

**FINAL REPORT
TO THE CHIEF JUDGE
OF THE STATE OF NEW YORK**

**COMMISSION ON THE FUTURE OF
INDIGENT DEFENSE SERVICES**

June 18, 2006

COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES

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TABLE OF CONTENTS

	Page
Preface	v
I. The Chief Judge’s Commission on the Future of Indigent Defense Services	
A. The Charge to the Commission	1
B. The Commission and its Work	1
II. The Right to Counsel in New York: An Ongoing Crisis	5
III. The Commission’s Findings	
A. New York’s current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state’s constitutional and statutory obligations to protect the rights of the indigent accused.	15
1. There are no clear standards regarding eligibility determination and procedures.	15
2. There is no statewide standard that defines “adequate” indigent defense and there exists no mechanism to enforce any particular set of standards.	16
3. The amount of monies currently allocated within the State of New York for the provision of constitutionally-mandated indigent defense is grossly inadequate.	17
(a) excessive caseloads	17
(b) inability to hire full-time defenders	18
(c) lack of adequate support services	18
(d) lack of adequate training	18
(e) minimal client contact and investigation	19
4. The current method of providing indigent defense services	

in New York imposes a large unfunded mandate by the State upon its counties, results in a very uneven distribution of services and compromises the independence of defense providers.	20
5. In Town and Village Courts, in which a majority of the justices presiding are not lawyers, there is a widespread denial of the right to counsel and even a lack of clear understanding as to which cases trigger the right to counsel.	21
6. There is a significant statewide disparity between the resources available to public defenders and those enjoyed by prosecutors.	23
7. The lack of more open discovery procedures and variations in discovery practices impedes the efficient expedition of cases, timely investigation by the defense, including location of witnesses, and gives rise to unfairness.	24
8. Defense providers are not providing the requisite counseling with regard to collateral issues that can affect critically a defendant's case, especially those regarding a defendant's immigration status. Insofar as minorities are disproportionately represented in the criminal justice system, this failure has particular implications for individuals in those communities.	25
9. There is no comprehensive system of data collection designed to provide accurate statistics regarding the provision of indigent criminal defense services in New York. The absence of such a system significantly hampers the ability of policy makers and administrators to make informed judgments and plan meaningful improvements in the administration of indigent defense services.	25
10. The Commission's ultimate conclusion, based on all the information that has been presented to us, is that the delivery system most likely to guarantee quality representation to those entitled to it is a statewide defender system that is truly independent, is entirely and adequately state-funded and is one in which those providing indigent defense services are employees of entities within the defender system or are participants in an assigned counsel plan that has been approved by the body established to administer the statewide defender system.	26

III. The Commission's Recommendations:

- A. The delivery of indigent defense services in New York State should

be restructured to insure accountability, enforceability of standards, and quality representation. To this end there should be established a statewide defender office consisting of an Indigent Defense Commission, a Chief Defender and Regional Defender and Local Defender Offices, a Deputy Defender for Appeals, and a Deputy Defender for Conflict Defense.	27
1. The Indigent Defense Commission	
a) Responsibility	27
b) Composition	28
c) Function	29
2. The Chief Defender	30
3. Regional and Local Defender Offices	30
4. Appellate Representation	31
5. Conflict Defense Representation	31
B. The enactment of the Indigent Defense Commission Plan should be followed by an expeditious phase-in schedule.	32
C. Adequate funding of indigent criminal defense must be provided by the New York Legislature from the State’s General Fund, not from the counties. County funding should be phased out over a three-year period.	32
D. The system for funding indigent criminal defense services should provide for elimination of the overall disparity between prosecution and defense resources so as to achieve “adequate and balanced” funding defense representation.	33
E. A comprehensive date collection system designed to provide an accurate picture of the provision of indigent criminal defense services in New York should be established and maintained. Such a system would enable policy makers and administrators to make informed judgments concerning the administration of the indigent defense system and plan for improvements.	33
IV. Conclusion	34

Additional Commentary of Commission Member Steven Zeidman
in which Commission Members Hon. Penelope Clute,
Hon. Patricia Marks, Laurie Shanks and Hon. Elaine Jackson Stack join.

Additional Commentary of Commission Member Klaus Eppler
in which Commission Members Hon. Penelope Clute,
Laurie Shanks, Hon. Elaine Jackson Stack and Steven Zeidman join.

Additional Commentary of Commission Member Hon. Patricia Marks
in which Commission Members Hon. Penelope Clute,
Hon. Sallie Manzanet, Laurie Shanks and Steven Zeidman join.

Appendix A: List of Witnesses

Appendix B: The Spangenberg Report

Preface

When the Chief Judge of New York State, Judith S. Kaye, asked us to chair a commission on the future of indigent criminal defense services, we understood her concern about the quality of representation that indigent defendants were being afforded throughout the state. But until the Commission was formed and pursued its mandate, we did not appreciate the depth of the problems which, over the past two years, the Commission has observed. In the Commission's Interim Report, transmitted to the Chief Judge on December 1, 2005, we reported on these problems and outlined a proposal for a fully state-funded statewide defender system that we determined was essential if indigent defendants in New York State were to be accorded their constitutional rights to quality representation.

This Final Report presents the Commission's factual findings in greater detail than previously, with the added benefit of having the extensive report of the Commission's consultant, The Spangenberg Group, available to aid us in our determinations. In this Final Report, we also present with greater specificity, the statewide defender system that we believe is the only solution to the crisis in indigent defense representation in New York State. In an Addendum, we also set forth a number of measures that can be implemented immediately to ameliorate certain discrete deficiencies that adversely affect the representation of indigent defendants.

We are grateful to the witnesses who testified at the Commission's public hearings, to the individuals who submitted written commentary to the Commission, and to the many organizations who shared with us the results of their work as it pertained to the issues surrounding indigent defense representation. These groups include bar associations, legal services providers, the NAACP Legal Defense & Education Fund, Inc., the American Civil Liberties Union, the New York State Defenders Association, the New York Civil Liberties Union, the New York State Association of Criminal Defense Lawyers, the Association of Legal Aid Attorneys, the Northern Manhattan Coalition for Immigrant

Rights, the Brennan Center for Justice, the League of Women Voters, the Prison Action Network, and Prison Families of New York. We are also grateful to the hundreds of public officials, judges, and court personnel throughout the state who made themselves available to The Spangenberg Group in the course of its work. We are also indebted to the Open Society Institute, the Center for Court Innovation, the National Association of Criminal Defense Lawyers, and the law firm of Davis, Polk & Wardwell for their financial assistance, which greatly facilitated the Commission's ability to retain The Spangenberg Group as our consultant.

We also acknowledge our debt to the Commission's able counsels, Paul Lewis, John Amodeo, David Markus, and Robert Mandelbaum, whose wisdom and energy have greatly aided the Commission's endeavor.

William E. Hellerstein
Hon. Burton B. Roberts
Co-Chairs of the Commission

I. The Chief Judge's Commission on the Future of Indigent Defense Services

A. The Charge to the Commission

In February 2004, in her State of the Judiciary address, Chief Judge Judith S. Kaye announced the formation of the Commission. The Commission's charge, she stated, is to "examine the effectiveness of indigent criminal defense services across the State, and consider alternative models of assigning, supervising and financing assigned counsel compatible with New York's constitutional and fiscal realities." Chief Judge Kaye stated further that "under our current system created in 1965, which places the burden on local governments, a patchwork of indigent defense programs of varying size and character has developed around the State." The Commission, therefore, understood that its mandate was to (1) examine the existing methods of funding indigent defense services; (2) evaluate the effectiveness of the various criminal defense provider plans throughout the state; and (3) assess the quality of the representation afforded indigent criminal defendants, including the adequacy of training received by attorneys who deliver defense services, and the quantity and quality of ancillary resources, such as investigative and language interpretive services, afforded by and for defense providers.

B. The Commission and its Work

The Commission's formation was completed in May 2004. Its 30 members come from each of New York State's 12 judicial districts and have extensive experience in the prosecution, defense, and adjudication of criminal cases; experience in the state's legislative and budget processes; and involvement in court and criminal justice improvement organizations and academic scholarship regarding criminal justice and indigent criminal defense systems. The Commission's members also reflect the diverse political, social and ethnic diversity of the state.

The Commission held its organizational meeting in May 2004. It created four subcommittees to deal with (1) the current status of indigent defense in New York State; (2) the need for change; (3) proposals for change, and (4) financing mechanisms. Subcommittee meetings took place between plenary sessions of the Commission. The Commission held four public hearings: New York City on

February 11, 2005, Rochester on March 11, 2005, Ithaca on March 23, 2005, and Albany on May 12, 2005. A total of 93 individuals testified at the hearings and others submitted written statements. These individuals included public defenders, private criminal defense attorneys, assigned counsel plan administrators, judges, prosecutors, experts in indigent defense, bar association representatives, members of the civil rights community, representatives of community groups, and defendants and their families. A list of the witnesses who testified is set forth in **Appendix A**.¹

The Commission also requested the Office of Court Administration, through Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman, to retain The Spangenberg Group (“TSG”) to conduct a statewide study of New York’s indigent defense system. TSG is a nationally and internationally recognized criminal justice research and consulting firm that specializes in research concerning indigent defense services. For over 15 years, it has been under contract with the American Bar Association’s Bar Information Program (ABA-BIP), which provides support and technical assistance to individuals and organizations working to improve their jurisdiction’s indigent defense system. It has conducted empirical research in each of the 50 states and compiled comprehensive statewide studies of the indigent defense systems in more than half the states.

The Spangenberg Group’s report, which is set forth as **Appendix B**, is the most comprehensive study of indigent defense representation ever undertaken in New York State. It depicts the real crisis that exists in the provision of indigent defense services in New York City and throughout the state. The seriousness of its principal conclusions – that funding for indigent defense services is totally inadequate and that the system, as presently constituted, is dysfunctional – cannot be minimized.

The Spangenberg Report is based on two major components: data collection/analysis and on-site assessment. For the data collection and analysis, TSG collected information on cost, caseload, and

¹ Transcripts of the testimony at the hearings are available on the Commission’s website: <http://www.courts.state.ny.us/ip/indigentdefense-commission/index.shtml>.

system type for each of New York's 62 counties. It conducted site work from September 2005 to March 2006, that involved visits to 22 counties, including the five counties comprising New York City, which were selected based upon factors such as judicial district, geography, and population. TSG spoke with defense attorneys, judges and court personnel, as well as with state, county, and city officials with knowledge of the criminal justice system. In addition to these interviews, TSG observed criminal court sessions in many of the counties in the study. It also attended each of the Commission's public hearings and reviewed the transcripts of testimony at each of the hearings.

The Commission delivered an Interim Report to Chief Judge Kaye on December 1, 2005 in which the Commission described the long-term and continuing crisis in the delivery of indigent criminal defense services in New York State² and concluded, on the basis of previous studies and testimony at its four public hearings, that:

the indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York. In actuality, it is a misnomer to call it a "system" at all. Rather, it is a composite of a multiplicity of modalities, all of which are sanctioned by the statutory framework which New York State adopted in 1965 when it enacted Article 18-B of the County Law. Unfortunately, this framework has resulted in a disparate, inequitable, and ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing. (Interim Report at 16)

The Commission also informed the Chief Judge that "[a]greement was virtually unanimous amongst the witnesses that there is a pressing need for an independent indigent defense oversight entity that, at a minimum, promulgates and enforces standards of effective representation," and that the creation of " a Statewide Defender Office is essential to both the independence of an indigent defense system and the ability to provide a consistently high level of representation to indigent defendants." (Interim Report at 24-25, 30) The Commission concluded that such a system must be entirely state-funded and it outlined the components

² The Interim Report can be found at <http://www.courts.state.ny.us/ip/indigentdefense-commission/index.shtml>.

of such a system — that it should consist of an “Indigent Defense Commission, a Chief Defender, and Regional Defender Offices with local defender offices within each region that are established where needed.” (Interim Report at 36) However, the Commission postponed the detailing of such a structure until the Commission’s Final Report.

On January 27, 2006, Chief Judge Kaye, in a speech to the New York State Bar Association, previewed the Commission’s recommendation for a state-funded, statewide indigent criminal defense system. That same day, the Association’s House of Delegates unanimously called for statewide oversight of what it, too, portrayed as New York’s “existing, balkanized system.”³ On February 6, 2006, Chief Judge Kaye released the Commission’s Interim Report as part of her State of the Judiciary address. She stated that “[t]he Commission has convincingly concluded that the existing system needs overhaul. . . ,” and that she had “not seen the word ‘crisis’ so often, or so uniformly, echoed by all of the sources, whether referring to the unavailability of counsel in Town and Village Courts, or the lack of uniform standards for determining eligibility, or the counties efforts to safeguard county dollars, or the disparity with prosecutors, or the lack of attorney-client contact, or the particular implications for communities of color.”⁴

Since the Commission issued its Interim Report, the factual assessments upon which the Commission’s conclusions were based have been overwhelmingly corroborated by TSG’s factual findings. TSG’s massive and comprehensive study provides a true understanding of the depth and scope of the crisis in the delivery of defense services to impoverished defendants in New York’s criminal justice system. Therefore, we urge all who are concerned with this crisis to examine closely The Spangenberg Report. We do so at a time in New York’s history when there is a chorus of voices calling for extensive and meaningful change in the delivery of indigent defense services in New York in order to effectuate the mandates of the

³ John Caher, *Kaye Says Panel Backs Funded Statewide Plan To Represent Indigents*, New York Law Journal, January 30, 2006, p. 1.

