provided me with a certain dignity in the form of additional compensation and respect from the courts. Our Association is of the firm belief that in order to improve the

quality of representation for indigents in the First Department, your department need only pattern the program after the federal system.") Although New York courts have increasingly exercised their discretion to set fees in excess of the statutory amount, such action requires a finding of "extraordinary circumstances." *See* Michael A. Ricardi, "Family Court Judge Approves Compensation Above 18-B Rate," N.Y.L.J., August 11, 2000, at 1.

Within New York, rates for assigned counsel representing the indigent are substantially lower than rates paid to other government-contracted attorneys. For instance, bond counsel hired by the State Dormitory Authority are paid from \$175 to \$300 per hour, depending on experience. The Metropolitan Transit Authority pays over \$250 per hour and New York City's Education Construction Fund pays an average rate of \$325 per hour. *See* OCA Report, at 6-7; Justice Denied, at 13. In fact, New York State sets higher rates for court-appointed experts than it does for court-appointed counsel for the indigent. In New York, court-appointed physicians receive \$200 per hour; psychiatrists receive \$125 per hour; certified psychologists receive \$90 per hour; certified social workers receive \$45 per hour; and even licensed investigators receive \$32 per hour. *See* OCA Report, at 7; Justice Denied, at 14.

New York's assigned counsel rates fall below the standards recommended by national legal organizations. The National Legal Aid and Defender Association recommends that assigned counsel receive "reasonable compensation ... commensurate with that paid for other contracted government legal work ... or with prevailing rates for similar services performed by retained counsel in the jurisdiction." National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems, Standard 4.7.1 (Nov. 1989) (also recommending establishment of independent board to govern assigned counsel system). The American Bar Association Standards for Criminal Justice state that assigned counsel should receive a "reasonable compensation in accordance with prevailing standards." The ABA Standards for Criminal Justice, Standard 5-2.4 (2d Ed. 1980). Clearly, New York's rates for assigned counsel for the indigent, which are lower than all but one other state and lower than rates paid to virtually all other government contracted attorneys or court appointed experts in New York, do not meet even broadly-drawn standards such as these.

³⁵ *See* N.Y. Comp. Codes R & Regs. tit. 22, § 613 (2000).

³⁶ *See* N.Y. Fam. Ct. Act § 262 (Consol. 2001).

³⁷ The Justice Denied Report provides another reason for continued representation: "Most significantly, although state law limits initial foster care placement to one year, many children remain in 'lapsed placement' after the year is up, *i.e.*, they remain in care without legal authority. The parent, unfortunately, has no attorney to notify the court that the City has failed to file a petition to either terminate or extend placement." Justice Denied, at vi.

The Justice Denied Report also refers to a recent study that showed for the five year period between 1993 and 1998, 39% of 328 children in foster care experienced at least one lapsed placement. "They were in care an average of three years before the placement lapsed, and, on average, they remained in care with no legal authority for yet another year". *Id.*

³⁸ The need for a more holistic approach to legal representation has been emphasized by, among others, the Vera Institute for Justice and the Justice Denied Report.

³⁹ For details on these programs and others see Justice Denied, at 39-40.

⁴⁰ *Committee on the Representation of the Poor*, First Judicial Department (June 14, 2000) (prepared testimony of Robert S. Dean, Attorney-in-Charge, Center for Appellate Litigation).

⁴¹ *Committee on the Representation of the Poor*, First Judicial Department (June 14, 2000) (written comments of LSNY, the Legal Support Unit) at 2; *see also* Justice Denied, at 23-27.