⁴ Judith S. Kaye, *The State of the Judiciary* at 10 (2006).

United States Constitution and the Constitution and laws of the State of New York.⁵

II. The Right to Counsel in New York: An Ongoing Crisis

In 2006, there remains little to debate about the substantive meaning of the right to counsel. Although it took much too long for the value of the right to counsel to be fully appreciated in American jurisprudence, 43 years have elapsed since the Supreme Court, in *Gideon v. Wainwright*,⁶ embraced fully the principle “that lawyers in criminal courts are necessities, not luxuries” because it is an “obvious truth” that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him;”⁷ the Supreme Court also applied that principle to an indigent defendant’s ability to appeal a conviction.⁸ Several years after *Gideon*, the Court extended a poor person’s right to counsel “to any criminal trial, where an accused is deprived of his liberty”⁹ and, most recently, to cases in which a

⁵ In addition to the action taken by the House of Delegates of the New York State Bar Association, the New York State Association of Criminal Defense Lawyers informed the Commission on April 14, 2006 that in light of the Commission’s recommendation that a statewide system of indigent defense services should be established, it “had convened a diverse working group of its members to think about the best way for a statewide system to be implemented in New York State.” The Association’s efforts have produced a draft bill that would create such a system; the bill mirrors many of the Commission’s recommendations in its Interim Report and in this Report. In addition, the Committee for an Independent Public Defense Commission, chaired by Michael S. Whiteman, has long been active in seeking the creation of a statewide defender system. Among others who have spoken out in favor of such a system are former Chief Judge Sol Wachtler, former Court of Appeals Judge and former Dean of St. John’s Law School, Joseph Bellacosa, former Chief Administrative Judge Richard Bartlett, former Senate Majority Leader Warren M. Anderson, Norman L. Reimer, then President of the New York County Lawyers’ Association, Vincent E. Doyle III, chairman of the New York State Bar Association’s Special Committee to Ensure Quality of Mandated Representation, and Jonathan Gradess, Executive Director of the New York State Defenders Association. See, John Caher, *Draft Bill Outlines Proposal for State ‘Defender General,’* New York Law Journal, May 1, 2006, pp. 1, 8.

⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963)

⁷ *Gideon v. Wainwright*, 372 U.S. at 344.

⁸ *Douglas v. California*, 372 U.S. 353 (1963).

⁹ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

suspended sentence may “end up in the actual deprivation of a person’s liberty.”¹⁰ The Supreme Court has also made it clear that the Sixth Amendment’s guarantee of the right to the assistance of counsel means the right to the “effective assistance” of counsel.¹¹

In our constitutional system, the United States Constitution, as interpreted by the Supreme Court, provides the minimal protections that states must afford persons charged with crime. In New York, however, the Criminal Procedure Law affords a more expansive right to counsel than federal law in that a defendant is entitled to counsel for any offense (except traffic infractions) regardless of whether incarceration is authorized upon conviction.¹² Additionally, the right to counsel provision of New York’s Constitution, as interpreted by the Court of Appeals has, in a number of contexts, afforded greater protections to criminal defendants than does the federal constitution.¹³

This Report then is not about the adequacy of substantive law concerning the right to counsel for indigent defendants. It concerns whether the law’s mandate is being afforded to every defendant entitled to its enjoyment. Regrettably, although rights under the Constitution and laws are individual rights,¹⁴ it is clear that, on a widespread basis, they are not honored as such in New York State.

In 1965, to meet constitutional mandates, New York enacted Article 18-B of the County Law, which required each county and the City of New York to establish a plan for the provision of counsel to indigent

¹⁰ *Alabama v. Shelton*, 535 U.S. 25 (2002).

¹¹ *McMann v. Richardson*, 397 U.S. 759, 771 n4 (1970).

¹² See, CPL 180.10 (3)(c), CPL 170.10 (3), CPL 210.15 (2)(c). For a full discussion see The Spangenberg Report at 13.

¹³ See e.g. *People v. Arthur* 22 N.Y.2d 325 (1968); *People v. Benevento*, 91 N.Y.2d 708 (1998).

¹⁴ See e.g. *Hill v. Texas*, 316 U.S. 400, 405 (1942) [“Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand.”]

defendants.¹⁵ The law allowed localities to choose among several options. A locality could create a public defender office¹⁶ and appoint through its governing body an attorney to fill the position;¹⁷ it could opt to designate a legal aid society;¹⁸ or it could adopt a plan of a bar association wherein the services of private counsel would be provided on a rotational schedule which plan would be coordinated by an administrator.¹⁹ The statute also allowed a county to adopt a combination of these options.²⁰ The law mandated that “each plan . . . provide for investigative, expert and other services necessary for an adequate defense.”²¹ However, private assigned counsel compensation was set at \$10 per hour for out-of-court work and \$15 per hour for in-court time. The dollar amounts for investigative and other auxiliary services was capped at \$300.²²

The deficiencies in the structure created by Article 18-B became apparent almost at its outset. First and foremost was that Article 18-B did not include a mechanism to evaluate the quality of representation; it also placed the financial burden on counties and the City of New York. Other than requiring that a public defender, legal aid society, or assigned counsel administrator file an annual report with the Judicial Conference,²³ the statute contained no standards by which the quality of representation could be measured and enforced, nor did it establish a mechanism to ensure that there would not be serious disparities in the quality of representation afforded indigent defendants simply by the mere happenstance of geographic

¹⁵ County Law § 722.

¹⁶ County Law § 722 (1).

¹⁷ County Law § 716.

¹⁸ County Law § 722 (2)

¹⁹ County Law § 722.

²⁰ County Law § 722 (4).

²¹ County Law § 722.

²² County Law § 722-c.

²³ County Law § 722-f.

location. Although the framework created by Article 18-B was supported by bar associations and government officials at the time, structurally it gave rise to a fractured, balkanized system, and those who opposed it recognized that it would place serious financial burdens on counties.

By January 1967, the New York State Bar Association already detected serious shortcomings in indigent defense representation in New York. In an Indigent Defense Seminar, held in conjunction with the Judicial Conference, the Association placed at the top of its agenda the following: the absence of standards for ensuring quality representation, the lack of guidelines for determining an accused's eligibility for assigned counsel and for ancillary services, such as investigators and experts, the scope of representation, and the representation of minors.

By 1981, the Legislature itself perceived that New York's system of indigent defense was in difficulty and it funded the New York State Defenders Association to administer a Public Defense Backup Center. The Association's mandate was to help defenders and their clients by assisting with cases, securing experts, and providing training. The Association was also asked to review, assess, and analyze the public defense system, identify problem areas and propose solutions in the form of specific recommendations to the various branches of government. Over the ensuing decade, the Association published a series of reports in which the manifold shortcomings in New York's indigent defense system were described.

With regard to rates of pay for assigned counsel, the Legislature in 1977 increased the rate for out-of-court work from \$10 to \$15 per hour and from \$15 to \$25 per hour for in-court work. In 1986, the rates were increased to \$25 per hour for out-of-court work and \$40 for in-court work and payment for all appellate work was to be compensated at the in-court rate.

In the period from 1986 to 2003, bar associations and other interested organizations expressed growing concern about the lack of adequate funding for indigent defense representation and the quality of representation that was being afforded. In 1994, the New York County Lawyers Association raised serious questions about the quality of representation being afforded to the indigent defendant and the impact of

decreased funding on defense providers. As a result, it established a Task Force on the Representation of the Indigent.²⁴ In June 1995, the Task Force urged the immediate creation of a Board of Trustees for Indigent Defense to oversee and secure the professional independence of defender organizations in New York City. It recommended that the Board of Trustees be authorized to establish general policy for all individual and institutional counsel providing for the criminal defense of the indigent.

In October 1995, the Appellate Division, First Department, established the Indigent Defense Organization Oversight Committee (“IDOOOC”) to monitor the operation of organizations that contract with the City of New York to represent indigent defendants in criminal proceedings.²⁵ On July 1, 1996, IDOOOC issued its standards, *General Requirements for All Organized Providers of Defense Services to Indigent Defendants*, which were adopted by the Appellate Division, First Department, as court rules. IDOOOC’s mandate did not include the oversight of assigned counsel programs. Nor was IDOOOC authorized to alter the funding of any defender organization not in compliance with its standards. However, there is some evidence that IDOOOC’s standards and modest monitoring affected positively the quality of representation by institutional providers but no body similar to IDOOOC has been created elsewhere in the State.²⁶

²⁴ Also in 1994, in New York City, then-Mayor Rudolph Giuliani reached an agreement with state court officials to begin using, as a cost savings measure, fewer 18-B attorneys to represent indigent defendants. This placed a greater burden on the Legal Aid Society’s ability to fulfill its contractual obligations with the city. When the Association of Legal Aid Attorneys went on strike, Mayor Giuliani proposed to reduce the Society’s funding by \$16 million and issued a call for Requests for Proposals from nascent competing defense organizations to take over work of the Legal Aid Society at both the trial and appellate levels. As a result of this process, New York County Defender Services, Queens Law Associates, Brooklyn Defender Services, Bronx Defenders, the Center for Appellate Litigation, Appellate Advocates, and the Richmond County law firm of Battiste, Aronowsky & Suchow were allowed to contract with the city for defense work.

²⁵ See, 22 NYCRR, Part 613.5.

²⁶ The only body with any similarity to IDOOOC was the Oversight Committee for the Criminal Defense Organizations for the Appellate Division, Second Department, created in 1997. The Committee was formed in response to a request by the Mayor’s Criminal Justice Coordinator for an evaluation of the performance of the criminal defender groups created within the Second Department in 1996 by the City of New York. In February 1998, the Committee issued an evaluation of three new defender groups and found them to provide quality representation. However, neither the Legal Aid Society nor the 18-B

In February 1997, the Task Force of the New York County Lawyers Association announced that the rates of compensation for assigned counsel were inadequate and “inconsistent with New York’s commitment to equal justice.” In December 1997, the New York State Defenders Association called for state financial support of assigned counsel plans as well as legal aid societies and public defender systems. In 1998, IDOOC issued a report concluding that, at its current funding level and caseload levels, the Legal Aid Society of New York was not meeting the standards IDOOC had established. Also, in 1998, the New York State Defenders Association held fact-finding hearings throughout the state at which numerous witnesses testified to widespread inadequacies in the representation afforded indigent defendants.

In June 1999, the Unified Court System expressed its own deep concern with the inadequacy of assigned counsel fees and Chief Judge Kaye proposed using \$63 million of the state’s share of surcharge monies to offset the costs of a fee increase, a plan that was endorsed by bar leaders, the presiding justices of the Appellate Division, Attorney General Elliot Spitzer, and the New York State District Attorneys Association. In September 1999, the Deputy Chief Administrative Judge for Justice Initiatives, Juanita Bing Newton, convened a working group to find solutions to the fee crisis.

In January 2000, the Unified Court System issued its report, *Assigned Counsel Compensation in New York: A Growing Crisis*. Focusing exclusively on the low rates of compensation for assigned counsel, the report urged not only that the rates for assigned counsel should be increased, but also that due to the considerable fiscal burdens imposed on local governments, the state should share the cost of assigned counsel compensation.

In February 2000, the New York County Lawyers Association filed a lawsuit in Supreme Court, New York County (*New York County Lawyers Association v. New York State, et. al.*) alleging that indigent adult defendants and children in the First Department were being denied their constitutional rights to effective legal assistance. In January 2001, Governor George Pataki announced the creation of a joint task force to study

Panel, by far the largest defense providers in the city were evaluated, and there is no indication that the Committee is currently operational.

the compensation rates for law guardians and assigned counsel and come up with a proposal for legislation.

In March 2001, after holding hearings, the Appellate Division, First Department's Committee on the Legal Representation of the Poor issued a report entitled *Crisis in the Legal Representation of the Poor: Recommendations for a Revised Plan to Implement Mandated Funded Legal Representation of Persons Who Cannot Afford Counsel*. The report stated that "[t]he entire system by which poor people are provided legal representation is in crisis." The report concluded that the crisis went well beyond the low rates for assigned counsel and emphasized that the major causes of the crisis were the "lack of resources, support and respect, [and] inadequate funding of institutional providers combined with ever-increasing caseloads." The Committee called upon "the New York State Legislature to reconsider the entire legislative structure relating to governmentally funded legal representation of the poor." Also, in March 2001, the New York State Defenders Association issued a report, *Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services*. The report called for the creation of an independent and politically insulated statewide Public Defense Commission that would oversee both the distribution of state funds and the provision of defense services.

In April 2001, *The New York Times* published a three-part series on New York City's indigent defense system. In an editorial, *Drive-by Legal Defense*, which commented on the series, *The Times* stated that it portrayed a system in which "underpaid, ill-prepared, virtually unsupervised private lawyers sometimes represent hundreds of defendants per year, leaving little time or incentive for them to master the facts, prepare and argue the cases or file appeals of dubious convictions." "There is a real question," said *The Times*, "whether many defendants are getting the legal representation to which they are entitled, or are receiving merely token representation to give their trials a veneer of constitutionality." *The Times* observed further that "[e]ven the public and nonprofit institutions that defend many of the state's indigent defendants are so starved for funds that they cannot do their best for clients." *The Times* called "for a strong state role – preferably through a politically insulated commission – in setting quality standards . . . and in exercising

vigorous oversight to make sure those standards are met.”

In July 2001, the Committee for an Independent Public Defense Commission was formed, chaired by Michael S. Whiteman, former counsel to Governor Nelson A. Rockefeller. The Committee declared that the indigent defense system was on the verge of collapse and presented to the Governor and the Legislature a bill to establish an independent oversight commission.

In May 2002, Senator Dale Volker and Assemblyman Martin Luster introduced bills that, in addition to raising assigned counsel rates and eliminating caps on auxiliary defense services, also provided for creation of an independent public defense commission to promulgate standards for representation and which would serve as a conduit for state financing of up to 40 percent of the cost of local defense systems.

On February 5, 2003, Supreme Court Justice Lucindo Suarez rendered his decision in the lawsuit brought by the New York County Lawyers Association. He declared that the existing compensation rates for assigned counsel were unconstitutional because their inadequacy violated a defendant’s constitutional and statutory rights to meaningful and effective representation. In describing the evidence bearing on the representation of the indigent, Justice Suarez made the following findings:

Too many assigned counsel do not: conduct a prompt and thorough interview of the defendant; consult with the defendant on a regular basis; examine the legal sufficiency of the complaint or indictment; seek the defendant’s prompt pretrial release; retain investigators, social workers or other experts where appropriate; file pretrial motions where appropriate; fully advise the defendant regarding any plea and only after conducting an investigation of the law and the facts; prepare for trial and court appearances; and engage in appropriate presentence advocacy, including seeking to obtain the defendant’s entry into any appropriate diversionary program.²⁷

In May 2003, the Legislature enacted legislation that increased the rates of compensation for assigned counsel.²⁸ The main provisions of the law, which took effect on January 1, 2004, (a) increased assigned counsel fees to \$60 per hour for misdemeanors (with a per case cap of \$2,400) and \$75 per hour for

²⁷ *New York County Lawyers Association v. New York State, et al.*, 196 Misc.2d 761, 774-75, 763 N.Y.S. 2d 397, 403 (Sup. Ct. N.Y. Co. 2003).

²⁸ S. 1406-B/A. 2106-B (Chapter 62 of the Laws of 2003).

felonies and all other eligible cases (with a per case cap of \$4,400); (b) raised the caps on expert and investigative services to \$1,000 per provider; (c) created a revenue stream for some state funding of defense services from various fees, such as attorney registration fees and Office of Court Administration charges for various electronic database searches; (d) established an Indigent Legal Services Fund (“ILSF”), under the joint custody of the Commissioner of Taxation and the Comptroller, to distribute state funds based on the total amount of local funds spent by localities on public defense statewide; and (e) created a task force to review the sufficiency of assigned counsel rates which sunsets on June 30, 2006.²⁹ However, under the 2003 legislation, monies from the Indigent Legal Services Fund first go to reimburse the state for payment of law guardians. The remainder was to be distributed, beginning only in 2005, to localities based on the percentage spent by a locality of the overall statewide total for public defense services.

On November 5, 2003, the Office of Justice Initiatives in the Office of Court Administration brought together, at Pace Law School, criminal defense attorneys, prosecutors, judges, and other stakeholders in the criminal justice system to examine the structure, method of financing, and the quality of representation provided by New York’s public defense system. Experts from across New York State and elsewhere identified a host of major problems in the system and a consensus was reached as to the components for a quality defense system. These are: (1) detailed statewide standards of practice for public defense providers; (2) the provision of meaningful training, supervision, and mentoring of attorneys; (3) parity in salary and resources between the prosecution and the defense; (4) ensuring defender independence; and (5) development of a client-centered ethos.

In 2004, the New York State Bar Association established the Special Committee to Ensure Quality of Mandated Representation. The Special Committee was charged to study the issues that arose from the assigned counsel rate increase and the responses to that increase from the counties. It was also charged to

²⁹ Although the task force was required to issue a report to the Governor and the Legislature on or before January 15, 2006, the members of the task force have not been appointed and it has never met.

recommend to the Association’s Executive Committee steps that might be taken to ensure that mandated legal representation would satisfy constitutional standards. The Special Committee concluded that the most effective measure that the Association could take *in the short term* to ensure quality representation would be the promulgation of standards for the provision of such representation. In fulfillment of its mandate, the Special Committee produced an extensive set of standards noting, however, that it “made no qualitative judgments about the different provider systems allowed under [Article] 18-B.”³⁰

On April 2, 2005, the New York State Bar Association’s House of Delegates approved, with some modifications, the set of standards that had been drafted by the Special Committee. The standards call for (1) a highly qualified and well-trained staff who are committed to the defense function; (2) an independent board of directors that sets policy; (3) limitations on caseload and workload that its lawyers assume; (4) intensive training for each lawyer; (5) a strong support staff, including full-time professional investigators and other relevant personnel. The House of Delegates also recommended that these standards be adopted as court rules.

In October 2005, the Special Committee issued a follow-up report in which it recommended that the Association “advocate for the creation of an independent public defense mechanism empowered to provide oversight, quality assurance, support, and resources to providers of mandated representation and to advocate for funding and reform when appropriate. As noted earlier, this recommendation also was approved by the Association’s House of Delegates.³¹ In April 2006, the New York State Association of Criminal Defense Lawyers issued its proposed draft bill calling for a statewide indigent defense structure overseen by a Public Defense Commission.

III. The Commission’s Findings

³⁰ In July 2004, the Chief Defenders of New York State also approved *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State*. These standards were adopted by the Board of Directors of the New York State Defenders Association.

³¹ See n3 *ante*.

Based upon the Commission's four public hearings, a review of the extensive documentation provided to the Commission by witnesses and other parties, and a careful examination of TSG's comprehensive and exhaustive report, the Commission has concluded that there is, indeed, a crisis in the delivery of defense services to the indigent throughout New York State and that the right to the effective assistance of counsel, guaranteed by both the federal and state constitutions, is not being provided to a large portion of those who are entitled to it. In general terms, this failure is attributable to a lack of an independent statewide oversight mechanism that can set standards and ensure accountability in the provision of indigent criminal defense services and to a grievous lack of adequate funding by the state for those services. Specifically, the Commission makes the following findings:

A. New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused.

The system created in 1965 pursuant to Article 18-B of the County Law has, in the words of TSG, produced "a haphazard, patchwork composite of multiple plans that provides inequitable services across the state to persons who are unable to afford counsel. The multiple plans . . . not only lack uniformity and oversight, but often fail to comply with the requirements of the enabling statute. The result is a fractured, inefficient and broken system." (SR at 155) There is virtual universal agreement that what is required is an effective statewide structure designed to monitor and enforce compliance with existing norms and standards that govern the representation of indigent defendants. The fault lines in the system throughout New York State are numerous:

1. There are no clear standards regarding eligibility determinations and procedures.

At the outset of a criminal proceeding, there must exist an effective method for determining whether the accused is entitled to the assignment of counsel. However, TSG has found that guidelines for the appointment of counsel exist only in a few counties and that even in those counties, the guidelines were not uniformly applied. Thus, a defendant may be deemed eligible for the appointment of counsel in one county

and ineligible in a neighboring county or even in a different court within the same county. Moreover, public defenders and assigned counsel themselves are frequently charged with the responsibility for making initial eligibility determinations. This responsibility not only adds unduly to their workloads but also raises serious ethical issues. Judges and court clerks also share in the responsibility for determining eligibility for assignment of counsel and must do so with limited or no standards to follow. TSG observed further that “[i]n the absence of uniform guidelines, subjective and sometimes disparate eligibility determinations are made across the state, and competing concerns such as county funding and workload may become inappropriate factors in the determinations.” (SR at 157)

2. There is no statewide standard that defines “adequate” indigent defense and there exists no mechanism to enforce any particular set of standards.

Despite the existence of various sets of standards for representation that bar associations have issued over the years, there is no single set of standards that actually governs what “adequate” indigent defense services means. As TSG notes, “[w]hile New York has three sets of standards that relate to attorney performance and mandated legal representation, except for the general disciplinary rules of the professional code, they are largely unenforceable.” (SR at 21) At the hearings, the Commission learned of at least one county executive who considers representation “adequate” if it avoids “ineffective assistance of counsel” claims on appeal. At least one public defender also thought this was the standard by which his office’s representation should be measured; because no conviction from his office had ever been reversed on grounds of ineffective assistance, he too concluded that no attorney in his office had ever been less than effective.

As we noted previously, the New York State Bar Association recently adopted *Standards for Providing Mandated Representation*. Although it is the Association’s hope that its standards will be widely accepted as minimum standards and that they will have a positive effect on the quality of representation, the fact remains that these standards, and those of other organizations that have adopted standards, are binding on no one. The consequence of having unenforced standards, as found by TSG, is that “in some areas, substandard practice has become the acceptable norm.” (SR at 156) TSG has also noted that New York’s

indigent defense system does not even conform to the American Bar Association’s Ten Principles of a Public Defense Delivery System, which are set forth in The Spangenberg Report’s Appendix C. (SR at 155)

3. The amount of monies currently allocated within the State of New York for the provision of constitutionally-mandated indigent criminal defense is grossly inadequate.

TSG has determined that “New York’s indigent defense system is in a serious state of crisis and suffers from an acute and chronic lack of funding.” (SR at 155) At an average cost-per-capita of \$18.54,³² New York ranks substantially lower in payment per defendant than a number of states. (SR at 29) Such under-funding has a deleterious impact on all aspects of indigent defense representation. Testimony at the Commission’s hearings was replete with descriptions by defenders of their inability to provide effective representation due to a lack of resources. This lack of resources (a) results in excessive caseloads; (b) impedes the ability of many institutional providers to hire full-time defenders; (c) deprives defense providers of adequate access to investigators, social workers, interpreters and other support services; (d) is largely responsible for inadequate or non-existent training programs; and (e) contributes to defense providers having only minimal contact with clients and their families:

(a) excessive caseloads

At the Commission’s four public hearings, virtually all institutional defenders testified to having to labor under excessive caseloads. TSG observes that “[g]iven the funding problems and the need to show efficiency, it is not surprising that institutional providers throughout the state are burdened with heavy caseloads.” (SR at 43) A chilling example of this distressful fact came from the Monroe County Public Defender, one of the state’s most highly regarded public defenders, who described in detail the overwhelming caseloads under which his office labors. (SR at 45) There was also much evidence presented at the hearings that public defenders or other institutional providers do not have adequate staff to cover all Town and Village Courts in a given jurisdiction and that requests for additional funds to keep pace with ever growing caseloads

³² TSG computes cost-per-capita by dividing the total statewide indigent defense expenditure by New York State’s population.

are, for the most part, not granted. In one county, for example, despite average misdemeanor caseloads of 1,000 cases per attorney and 175 felony cases per attorney per year, the chief public defender annually is required to submit to the county a proposal as to how he would operate his office with a 10 to 12 percent budget cut.

(b) inability to hire full-time defenders

Significant numbers of public defenders testified that they could only be funded by their respective counties to work part-time. As TSG determined “[t]he burden of heavy caseloads is exacerbated in some counties by the use of part-time attorney positions” and that “in some counties the part-time attorneys . . . are expected to handle full-time caseloads. (SR at 46)

(c) lack of adequate support services

Many institutional providers testified to their lack of access to investigators, social workers, foreign language interpreters, and other support services. TSG reports that “[t]hroughout our site work in New York, in all parts of the state, we were struck by the inadequate provision of and lack of requests for expert and investigative services.” (SR at 72) In some defender offices, the attorneys conduct their own investigations, as best they can. A number of defenders testified that they even lacked sufficient funds for basic office supplies.

(d) lack of adequate training

There exist wide disparities in the training of indigent defense counsel. We learned that very few institutional providers have in place viable training programs and that access to training is inconsistent across the state. In regard to assigned counsel and contract defense programs, training ranges from non-existent to the barely adequate. While the New York State Defenders Association has training programs, they are not always easily accessible by overworked defenders. In some counties, institutional defense providers have no funds to provide training or even to send their attorneys to defender training programs and CLE programs. As noted by TSG, “other than Disciplinary Rule 6-10 (which forbids a lawyer from handling a matter which

the lawyer knows or should know that he or she is not competent to handle) public defenders and legal aid lawyers in many New York counties are subject to few mandatory standards of practice, inadequate training, and little or no oversight.” (SR at 51)

(e) minimal client contact and investigation

Extensive hearing testimony also presented a distressing picture of minimal attorney-client contact. We were told of attorneys who did not visit their clients in jail, return phone calls, answer letters, or conduct even minimal investigations of their clients’ cases. In some counties, the only attorney-client contact available is through collect calls to counsel, which many counsel refuse to accept. In a number of counties, attorney-client contact occurs only when the defendant is brought to court for a scheduled appearance. Although some judges indicated that they will grant an attorney’s request that the defendant be brought to the courthouse for a meeting in between court appearances, there was no indication that this is a common request or that courts commonly grant such requests. Especially disturbing was the testimony from former prisoners and from families of defendants as to the lack of contact with counsel, creating the perception, and most likely the reality, of a lack of attention to a defendant’s case. As TSG learned from its site visits, “it is not uncommon for indigent defense attorneys across New York State to meet a client for the first time on the day of court. Thus, attorney-client contact frequently occurs in court where the attorney’s time is short and there is often no setting for meaningful, confidential communications.” (SR at 67)

Recognizing that the above-described deficiencies are so clearly linked to inadequate funding, the Commission embraces TSG’s conclusion that “no structural changes in the indigent defense system can be implemented, no mandatory and enforceable standards established, no statewide training developed and no substantial efforts undertaken to meet the state and federal counsel requirements, without a substantial infusion of additional funds to the state’s indigent defense system.” (SR at 155)

4. The current method of providing indigent defense services in New York imposes a large unfunded mandate by the state upon its counties, results in a very uneven distribution of services and compromises the independence of defense providers.

According to TSG, the counties provided 80 percent (\$280,588,598) of the overall indigent defense funding in New York in fiscal year 2004. (SR at 27) TSG points out, however, that although the state provided 20 percent (\$71,220,582) of all funding for indigent defense, 72 percent, or \$51,551,710 from the new ILSF fund distributed to the counties, was provided through alternative revenue sources. In fact, the data shows that only slightly more than 6 percent of the total state and local expenditures for indigent defense services was attributable to the state general fund appropriation for fiscal year 2004.³³ (SR at 27)

In light of the fiscal burdens on the counties, it was not surprising that witnesses at the hearings spoke of experiences that made it clear that the funding structure compromised both the quality of representation and the very independence of the defense function. One institutional provider told of a County Executive's admonition to judges that they were "gatekeepers" of county funds. Another spoke of a County Executive's demands that, as part of his office's contract with the county, it waive certain of its clients' rights. Another stated that he had been reprimanded by his County Executive for spending money on an expert witness rather than relying on the prosecution's expert. As TSG found, "New York fails to ensure the independence of its indigent defense providers who are too often subject to undue interference from the counties that fund them. While County Law §722 requires the counties to provide indigent defense services 'necessary for an adequate defense,' this requirement is largely open to interpretation by the counties that are driven by competing fiscal (and sometimes) political concerns." (SR at 155-156)

³³ Though the Commission was not charged with studying Family Court mandated representation, the criminal defense programs studied by TSG were, in many instances, inseparable from the programs providing Family Court representation. As TSG observed, "[f]amily court matters are an integral part of New York's indigent defense system and cannot be completely removed from an overall consideration of the current system." (SR at 158) Indeed, these programs are frequently jointly administered and completely interdependent and reported county level fiscal data is usually merged into one amount covering both programs. *Ibid.* These factors suggest that the Indigent Defense Commission that we propose also oversee services providing for Family Court representation. However, given the limitations of the Commission's mandate, we are hesitant to make this a specific recommendation.

Ironically and unfortunately, the 2003 increase in assigned counsel rates actually had a negative impact on indigent defense representation. As TSG found, the increase caused many counties, as well as New York City, to “focus on the efficiency and cost-saving efforts of their providers,” and that “[a] number of counties created a conflict office or shifted additional workload to institutional providers in an effort to control rising costs, often without sufficient additional resources.” (SR at 156)

The Sixth Amendment and Article I, § 6, of the New York Constitution impose the obligation to provide effective assistance of counsel for all indigents accused of crime on the State of New York, not on counties or the legal profession. The state also must guarantee that the criminal defense function is truly independent. This means that defense counsel must have responsibility for case-by-case administration while leaving to judges their inherent right and obligation to ensure that courtroom proceedings comply with the mandates imposed by the law and the rules of professional responsibility. Therefore, defense counsel, as well as judges, also must be independent from the executive function at the local level, whose concerns with county-wide fiscal obligations have been shown to intrude on the defense function.

5. In Town and Village Courts, in which a majority of the justices presiding are not lawyers, there is a widespread denial of the right to counsel and even a lack of clear understanding as to which cases trigger the right to counsel.

The position occupied by Town and Village Courts in the administration of justice cannot be overstated. They handle the largest number of cases in the state’s criminal court system and the fines they impose contribute greatly to state and local government coffers. However, the absence of a statewide defense oversight structure has had an especially devastating effect on the thousands of indigent defendants prosecuted in the Town and Village Courts throughout the state. In fact, the Commission was alarmed, not only by the vast disparity in these courts with respect to when the assignment of counsel is made, but also by the numerous outright denials of the right to assigned counsel itself.

There are 1,281 Town and Village Courts outside of New York City with 2,154 Town and Village justice positions, the majority of which are filled by non-lawyers. Like City Courts, Town and Village Courts

are “local criminal courts” and have trial jurisdiction over misdemeanors, violations and traffic infractions. They also have preliminary jurisdiction over felonies committed in any town located in a county where such Town or Village Court is situated. The Commission learned from witnesses at the Commission’s hearings and from other sources that the deprivation of indigent defendants’ right to counsel was widespread in Town and Village Courts. Specifically, we learned that there are significant delays in the appointment of counsel, that many indigent defendants must negotiate pleas with the prosecution while unrepresented, and that many justices themselves lack a clear understanding as to which cases trigger the right to counsel. The Commission also learned that all too often counsel for indigent defendants are not available to attend the numerous Town and Village Courts.

TSG’s extensive findings with respect to proceedings in the Town and Village Courts are extremely serious. Among the most distressing are: (1) the lack of legal training, enforceable standards and oversight which “create a risk to the quality of justice rendered:” (2) that “[o]ften lacking sufficient legal knowledge and confidence, some justices are averse to trials and defense motions, seek advice from local prosecutors before making decisions, make subjective rather than legally-objective decisions, and/or lose their independence by succumbing to local government pressure to guard its funds,” and frequently “set excessive bail in many minor cases.” (SR at 161) TSG found that “[m]any indigent defendants in the town and village courts across the state are deprived of their state and federal right to effective assistance of counsel. Counsel is either not present, not assigned in a timely manner, or not assigned at all.” (SR at 161)

TSG observed further that “[b]ecause town and village courts are not required to be courts of record, it is often difficult or impossible for a defendant to adequately exercise the right to appeal a decision by a local justice,” and that “[i]n addition to lacking a record, some town and village courts are not held in a public place and fail to ensure full public access and open procedures.” (SR 161) Thus, TSG concluded that it is not “currently possible to receive adequate and meaningful representation in many of the town and village courts in New York State,” and that “major reform is needed to remove the numerous barriers to justice in

the locally-funded town and village court system.” (SR 161-162) The widespread abrogation of the right to counsel for the indigent defendant in these courts is simply unacceptable.³⁴

6. There is a significant statewide disparity between the resources available to public defenders and those enjoyed by prosecutors.

Prosecutors are consistently better funded and better staffed than indigent criminal defense service providers. Their personnel, on average, have higher salaries and greater ancillary resources than do their public defender counterparts. Moreover, the disparity is not just apparent in funding, salaries, and the number of full-time employees but in additional in-kind resources available only to prosecutors. This includes access to all law enforcement agencies in the county, as well as the New York State Division of Criminal Justice Services, the FBI and the state crime laboratory. In addition, prosecutors often receive federal and state grant assistance that defenders do not. For example, the creation of new drug and other specialty courts (as of September 8, 2005, 218 courts were operational with at least 55 more planned) often comes with additional federal grants for prosecutors and courts but not for defense providers. Nonetheless, institutional providers in particular are expected to staff many more parts, and make many more court appearances, with no additional resources. These disparities are well-documented in The Spangenberg Report. (SR at 83-863 The Report also calls attention to the American Bar Association’s position, that “the appropriate measure of

³⁴ When the Commission began its work, it did not anticipate discovering the vast range of shortcomings and abuses that abound in the Town and Village Courts throughout the state. Although the Commission believes its proposed statewide defender system can improve considerably the ability to provide representation to indigent defendants in those courts, we would be remiss if we did not call attention to the defects in the Town and Village Court system that we encountered in the course of our work. In our judgment, the abuses are so serious in the Town and Village Courts that they should be examined by a body with specific authorization to scrutinize the manner in which those courts function. In this regard, we note that Chief Judge Kaye has created a Special Commission on the Future of the New York State Courts and has stated that the Special Commission “will be asked to look at systems across the nation for ideas, and to propose a court structure that is free of barriers that force the unnecessary fragmentation of courts and cases, that is user-friendly, has the benefits of both specialization and simplicity and that is accessible to all New Yorkers; and to suggest procedures that complement such a streamlined system.” Judith S. Kaye, *The State of the Judiciary* 24 (2006). An evaluation of the Town and Village Court system would seem appropriate to the work of a body such as the Special Commission.

health with a criminal justice system is whether each agency in the system – courts, prosecution, defender – receives adequate and balanced resources.” (SR at 83) “Applying this measure of success,” TSG concludes, “New York’s system is failing.” (SR at 83)

7. The lack of more open discovery procedures and variations in discovery practices impedes the efficient expedition of cases, timely investigation by the defense, including location of witnesses, and gives rise to unfairness.

The Commission heard considerable testimony regarding pretrial discovery practices among prosecutors’ offices throughout the state. A major grievance of defense providers is that prosecutors refuse to disclose discovery materials until hours or even minutes before trial. It also is apparent that these practices vary among prosecutors’ offices. Some prosecutors afford the defense more liberal discovery than is required by the current provisions of CPL Article 240. Most choose to afford only what is minimally required, and individual prosecutors at times do not do even that – as the plethora of discovery issues in criminal appeals and collateral attack cases evidences. Efforts to liberalize New York’s discovery laws have gone on for years,³⁵ and it not within the Commission’s mandate to enter this debate. However, in the course of our investigation, we could not ignore the obvious built-in inefficiency in existing discovery procedures and practices that causes delay and inhibits the efficient disposition of cases. Nor can we ignore TSG’s observation, which is well within the Commission’s mandate, that “[t]he problems facing New York’s indigent defense providers – including inadequate resources, insufficient client contact, and a failure to request or receive investigative and expert services – are made more troubling by discovery practices and other prosecutorial policies with which they are faced.” (SR at 77)

8. Defense providers are not providing the requisite counseling with regard to collateral issues that can affect critically a defendant’s case, especially those regarding a defendant’s immigration status. Insofar as minorities are disproportionately represented in the criminal justice system, this failure has particular implications for individuals in those communities.

Numerous witnesses at the Commission’s hearings emphasized the importance of defense providers’

³⁵ See e.g., 2006 Report to the Chief Administrative Judge by the Advisory Committee on Criminal Law and Procedure at 4.

awareness of and ability to deal with a host of issues that disproportionately impact minorities. First and foremost is the relationship between the changing ethnic composition of the minority population and current government policies and practices with respect to immigration. This has greatly increased the need for defense attorneys to be cognizant of the immigration status of clients and to be able to render advice as to the possible effect on that status when assessing options that may be available to clients. This is especially critical with regard to a defendant's informed decision when entering a guilty plea to a misdemeanor or a violation. As Russell Neufeld, the former Chief of the New York Legal Aid Society's Criminal Defense Division, told the Commission:

The collateral consequences of criminal convictions has [*sic*] grown rapidly. So the balance has shifted from the primary harm to a client almost always being the amount of prison time he or she is facing, to the collateral consequences of a conviction. These include a myriad of penalties such as deportation, an entire family's loss of public housing, expulsion from school, ineligibility for student loans and the disclosure to prospective employers of even violation convictions. Of these, deportation has increased to epidemic proportions. (SR at 145)

Other factors germane to informed representation include awareness of a defendant's employment history, housing status, overall family situation and the availability of diversionary programs. Regrettably, the vast majority of defendants do not experience such essential representation.

9. There is no comprehensive system of data collection designed to provide accurate statistics regarding the provision of indigent criminal defense services in New York. The absence of such a system significantly hampers the ability of policy makers and administrators to make informed judgments and plan meaningful improvements in the administration of indigent defense services.

The Spangenberg Report details the serious shortcomings in New York State's data collection system in regard to indigent defense. It emphasizes that "[w]hile there are a number of sources regarding appointment of indigent defense counsel, there is no single source for reliable information. In spite of the existence of very advanced and interconnected criminal justice data systems throughout the state, gathering detailed and reliable information for criminal and family court appointments to indigent defense providers is virtually impossible." (SR at 34) Even under the new Indigent Legal Services Fund legislation that raised compensation rates for indigent defense, the reports required of defense providers were often "prepared

inconsistently, incompletely, or not at all.” (SR at 32-33) In this advanced technological age, such deficiencies are unnecessary and preventable and therefore unacceptable.

10. The Commission’s ultimate conclusion, based on all the information that has been presented to us, is that the delivery system most likely to guarantee quality representation to those entitled to it is a statewide defender system that is truly independent, is entirely and adequately state-funded, and is one in which those providing indigent defense services are employees of entities within the defender system or are participants in an assigned counsel plan that has been approved by the body established to administer the statewide defender system.

As we have pointed out, New York’s current funding of defense services is grossly inadequate in terms of total dollars and in requiring that counties bear the brunt of the costs for defense services, the funding structure has created substantial disparities among the various counties in the type of representation afforded indigent defendants; in many instances, it has seriously compromised the independence of defense providers. It is also significant that New York is out of step with the national trend that recognizes that full state funding is the preferable choice. As of October 1, 2005, 28 states fund their indigent defense system entirely through state funds.³⁶ Recent funding data that TSG has reviewed shows that 19 of 25 states that provide the highest *per capita* spending for indigent defense are also 100 percent state-funded.

There is also a clear trend among the states to develop statewide oversight mechanisms for indigent criminal defense. Twenty-eight states place the responsibility and oversight of their state and local indigent defense programs within a state commission or a statewide public defender.³⁷ In many states, both those with

³⁶ Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See, *Indigent Defense Costs Per Capita, A State by State Comparison*, prepared by The Spangenberg Group for the ABA Bar Information Program, July 1, 2005.

³⁷ Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Vermont, Virginia, West Virginia, Wisconsin and Wyoming. Tennessee and Florida have statewide systems involving elected public defenders. Several of the remaining states have a commission with limited state oversight and responsibility. See *Statewide Indigent Defense Systems*, prepared by The Spangenberg Group for the ABA Bar Information Program, October 2005.

a statewide public defender program and those without, such oversight is provided exclusively through a state commission or oversight board. The oversight board is typically charged with setting policy for indigent defense services and advocating for state resources. In 25 states, there is total state oversight and 100 percent state funding. In several states, the commission provides some statewide oversight, but lacks full authority over indigent defense services. In other states, the oversight is provided by the chief public defender and there is no commission. New York is one of only six states that have no statewide responsibility or oversight mechanism for indigent criminal defense.³⁸

III. The Commission's Recommendations:³⁹

A. The delivery of indigent defense services in New York State should be restructured to insure accountability, enforceability of standards, and quality of representation. To this end there should be established a statewide defender office consisting of an Indigent Defense Commission, a Chief Defender and Regional Defender and Local Defender Offices, a Deputy Defender for Appeals, and a Deputy Defender for Conflict Defense.

1. The Indigent Defense Commission

a) Responsibility

The Indigent Defense Commission should have the responsibility for ensuring that quality legal representation is provided on a consistent basis throughout the state, independent of parochial or private interests. To achieve this end, the Commission should organize, supervise, and assume overall responsibility for the operation of New York's indigent defense system and pursue adequate funding necessary to accomplish these goals.

b) Composition

- 1. The Commission should be comprised of no fewer than nine nor more than 13**

³⁸ The other states are Arizona, Maine, Pennsylvania, South Dakota and Washington.

³⁹ As noted earlier, the Commission concluded that there are a number of interim measures that the Unified Court System can take immediately to ameliorate a number of deficiencies that adversely affect the representation of indigent defendants; these measures are set forth in the Addendum.

members appointed by the Governor, the Chief Judge, and the leaders of the State Legislature, with none of the three branches appointing a majority of its members. The selection should be made after solicitation of candidates for appointment from bar associations, individuals, and community, civic and other groups.

2. Commission members should reflect the geographic and ethnic diversity of the state and should be individuals who have a variety of backgrounds, experiences, and qualifications. They should also be individuals with significant experience in the provision of representation in criminal cases, or who have demonstrated a commitment to the provision of high quality representation of criminal defendants, or who have served people of low income in other contexts. An essential qualification for all candidates should be a firm commitment to the principle of independence of the defense function. However, no individual who is a public defender, prosecutor, judge, law enforcement officer, or a member or employee of a branch of government or of a government agency, should be eligible for appointment to the Commission. At least two-thirds of the Commission's members should be attorneys.

3. The term of office for a member of the Commission should be four years. However, initially, the terms of office should be staggered to ensure continuity of the Commission. The Commission's chairperson should be chosen by majority vote of the Commission's membership. The Commission's members should not be compensated for their work except for reimbursement of actual and necessary reasonable expenses in connection with their duties as members of the Commission. For budgetary purposes only, the Commission should be housed in the judicial branch. In all other respects, it must be independent of all governmental influence.

c) Function

The Indigent Defense Commission should have broad powers and responsibilities for the delivery of quality indigent defense services. It should: (1) hire a Chief Defender who should also serve as chief of the Commission's staff; (2) determine the location of Regional Defender Offices and local defender offices within each region as are needed; (3) hire Regional, Deputy, and local defenders upon

recommendation of the Chief Defender and hire the Conflict Defender; (4) together with the Chief Defender, establish and implement standards for performance, hiring, training and continuing legal education, permissible caseloads, support services, determination of financial eligibility, and any other standards that are required to supervise and monitor the delivery of defense services; (5) together with the Chief Defender, evaluate existing indigent defense programs and determine the type of indigent defense services that should be provided within each region which best serves the interests of indigent defendants in the region including but not limited to, regional defender offices, contract institutional defenders and assigned counsel plans; (6) be authorized to enter into contracts with institutional defense providers and assigned counsel plans that provide representation that meet the standards established by the Commission; (7) set compensation standards designed to ensure adequate and balanced funding for attorneys providing indigent defense services, including attorneys employed by regional and local defender offices, contract legal defense providers, and assigned counsel; (8) develop standards for hourly rates to be paid to assigned counsel, expert witnesses, investigators and interpreters and update those standards periodically.

The Commission should also: (9) determine the types of information required for the auditing and monitoring of the performance of the indigent criminal defense function and establish an appropriate mechanism for the collection and publication of such data; (10) establish auditing procedures in connection with the handling of public funds; (11) be authorized to receive grants and contributions for the conduct of special projects that will enhance further the delivery of indigent defense services; (12) in conjunction with the Chief Defender, make annual recommendations to the Chief Judge, Governor and the Legislature to improve the administration of the criminal justice system and the statewide indigent defense system.

2. The Chief Defender

a) The Chief Defender should be chosen by the Commission on the basis of his or her training, experience, and other qualifications as the Commission deems appropriate. Prior to making the appointment, the Commission should solicit recommendations from bar associations and interested

community groups and individuals.

b) The Chief Defender should serve as chief of the Commission's staff and should have the authority, in consultation with the Commission, to hire attorneys as Regional and Deputy Defenders and such other staff as the Chief Defender and the Commission deem necessary to effectuate the purposes of the statewide defender system and to hire appropriate staff for his or her own office.

c) The Chief Defender should assist the Commission with the promulgation of standards for performance of the indigent defense function and ensure that those standards are monitored and enforced in all regional and local defender offices.

d) The Chief Defender should insure that all regional and local defender offices are provided with adequate support services.

e) The Chief Defender should evaluate existing defender service programs and make recommendations to the Commission with respect to their continued existence.

f) The Chief Defender should create a statewide database of available experts, investigators, and interpreters by region.

g) The Chief Defender, in consultation with the Commission, should prepare the annual budget.

3. Regional and Local Defender Offices

a) A Regional Defender Office in each geographic region as determined by the Commission should be established, headed by a Regional Defender. The Regional Defenders should be hired by the Commission upon recommendation of the Chief Defender.

b) Within each region, local defender offices should be established as needed. The determination as to the location of such local offices should be made by the Commission, in consultation with the Chief Defender and the Regional Defender for the region. Each regional and local office should be situated to ensure that attorneys and support staff have maximum access to clients and their families,

courthouses, and detention facilities.

c) The Chief Defender and Regional Defender should consult with interested community groups and individuals in each region regarding matters affecting the delivery of indigent defense services in the region.

4. Appellate Representation

a) The Chief Defender should hire and supervise a Deputy Defender for Appeals who should develop a plan for the representation of indigent defendants who wish to appeal their convictions or respond to appeals by the prosecution. Such a plan should include standards for the determination of whether representation of an indigent client should continue beyond the direct appeal from the client's judgment of conviction.

b) The Deputy Defender for Appeals should monitor all appellate assignments, ensure that the assignment of cases is made promptly, that the record on appeal is obtained expeditiously and that all appellate service providers comply with the standards for performance established by the Commission.

c) The Deputy Defender for Appeals should maintain complete and accurate records of appellate and post-conviction services and expenses.

5. Conflict Defense Representation

a) There should be a Defender for Conflicts who is appointed and supervised directly by the Commission and is totally independent of the Chief Defender.

b) The Defender for Conflicts should be responsible for developing a plan for providing conflict counsel in criminal cases both at trial and on appeal. Such a plan may include Conflict Offices, contracts with assigned counsel plans or programs or with individual attorneys, as long as all providers of conflict defense services meet the standards for representation adopted by the Commission.

B. The enactment of the Indigent Defense Commission plan should be followed by an expeditious phase-in schedule that sets reasonable time limits for:

(1) the appointment of all members of the Indigent Defense Commission and

designation of its chairperson;

(2) the appointment of the Chief Defender;

(3) the establishment by the Commission of the requisite Regional and Local Defender Offices;

(4) the publication by the Commission of its initial set of standards and guidelines;

(5) the review and evaluation by the Chief Defender and the Commission of each existing defender program in the state;

(6) the effective date on which the Commission shall take over the responsibility and funding of all indigent defense programs in the state as designated by the Commission.

The Commission recognizes that implementation of a statewide defender system cannot be achieved overnight. However, in light of the crisis in defense representation that we have detailed and from which our proposal springs, its implementation must be undertaken with the greatest urgency lest many more thousands of impoverished defendants are deprived of their constitutional rights to a quality defense.

C. Adequate funding of indigent criminal defense must be provided by the New York Legislature from the State's General Fund, not from the counties. County funding should be phased out over a three-year period.

New York's experience since 1965 has demonstrated that a system of minimal state funding with primary financial responsibility at the county level does not work. It results in an inadequate and in many respects, an unconstitutional level of representation and creates significant disparities in the quality of representation based on no factor other than geography, thereby impugning the fairness of New York's criminal justice system. No substantial improvement can be achieved in the provision of indigent defense services in the state without a significant increase in overall state funding and the elimination of local funding. New York should join the majority of states that fund 100 percent of all costs of their indigent defense system. A system of direct state funding at the requisite adequate level will eliminate the geographic disparity in representation that currently abounds throughout the state. Because local funding drives up local costs and requires local choices to be made among social benefit programs, a state-funded defense system will spread out costs on a statewide basis and lessen greatly the fiscal impact on counties.

D. The system for funding indigent criminal defense services should provide for elimination of the overall disparity between prosecution and defense resources so as to achieve “adequate and balanced funding” defense representation.

A justice system’s funding program that does not take into account disparities between prosecution and defense resources is neither fair nor sensible. It deprives indigent defendants of their constitutional rights and relegates the defense function, despite constitutional and statutory mandates, to a form of second class citizenship. There exists no justification for such imbalance and inequity in a system that professes to comport with one of the basic tenets of our legal system, “equal justice for all.”

E. A comprehensive data collection system designed to provide an accurate picture of the provision of indigent criminal defense services in New York State should be established and maintained. Such a system would enable policy makers and administrators to make informed judgments concerning the administration of the indigent defense system and plan for improvements.

(1) There should be established a single source for reliable, indigent defense case activity and cost that can provide a complete and accurate picture of the system statewide and by region.

(2) The data system that is developed should be consistent with the plan for an overall criminal justice coordinated system currently being developed in New York State.

(3) All case and cost information should be entered in a single, statewide database that must also include the data collected for non-fingerprintable offenses.

IV. Conclusion

For more than two years, the Commission has examined the provision of indigent criminal defense services in New York State. We have been aided immeasurably by the high quality, professional study conducted by The Spangenberg Group. As a result of this undertaking, we have concluded that nothing short of major, far-reaching, reform can ensure that New York meets its constitutional and statutory obligations to provide quality representation to every indigent person accused of a crime or other offense. That substantially more funding must be dedicated to accomplishment of this task is a fact that can neither be disputed nor ignored. However, we also conclude that an infusion of additional funds, while absolutely

necessary, will not suffice. There must be established a statewide defender system, such as we have proposed, that is truly independent and which is structured to enforce standards of performance and demand true accountability from all who have the responsibility for defending those accused of a crime or other offenses. It must be a system for which the State of New York, not the counties, assumes full responsibility for funding. Only through such a system can constitutional mandates for quality indigent defense representation be realized on an equal basis throughout the state.

This Report is not the first to examine the adequacy of indigent legal representation in criminal cases in this state. Indeed, in this Report, we have catalogued the history of attempts by various organizations over the last 40 years to call attention to the defects in New York's manner of providing for indigent defense representation. But our Report, considered in tandem with The Spangenberg Report, is the most comprehensive evaluation ever done in New York State. It signals that the time for further study is over. The crisis in indigent representation in this state is a well documented fact. The time for action is now.

ADDENDUM*

I. GENERAL PROPOSALS

- A. Amend the Rules of the Chief Administrator to require that the denial by a trial court of an assigned counsel's request for appointment of an investigator or expert under County Law section 722-c be set forth in a written order with written findings of fact supporting the court's determination.**

The Spangenberg Report is replete with examples from around the State of what appear to be improper, summary denials by trial courts of assigned counsel requests for appointment of investigators and experts under County Law section 722-c. According to the Report, judges considering these requests are well aware that costs for investigative and expert services under section 722-c are borne by the county, and, “[i]n this respect, the courts are put in the position of guarding the county’s coffer. This unavoidable and unenviable role is not lost on many judges who are constrained by limited county funds.” (SR at 74) By requiring that all orders denying requested services under that section be in writing and contain written findings of fact in support of the court’s determination, the proposed rule will help to ensure that: (1) these determinations are not based on inappropriate and irrelevant factors such as the fiscal status of the county at the time of the request; and (2) a proper record of the court’s decision – including a decision rendered in a Town or Village Court where the proceedings are not recorded – is available in the event the defendant is ultimately convicted and raises the court’s denial of his or her section 722-c request on appeal. In keeping with the *ex parte* nature of most of these section 722-c applications, the proposed amendment should allow the defense to request that any such written order and findings of fact be sealed until after the verdict is entered.

- B. Amend the Rules of the Chief Administrator to permit administrative review of a trial court order reducing or denying a claim for compensation submitted by an assigned attorney, expert or investigator.**

Section 127.2(b) of the Rules of the Chief Administrator currently provides, in relevant part, that a trial court order awarding compensation to an assigned attorney, investigator or expert in excess of the statutory limits set forth in Article 18-B “may be reviewed by the appropriate administrative judge, with or without application, who may modify the award if it is found that the award reflects an abuse of discretion by the trial judge.” 22 NYCRR 127.2(b). Pursuant to subdivision (c) of section 127.2, “[a]n application for review may be made by any person or governmental body affected by the order.” The Commission believes that defense attorneys, experts and investigators whose claims for compensation under article 18-B are reduced or denied by a trial judge should be allowed to have that determination reviewed administratively. Accordingly, the Commission recommends that Part 127 of the Rules of the Chief Administrator be amended to permit administrative review of a trial court order reducing or denying a claim for compensation submitted by an assigned attorney, expert or investigator.

*As noted in the Preface, this addendum sets forth interim measures which the Commission believes would help to ameliorate a number of specific difficulties that adversely affect representation of indigent defendants in the state. These measures, if implemented, should not be understood to undercut, in any way, the necessity for the broad reforms that are presented in the main body of this Report.

C. Revise and periodically review OCA’s hourly rate guidelines for investigators and experts, and develop and maintain a statewide list of available investigators and experts.

In February of 1992, then-Chief Administrator Matthew Crosson issued an administrative order (hereinafter “the order”) adopting hourly rate “guidelines for the payment of reasonable compensation to court-appointed psychiatrists and other nonlawyer professionals” pursuant to Judiciary Law section 35 and County Law section 722-c. Presumably intended to provide guidance to trial judges in complying with the statutory requirement that the court determine “reasonable compensation” for experts and investigators assigned pursuant to these two sections, the order listed five “categori[es] of professional[s]” and corresponding hourly rates. Despite the Legislature’s more than tripling of the statutory cap for investigative and expert services under section 722-c in 1993, the hourly rate guidelines established by the order have remained unchanged for more than 14 years. The Commission finds that the issuance by OCA of updated hourly rate guidelines for investigators, experts and other professionals retained by assigned counsel and other indigent defense providers would help to facilitate the broader use by these providers of these critical services. *See*, SR at 74-76. Accordingly, the Commission recommends that the Chief Administrative Judge issue a new administrative order updating the hourly rate guidelines, and that OCA review the guidelines at least every two years and update them as needed.

The Commission further finds that there is currently a need for a statewide list of experts and investigators who are willing and able to take cases at guideline rates. *See*, SR at 76-77. Accordingly, the Commission also recommends that OCA develop, maintain and make available to indigent defense providers and judges throughout the State a non-exclusive¹ list of investigators and experts who are available to take assignments at guideline rates. The list should be reviewed and updated frequently by OCA.

D. Expand the number of non-Penal Law petty offenses subject to the existing plea-by-mail procedure in the Summons Part of the NYC Criminal Court.

Pursuant to section 61 of the NYC Criminal Court Act and section 200.25 of the Uniform Rules for the Trial Courts, a defendant who has been served with an appearance ticket in lieu of an arrest, returnable in the Summons Part of the NYC Criminal Court, for a petty offense defined outside of the Penal Law that has been specifically designated by the Administrative Judge of the NYC Criminal Court as “appropriate for disposition” under that section, may waive arraignment in open court and the right to counsel, and offer to plead guilty to the offense by mail and pay a specified fine and surcharge. *See*, 22 NYCRR section 200.25(a) and (b). To date, the Administrative Judge of the NYC Criminal Court has designated one offense, “Consumption of Alcohol on the Streets” (NYC Administrative Code section 10-125(b)), as “appropriate for disposition” under that section. The Commission believes that expanding the number of non-criminal NYC Administrative Code offenses subject to the plea-by-mail procedures of section 200.25 would allow indigent defense providers in NYC to better allocate their limited resources to more serious (i.e., misdemeanor and felony) prosecutions.² Accordingly, the Commission recommends that the Administrative Judge of the NYC Criminal Court exercise his or her existing authority under section 200.25 to so expand the list of plea-by-mail offenses. In determining which additional offenses “would be appropriate for disposition” by mail, the Commission further recommends that the Administrative Judge not include any offense that might result in future “collateral consequences” to the defendant as a result of the plea.

E. Amend the CPL and other relevant statutes to expand the availability of plea-

by-mail procedures for selected petty offenses prosecuted outside NYC.

Because the section 200.25 plea-by-mail procedure adopted pursuant to the NYC Criminal Court Act cannot currently be applied in jurisdictions outside New York City, in order to conserve limited indigent defense resources in these jurisdictions the Commission recommends that the Legislature amend the CPL and other relevant statutes to allow for the expanded use in upstate counties of plea-by-mail procedures for selected non-criminal, non-Penal Law offenses that currently require the defendant's personal appearance in court, and/or an appearance by counsel, at arraignment. *See, generally*, CPL section 170.10(1)(a) and (1)(b). As with the New York City plea-by-mail rule, this procedure should not be used if the plea might result in future collateral consequences.

F. Amend Joint Rules of the Appellate Divisions to require that full-time defenders earn no less than 18 CLE credits, and other defenders earn no less than 12 CLE credits, every two years in criminal law.

The Commission finds that while some defender institutions aggressively train their attorneys and although the New York State Defenders Association has worked admirably to improve the professionalism of participating counsel, many attorneys remain under-prepared for their representations. Many defenders – institutional defenders and panel attorneys alike – fail to receive the ongoing, cutting-edge training in defense issues that their posts require. Even assuming that indigent defenders meet their Continuing Legal Education (“CLE”) requirements for overall number of credits (*see*, 22 NYCRR section 1500.22[a] [24 credits, including four in ethics and professionalism, per biennium]), there is no requirement that defenders dedicate any portion of their CLE credits to matters relevant to defense of the indigent. The evidence is that cost and time constraints require many defenders to meet CLE requirements without regard to subject matter. The Commission recommends that the Joint Rules of the Appellate Divisions be modified to require that every two years full-time defenders earn no less than 18 CLE credits, and all other defenders earn no less than 12 CLE credits in courses related to criminal law. In turn, the OCA Attorney Registration Form will need to be amended to reflect these new CLE Rules and allow enforcement as under current law.

G. Expand Opportunities for Free CLE and joint training opportunities with prosecutors.

Apart from the substance of indigent defender training, cost remains a frequent impediment to defender training. The Commission urges every possible means be explored to provide defenders with free or reduced-rate CLE. The Commission calls on law schools and bar associations offering CLE programs, and the Judiciary itself, to make special efforts to make available CLE Board-certified training available at low or no cost to indigent defense attorneys and to publicize such opportunities by all practicable means.

Another helpful step would be the creation of specific training programs in which indigent defense attorneys and prosecutors would participate jointly. It is important that prosecutors be cognizant of issues that affect indigent defense representation, especially the ever-growing universe of the collateral consequences of a criminal conviction. In this regard, some curricula important for the defense function, are also important for prosecutors. The Commission therefore recommends that the New York State Defenders Association, perhaps under the sponsorship of the New York State Judicial Institute, develop joint training protocols.

H. Modify Rule 17.4 of the Rules of the Chief Judge to require that trial judges exercising criminal jurisdiction complete an OCA-certified program in indigent defense and

related topics every two years.

Effective judicial training in the complex issues surrounding indigent defense is as critical as effective defender training. There is a troubling lack of understanding by some judges about what constitutes indigence, when and how indigency determinations must be made, when and how investigators, experts and counsel should be appointed, etc. The Commission finds that a clear understanding of and sensitivity to these predicates to entry into the indigent defense system, as well as judicial knowledge of collateral consequences of conviction are important for a meaningful indigent defense. The Commission therefore recommends that the Rules of the Chief Judge be amended to require every judge or justice presiding in a court that exercises criminal jurisdiction to participate in a program approved by the Chief Administrator of the Courts addressing issues relating to indigent defense. Such a rule already exists for domestic violence issues (*see*, 22 NYCRR [Rules of the Chief Judge] section 17.4[a]).

I. Take immediate steps to ensure that, in accordance with County Law section 722(3), every existing county bar association assigned counsel program in the State is operated pursuant to a written plan that has been filed with, reviewed and approved by OCA.

Despite the requirements of County Law section 722(3) that a county's assigned counsel system be pursuant to a plan of the county's bar association, and that such plan be approved by the "state administrator" (i.e., OCA) before it is placed in operation, "in many counties, no such formal plan exists, nor does OCA appear to house a collection of such plans submitted for approval pursuant to the law." (SR at 159) *See also*, SR at 56, n171. It follows that when a county having a bar association plan elects to modify that plan, those changes must also be approved by OCA. According to the Spangenberg Report, as a result of the 2004 increase in hourly rates for assigned counsel, a large number of counties, as a cost-saving measure, established new public defender or conflict defender offices or made other significant changes to their 18-B programs for delivering indigent defense services. *See*, SR at 56-58, 159. To the extent these changes included significant modifications to an existing county bar association assigned counsel plan, such modifications should have been reviewed and approved by OCA *before* being placed in operation. The Spangenberg Report cites only one example of a county whose modified bar plan was formally approved by OCA prior to implementation. *See*, SR, Appendix J.

In light of the above, the Commission recommends that OCA take immediate steps to ensure that, in accordance with County Law section 722(3), every existing county bar association assigned counsel program in the State is operated pursuant to a written plan that: (1) accurately reflects the program actually in operation in that county; and (2) has been filed with, reviewed and approved by OCA.

J. Allow defenders to use CPL article 182 videoconference technology to communicate securely with incarcerated clients. 2. Enact legislation to make CPL article 182 authorization statewide and permanent.

The Commission finds, as reflected in the Spangenberg Report, that "[i]ndigent defendants throughout the state suffer from a serious lack of contact from their attorneys. Too often, the only attorney-client contact takes place in court," and "[t]his in-court contact is frequently brief and occurs in an area that cannot ensure confidentiality." (SR at 157) Among the obstacles to frequent attorney-client visits are the great distances between certain courthouses where criminal cases are heard and the jail facilities where defendants are housed, as well as, in New York City, the relative inaccessibility of the Rikers Island jails. CPL article 182 allows incarcerated defendants in enumerated counties to make certain court appearances by

two-way closed circuit television without having to be brought to court. Under current procedures, however, these two-way closed-circuit systems are generally used in conjunction with formal court proceedings: because defenders are not granted access to the system, a low-cost or even no-cost method to connect defendants with their appointed counsel, and thus significantly to improve the quality and quantity of attorney-client contact while fully protecting clients' rights, is needlessly lost. Moreover, the authorization to use this common-sense device sunsets every few years and is limited only to certain counties. To cure these inefficiencies and help defenders properly communicate with their clients, the Commission urges that the Judiciary enact rules to give defenders access to the videoconference system to communicate with their clients, and to introduce legislation to make this available system permanent and statewide.

K. Amend the Uniform Rules for the Trial Courts to require that Superior Courts conduct CPL 530.30 bail reviews promptly after arraignment in all cases where an incarcerated defendant has been arraigned without counsel.

CPL section 530.30 allows for superior court review of bail and remand orders issued by a local criminal court, and permits the superior court to, *inter alia*, ROR a defendant held on bail or remanded by the local criminal court or fix bail in a lesser amount. In order to address the problem of unrepresented defendants languishing in jail on excessive bail following arraignment in a local criminal court, the Commission recommends that OCA amend the Uniform Rules for the Trial Courts to require that Superior Courts conduct CPL 530.30 bail reviews promptly after arraignment in all cases where an incarcerated defendant has been arraigned without counsel.

L. Devote OCA and DCJS resources to improve the collection and verification of indigent defense data.

The Commission finds that there is currently a paucity of reliable, accurate data on indigent defense services in the State. *See*, SR at 156. Pursuant to County Law 722-f(1), indigent defense providers are required to file annually a "report with the judicial conference [OCA] at such times and in such detail and form as the judicial conference may direct." The current annual report is a one-page form (UCS-195). As noted in the Commission's Interim Report (*see*, pp. 29-30), "there are various errors, omissions, and confusing data on a large number of [UCS-195] submissions by the counties." In addition, as noted by the Spangenberg Group, the "self-reported UCS-195 information from the counties cannot be verified through any other data source." (SR at 156) This Commission finds that a statewide Indigent Defense Commission would most certainly benefit from immediately improving indigent defense data collection efforts, including data collected through the UCS-195 form, electronic data captured and transmitted to the Division of Criminal Justice Services (DCJS) through OCA's "CRIMS," "ADBM" and "UCMS" electronic case management systems and specific data relating to counsel, investigator and expert assignments in the Criminal and Family Courts under County Law Article 18-B. *See*, SR at 156. Accordingly, the Commission recommends that OCA and DCJS devote the necessary resources to improve and streamline data collection and data verification processes in this critical area.

M. Create an office or entity within OCA charged with facilitating the implementation of this Commission's recommendations and preparing generally for implementation of the statewide defender system.

To prepare generally for implementation of the statewide defender system recommended by this Commission and help facilitate the implementation by OCA of the Commission's other recommendations, we recommend the creation of a coordinating body within OCA to serve as a focal point on the complex and

interrelated issues of indigent defense. Properly staffed, this office should, among other things:

- compile and verify indigent defense data (*e.g.*, the bar association plans required to be approved by the Chief Administrator under County Law § 722[3]);
- assist in the development and implementation of judicial education materials relating to indigent defense and collateral consequences of conviction;
- publicize and assist in implementing rules promulgated pursuant to this Commission's recommendations;
- coordinate with defense providers, and with the Indigent Defense Commission on the Judiciary's behalf when created;
- create and distribute informational materials (*e.g.* videotapes) on defendant rights and the nature of court proceedings to be shown in proper locations and at proper times in the adjudicative process;
- advocate generally for effective provision of indigent defense services, including the enactment of the legislative recommendations of this report.

II. TOWN AND VILLAGE COURT PROPOSALS

A. Amend the Uniform Rules for the Trial Courts to require Town and Village Courts to electronically record all proceedings relating to felonies, misdemeanors and Penal Law violations; allocate funds through OCA's Justice Court Assistance Program to assist localities in purchasing and maintaining the necessary recording equipment.

As noted in the Spangenberg Report, Town and Village Courts are not "courts of record," and criminal proceedings before these courts are, in most cases, conducted without preserving a verbatim record of those proceedings. *See*, SR at 160. Due in large part to the lack of a verbatim transcript of the proceedings, "it is often difficult or impossible for a defendant to adequately exercise the right to appeal a decision by a local [Town or Village] justice." (SR at 161) The Commission believes that, ideally, there should be a stenographic record of *all* non-civil proceedings conducted in the Town and Village Courts, and that these courts should, like all other criminal courts in the State, be "courts of record," at least when exercising their criminal jurisdiction. However, requiring Town and Village Courts to electronically record all proceedings relating to felonies, misdemeanors and Penal Law violations, and providing state funding through OCA's Justice Court Assistance Program to help localities obtain recording equipment, will enable the preservation of an accurate and complete record of these proceedings for appellate review and other purposes. *See, generally*, Part 138 of the Rules of the Chief Administrator ["Justice Court Assistance Program"].

B. Establish a procedure to determine the extent of compliance with section 200.26 of the Uniform Rules for Courts Exercising Criminal Jurisdiction and undertake appropriate action to ensure that Town and Village justices conscientiously comply with the rule.

Section 200.26 of the Uniform Rules for Courts Exercising Criminal Jurisdiction (hereinafter, "the rule"), requires Town and Village Courts, in cases where the defendant appears for arraignment without counsel and either cannot make bail or is remanded without bail, to make an initial determination as to the

defendant's eligibility for assigned counsel. Where it appears that the defendant is financially unable to obtain counsel, the court must assign counsel on the spot and promptly notify both assigned counsel and the local pretrial services agency of the court's assignment and issuance of the bail or remand order. *See*, 22 NYCRR section 200.26(c). Under the rule, Town and Village Courts must maintain a record in the case file of any communications and correspondence initiated or received by the court pursuant to the rule.

It has been over a year since the rule was adopted and there has been no systematic effort to determine the extent to which the state's over 1200 Town and Village Courts are in compliance. Indeed, the Spangenberg Report cites numerous examples from around the state of Town and Village justices who are simply unaware of the rule or are failing to comply with it. (SR at 112-114) Accordingly, the Commission recommends that the rule be amended to require Town and Village justices to periodically submit to OCA a form listing cases where, at the initial appearance, the court either fixed bail that the defendant could not immediately make, or remanded the defendant without bail; whether counsel was assigned in accordance with the rule; and whether the notice and other requirements of the rule were satisfied. The form would be signed by the justice prior to submission. Using the completed forms, OCA would then conduct periodic audits of selected Town and Village Courts to review individual criminal case files and other relevant court records (*see, generally*, 22 NYCRR section 200.23) to determine compliance with the rule.

C. Amend Part 17.2 of the Rules of the Chief Judge to double to two weeks the minimum training for newly-selected non-attorney Town and Village justices.

Educational programs for newly-elected, non-attorney Town and Village justices should be enhanced so that the justices are better informed and sensitized to the constitutional requirements and standards for appointing counsel, investigators and experts. One present problem is that new non-attorney justices receive only a single week of basic courses (*see* 22 NYCRR [Rules of the Chief Judge] section 17.2[a]), leaving little time for instruction on issues concerning the rights of indigent defendants. Even a qualified attorney might have significant difficulty rapidly absorbing and properly applying complex new materials of this scope; for a lay person, the challenge is more difficult. The Commission therefore recommends that OCA revamp and expand training for non-attorney justices by doubling basic training to two weeks in the first year, perhaps in two one-week programs. While the Commission appreciates that these mandates could impose significant burdens both on localities with Town or Village Courts and participating justices (who often must take leaves of absence from their full-time jobs to participate in such training), expanded basic education programs for non-attorney justices will help to provide protections for indigent defendants' rights.

D. Revamp Town and Village Court training programs to include quarterly practical programs and remote programs.

The Commission further finds that for attorney and non-attorney justices alike who have served for fewer than four years, the annual training provided is insufficient. Most Town and Village Courts are not convened daily and new justices have fewer opportunities to acclimate to their judicial duties. Further, a significant proportion of justices are not attorneys and have little if any other legal training. Thus, the current judicial training cycle becomes insufficient to build critical judicial skills. OCA's experience is that many local justices themselves have reported a desire for more frequent training. Supplemental training has been used in the Fifth Judicial District in the form of mock proceedings. These educational opportunities have been very successful and should be made a standard tool of training, available to justices no less than quarterly, perhaps divided between attorney and non-attorney judges to provide targeted assistance suitable

to participants' level of prior legal training. The Commission further finds that the Town and Village Court education program could significantly benefit from frequent telephone, video-conference and internet-based symposia.

E. Increase publicity of Town and Village Court Resource Center.

While the OCA Town and Village Court Resource Center has proved to be an invaluable resource to many local justices and staff with questions on all manner of Town and Village Court operations, procedure and substantive law, the Commission finds that the Resource Center might be even more helpful if more justices used it. To this end, the Commission recommends that the Judiciary, in partnership with the New York State Magistrates' Association and other stakeholders, better publicize the Resource Center to local officials, and especially court staff, perhaps even by relatively simple means as desktop paraphernalia that remind Town and Village Courts of the assistance available to them.

F. Establish a mechanism to coordinate conflicting meeting times of local courts within each judicial district and county.

Defenders and prosecutors reported significant difficulty in allocating staff among local courts. The sheer number of City Courts and Town and Village Courts – in some counties numbering in the dozens and scattered across hundreds of square miles – makes staff allocations inefficient, expensive and inordinately complex. Defenders and prosecutors report cases before multiple courts at the same time; defenders report losing so much time traveling between courts that they cannot meaningfully meet with their clients. So long as there exist multiple criminal tribunals in each county, separated from central detention facilities by significant distances, New York's indigent defense system will remain inherently inefficient, foisting wastefully high costs onto taxpayers and depriving clients of already scant time with their lawyers. To mitigate these inefficiencies, the Commission urges systematic coordination of the terms of City, Town and Village Courts in each judicial district and county to improve the effectiveness of defense, prosecution and other law enforcement functions. Where one defender or prosecutor is assigned to multiple courts, these courts *never* should convene at the same time. Given the need for a comprehensive approach, the Commission urges that the Judiciary take a lead role in working with local governments, prosecutors and defenders, service providers and other stakeholders to ensure against scheduling conflicts among these local courts.³ While the Commission recognizes the historical independence of each Town or Village Court and its sponsoring locality, the complexity of efficiently providing indigent defense services – and the paramount interest of making this fractured system work – no longer permits each Town or Village Court to operate in a relative vacuum, without regard to the burdens of scheduling on defenders, prosecutors and taxpayers who fund their operations.

G. Promulgate a new Rule of the Chief Judge designating interpreters on the OCA Registry as "Official Interpreters" for the Town and Village Courts, and amend the Uniform Rules for the Trial Courts to require Town and Village Courts to include in case records a finding either that the defendant spoke English or had an OCA-certified interpreter.

Language barriers invariably complicate the provision of indigent defense services in the courtroom. This is especially true in the Town and Village Courts. Town and Village Courts and sponsoring localities often lack proper interpreting services for many reasons – some are unaware of their duty to provide

these services, others do not make funds available for this purpose, and some languages are difficult for which to find qualified interpreters. The Commission heard disturbing testimony that in some Town and Village Courts, a defendant's family member, an arresting officer, a prosecutor or even the judge serves as *ad hoc* interpreter, raising a palpable risk of mis-translation or worse. Moreover, without a transcript of the proceedings, there may be no way to ensure on appeal or collateral review that non-English speaking defendants' rights meaningfully to participate in their own defense are protected. In April 2006, OCA, noting the need to better connect Town and Village Courts with qualified interpreters, resolved to make available to Town and Village Courts the OCA registry of interpreters qualified to work in the State-paid courts. The Commission expects that the Town and Village Courts will find that this registry, coupled with availability of telephonic interpreting, will help speed engagement of interpreters, in almost any language, at any time of day, in any location across the State.

While the Commission applauds this OCA initiative, it will not fully address the real problem, which relates as much to *paying* interpreters as finding them. The root of the problem is an anachronistic statute that caps the compensation of Town and Village Courts' "official interpreters" at just \$25 per day, paid by the county. *See*, Judiciary Law section 387.⁴ Because few if any Town or Village Courts retain an "official interpreter" and few if any qualified interpreters agree to work for \$25, Town and Village Courts face a daunting choice: proceed without an interpreter (and thus potentially violate a defendant's constitutional rights), or engage an interpreter and order localities to pay fees often far in excess of \$25 (*i.e.*, violate section 387 and foist ostensibly unauthorized financial burdens on the sponsoring locality).⁵ There are widespread reports that when a justice does engage an interpreter on promise of payment, the justice encounters significant resistance from the locality, making it harder to retain interpreters in later cases. Given that qualified interpreters in State-paid courts now earn \$250 per day, the Commission finds that this \$25 cap frustrates defendants' rights to participate in their own defense, and concurs in the New York State Magistrates Association's call for the Legislature to end this restriction.

The Commission concludes, however, that the exigency of this problem does not allow New York to wait for a legislative solution, nor need we wait. The recent establishment of a Statewide registry of interpreters and OCA's initiative to make this registry available to Town and Village Courts together create a vehicle by which the Judiciary itself can aid in resolving the problem. To this end, consistent with the Chief Judge's power to establish standards and administrative policies of statewide applicability for all New York courts including the Town and Village Courts,⁶ the Commission proposes that the Judiciary promulgate a rule recognizing interpreters listed on the registry as "official interpreters" within the meaning of Judiciary Law section 387. Such a rule would require Town and Village Courts to exhaust the OCA registry before appointing an outside interpreter, and thus obviate the anachronistic \$25 cap in almost all cases.

Of course, requiring Town and Village Courts to use the OCA registry (and presumably to pay OCA rates), will impose new costs on localities, and create a disincentive for justices to appoint interpreters, much like courts' disincentives to appoint investigators and experts whose fees are paid by the county. To address this disincentive, the Commission proposes amending section 200.23(b) of the Uniform Rule for the Trial Courts to marginally expand the existing reporting requirements for Town and Village Courts in criminal cases. This amendment would require Town and Village Courts to include in each case file a statement either that the defendant was fluent in English or that the Court engaged an interpreter certified by OCA to translate in the defendant's language for all proceedings. Because this statement would become part of each case record, this new rule would sensitize justices to their duty to appoint qualified interpreters and provide at least some documentary basis on which to review these proceedings.

H. Amend Judiciary Law section 387 to lift the \$25/day cap on Town and Village Court temporary interpreter compensation and make these costs reimbursable by the State.

Recognizing the potential scope of the cost of interpreters and that Town and Village Courts may still need to engage outside interpreters, the Commission finds that judicial regulation alone cannot fully address the problem. A complete and fair way of dealing with the issue would be for the Legislature to amend section 387 to eliminate the \$25 cap and make all interpreting costs reimbursable by the State at rates fixed in advance by the Chief Administrator of the Courts. Such an amendment would eliminate many operational and political impediments to meeting Town and Village Court obligations to appoint interpreters, and thereby make great strides to help vindicate many indigent defendants' constitutional rights in the Town and Village Courts.

Endnotes

1Under the Commission's proposal, indigent defense providers would, of course, be free to retain an investigator or expert who does not appear on the OCA-prepared list. The Commission would further recommend that, in distributing the proposed list, OCA make clear to defense providers and judges that the list in no way constitutes an endorsement by OCA of the quality of services provided by any of the listed experts or investigators.

2 According to the Spangenberg Report, from 1991 to 2004 there was a dramatic increase in summonses filed in NYC, from 98,278 in 1991 to 581,734 in 2004, an increase of 491 percent. (SR at 141) Moreover, according to the Spangenberg Report, in 2001, 98 percent of summonses in NYC were disposed of at arraignment, and it is estimated that a similar percentage are so disposed of today. *Id.*

3The Commission notes that the New York State Constitution and the Judiciary Law invest in the Chief Judge regulatory authority herself to enact rules that would harmonize local court schedules (see NY Const, art VI, §§ 1[a], 28[b]; Judiciary Law §§ 211[1][a], 212[1][c]). Under this authority, the Chief Judge or her designates, including the administrative judges of each judicial district, likewise may work with affected stakeholders to avoid scheduling conflicts.

4“If the services of an interpreter be required * * * and there be no unemployed [i.e. available] official interpreter to act, the court may appoint an interpreter to act temporarily in such court. Such interpreter shall before entering upon his duties file with the clerk of the court the constitutional oath of office. The court shall fix the compensation of such interpreter at not more than twenty-five dollars per day for each day's actual attendance by direction of the presiding judge or justice and such compensation shall be paid from the court fund of the county upon order of the court.” Judiciary Law section 387.

5Where the \$25 cap results in a locality being unable to meet a defendant's constitutional right to have an interpreter, the statutory cap probably is unconstitutional as applied and thus cannot limit the Town or Village Court's appointment of an interpreter.

6See NY Const, art VI, §§ 1(a), 28(c).

Steven Zeidman
Additional Commentary in which
Hon. Penelope Clute, Hon. Patricia Marks, Laurie Shanks
And Hon. Elaine Jackson Stack join.
June 20, 2006

“The poor man looks upon the law
as an enemy, not as a friend. For
him, the law is always taking
something away.”

Attorney General Robert Kennedy, Law Day, May 1, 1964

The Commission’s report concludes that “the time for further study is over . . . [t]he time for action is now.”¹ I wholeheartedly concur; there is no need for “further study” and we must act “now.” Every day in this state, thousands of people who are unable to afford counsel are being victimized as constitutional and ethical standards of effective assistance of counsel are routinely reduced to platitudes. Yet all the report essentially does is recommend “further study.” Faced with the voluminous and detailed findings of the Spangenberg report,² which, parenthetically, come as no surprise to those who labor regularly in the Criminal Courts, the Commission merely recommends the same proposal that the New York State Defenders’ Association (NYSDA) and the Committee for an Independent Public Defense Commission (spearheaded by the self-same NYSDA) first put on the table a few years ago - a statewide entity to oversee and coordinate the myriad indigent defense systems in place across the state.³ While I concur that the case can certainly be made for a unified approach to the funding, delivery and oversight of indigent defense, more must be done, and on an immediate basis, to address the ongoing crisis in indigent defense.

Faced with indisputable evidence of a crisis of epic proportions, the Commission chooses to recommend the formation of another Commission. Ironically, that new Commission will no doubt be comprised of many of the same folks on this Commission. And, no doubt, the new Commission’s first step will be to look to the Spangenberg report that is presently sitting in front of this Commission. By then, however, the report will be a few years old, so it will require rehiring Spangenberg for an update. Thereafter, the Commission should be poised to take “action.” The Commission’s decision to leave for another day and another body efforts to address immediately the apparent and well-documented sorry state of indigent defense is an inadequate response to a crisis. For that reason, I dissent from that part of the Commission’s report which extols the formation of a new Commission as the panacea for all that ails indigent defense in this state.

And what exactly is the crisis that demands immediate attention? Is it about a lack of money, as the Commission’s report emphasizes? Of course indigent defense is, and has historically always been, drastically underfunded. That shameful reality was common knowledge

¹ Commission report at 42.

² The Spangenberg report is attached to the Commission’s report as Appendix B.

³ The Committee for an Independent Public Defense Commission (CIPDC) was formed in 2001, and soon thereafter recommended the creation of an independent, statewide indigent defense oversight commission. Recently, the CIPDC presented a draft bill to legislative leaders. In fact, according to the Commission’s report, a bill providing for an independent public defense commission was introduced by Senator Dale Volker and Assemblyman Martin Luster more than four years ago. Commission report at 17.

long before this Commission was convened. Should the myriad defense organizations and programs throughout the state be organized in some coherent way? Yes, but the crisis is about much more than funding and structure. Limiting the analysis to those factors serves to obfuscate the central issue - there must be careful examination of what it is that defenders of the indigent accused actually do and do not do. It is well past time for a comprehensive study and critique of the nature and quality of the work.

The time is ripe for such a discussion. On May 25, 2006, the New York Law Journal reported the decision in People v. DeJesus, where the court held that a defendant was not entitled to have his conviction set aside even though he had not been advised that his plea to a misdemeanor would automatically result in deportation. Reserving for another time and place a legal analysis of the holding, more to the direct point is the question of how it came to pass that a lawyer failed to know, or talk with his client about, the deportation consequences of a plea. That is a window into the real crisis.

The Spangenberg report itself documents the genesis of these tragedies. “By the year 2000, 18-B attorneys [in New York City] were disposing of 69 percent of all misdemeanor cases at arraignment.”⁴ Should not this Commission be concerned with such alarmingly high disposition rates, particularly at the accused’s first court appearance? Should not there as well be an in-depth analysis of the general prevalence of guilty pleas and the corresponding lack of litigation? Just why is the plea rate so high? Are indigent defenders in some form coercing or subtly influencing their clients into pleading guilty early and often? Or are defense lawyers failing to listen to their clients and/or to value the benefits to their clients of actively contesting the charges? In the current climate of concerns about innocence and wrongful convictions,⁵ as well as in the aftermath of the findings of police misconduct by the Mollen Commission⁶ and the Attorney General’s “stop-and-frisk” investigation,⁷ should not there be a clarion call for defense lawyers to actively investigate and litigate?

Concerns about the reliance on guilty pleas are exacerbated by the explosion of collateral consequences attendant to conviction. It is undoubtedly harder than ever before for a defense attorney to navigate through the deluge of punishments that follow from a conviction. With that in mind, one would expect, and demand, that plea rates, especially at arraignment, would be decreasing. Yet, as Spangenberg observed in his report, “Collateral consequences of a criminal conviction are of particular concern in New York City as such a high percentage of cases plead out at arraignment and defense counsel spends very little time with their clients before a plea is entered.”⁸ Spangenberg further noted the lack of any real litigation: “Because so many cases plead at arraignment, litigation and motion practice has changed in New York City, with very few pretrial motions filed, especially in misdemeanor cases.”⁹ This Commission cannot remain silent in the face of these revelations.

⁴ Spangenberg report at 142.

⁵ See, e.g., Adam Liptak, *Study Suspects Thousands of False Convictions*, N.Y. Times, Apr. 19, 2004, at A15.

⁶ Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Dep’t, City of New York, Commission Report (1994).

⁷ Office of New York State Attorney General Elliot Spitzer, the New York City Police Department’s “Stop & Frisk” Practices: A Report to the People of the State of New York from the Office of the Attorney General, Dec. 1, 1999.

⁸ Spangenberg report at 144-45.

⁹ Spangenberg report at 144.

Instead, why not recommend bold steps, as did the Broward County, Florida Public Defender? In a letter to all judges of the Criminal Court, he wrote that he had “forbidden his attorneys from advising indigent criminal defendants to plead guilty at arraignment unless they’ve had ‘meaningful contact’ with their clients in advance.”¹⁰ He reasoned that his lawyers were ethically and legally constrained from pleading clients guilty without having established an attorney-client relationship and having investigated the circumstances of the charges.¹¹ Notably, his actions seem to have the support of the local prosecutor.¹² In addition to simply being the right thing to do, his actions brought his office into conformity with the extant American Bar Association Standards, which state that “[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.”¹³ In fact, the standards recently promulgated by the New York State Bar Association contain similar cautions against pleas at arraignments unless or until adequate factual and legal investigation has taken place.¹⁴ Yet this Commission chooses to make no recommendations regarding plea rates generally, pleas at arraignments in particular, or the overall confluence of pleas and collateral consequences.

We have heard and seen how problem-solving and community courts are proliferating. Does this Commission address the fundamental issues those changes portend? How can a defense attorney be most effective in those settings? Has the Commission given consideration to where a defense provider should ideally be located? Does not a Community Court suggest a community defense office? Again, the Commission chooses to leave these crucial, fundamental questions for another body at another time.

Where is the input of those most affected by indigent defense providers - clients and their families and communities?¹⁵ What do those constituencies have to say about indigent defense? Why is it that every so-called “consumer perspective” study since Gideon v Wainwright¹⁶ has found that clients harbor great resentment and mistrust toward their appointed attorneys?¹⁷ Most studies have found that clients perceive their lawyers to be primarily interested in getting them to

¹⁰ Dan Christensen, *No More Instant Plea Deals, Says Public Defender*, Daily Business Review, June 6, 2005.

¹¹ Id.

¹² Id.

¹³ ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 4-6.1 (3d ed. 1993).

¹⁴ The New York State Bar Association Standards for Providing Mandated Representation (adopted by the New York State Bar Association House of Delegates on April 2, 2005) state in relevant part that counsel must “provide the client with the opportunity to make an intelligent and well-informed decision in those instances when such decision is to be made by the client (i.e, whether to plead guilty)” (I-3); “[obtain] all available information concerning the client’s background and circumstances for purposes of . . . avoiding, if at all possible, collateral consequences” (I-7a.); and “[provide] the client with full information concerning such matters as . . . immigration . . . and other collateral consequences” (I-7e.). Pleas at arraignments violate the letter and spirit of each of these standards.

¹⁵ The Commission’s report notes that “TSG [The Spangenberg Group] spoke with defense attorneys, judges and court personnel, as well as with state, county, and city officials with knowledge of the criminal justice system.” Commission report at 3. Noticeably lacking is any input from present or past clients and their families, communities and advocacy organizations.

¹⁶ 372 U.S. 335 (1963).

¹⁷ See, e.g., Jonathan D. Casper, *Criminal Justice-The Consumer’s Perspective* (Nat’l Inst. Of Law Enforcement and Crim. Just. Ed., 1972); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 Wis. L. Rev. 473, 474 (“That many clients are suspicious of, sometimes even hostile towards, their defenders has been repeatedly documented.”).

plead guilty.¹⁸ The reality of that perception is no doubt borne out in the Spangenberg findings. Other seemingly intractable issues that surface in those studies beg serious thought. Not surprisingly, indigent defendants express concern that they have no say in the selection of their lawyer¹⁹ and that he or she is appointed to them by the government.²⁰ Compounding the problem is the ever-present belief that anything free is worth what you paid for it,²¹ and also that so many defense attorneys seem to their clients to be inextricably linked with the other institutional players.²² Are there possible solutions to these longstanding problems? Is not that the core of the original charge to the Commission – to confront difficult issues and to try to develop creative solutions? One such example is the concept of “Judicare,” a kind of Medicare for legal needs.²³ Rather than consider such initiatives or think about ways of reconceptualizing indigent defense, the Commission report clings to the one thread of a statewide defense commission as if it is a cure-all.

Similarly, how can a Commission focused on indigent defense not squarely address the issue of race?²⁴ Who are the clients, what policing decisions brought them into court, who are the defenders, and how does the judiciary treat the accused? These questions have to be part and parcel of any report about criminal defense of the indigent.

The Commission’s report should confront and address at least select items from the Spangenberg report’s fifty-five findings. For example, as the Spangenberg report makes abundantly clear, most defense lawyers for the indigent have excessive caseloads.²⁵ Concomitantly, the report states that “[i]n New York, we did not encounter *any* institutional provider that had its own meaningful, written caseload standards,”²⁶ and that as a result, “they are handling heavy caseloads that are well in excess of the national standards.”²⁷ While developing

¹⁸ See, e.g., Casper, *supra* note 17.

¹⁹ See, e.g., Samuel J. Brakel, *Styles of Delivery of Legal Services to the Poor: A Review Article*, 1977 Am. B. Found. Res. J. 219.

²⁰ See, e.g., Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 Hastings Const. L.Q. 625, 667 (1986) (“The indigent defendant may view his defender at first with suspicion since the same source of funds that is paying the police to arrest him and the prosecutor to prosecute him, is also paying for his counsel.”).

²¹ See, e.g., Charles E. Silberman, *Criminal Violence, Criminal Justice* 306 (1978) (“[M]any defendants feel that he who pays the piper inevitably calls the tune; in their view, what you don’t pay for, you don’t get.”).

²² See, e.g., Alan F. Arcuri, *Lawyers, Judges, and Plea Bargaining: Some New Data on Inmates’ Views*, 4 Int’l J. Criminology & Penology 177, 187 (1976) (more than 80% of defendants interviewed felt that their appointed lawyer and the prosecutor were working in collusion with the judge).

²³ For discussions of Judicare both in the United States and abroad, see, e.g., Rob Atkinson, *Historical Perspectives on Pro Bono Lawyering: A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 Am. U.J. Gender Soc. Pol’y & L. 129, n.4 (2001); David J. McQuoid-Mason, *The Delivery of Civil Legal Aid Services in South Africa*, 24 Fordham Int’l L.J. 111 (2000); Dorothy Nicole Giobbe, *Legal Aid and Right to Counsel Under Canada’s Charter of Rights and Freedoms*, 25 Brooklyn J. Int’l L. 205, 210 (1999) (“One of the most coveted aspects of the judicare, or certificate model, is the degree of control that clients have over choice of representation. Because clients have discretion in their selection of a lawyer, the certificate system is thought to possess a unique quality of confidence between client and lawyer.”).

²⁴ See, e.g., Donna Coker, *Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. Crim. L. & Criminology 827 (2003).

²⁵ “[I]nstitutional providers throughout the state are burdened with heavy caseloads.” Spangenberg report at 43.

²⁶ Spangenberg report at 44 (emph. added).

²⁷ *Id.*

numerical standards requires a degree of sophistication and an ability to weigh types of cases, there is no doubt that it can, and, more importantly, must, be done.²⁸ Yet the Commission declines to recommend caseload standards of any kind.²⁹

Defending the indigent accused requires attorneys who understand and are ready to confront the modern age of “quality of life” and “zero tolerance” policing. Those lawyers must also be equipped to navigate through the newly developing problem-solving and community courts. And while every single arrest is brutally important, significant and meaningful to the person arrested, burgeoning collateral consequences have raised the stakes. A heretofore relatively “innocuous” charge can now lead to deportation, eviction, loss of government benefits, and a host of other problems, in addition to the fear, humiliation, frustration and concern that follows every arrest. The new age of criminal practice requires a new approach to criminal defense. Instead, the Spangenberg report paints a picture of rapid pleas and little or no motion practice. That reality must be confronted immediately.

There are hard questions to tackle but this Commission chooses to reserve them for another body at another time in the future. The notion seems to be that it is sufficient, or best, to wait for the Legislature to approve an adequately funded statewide commission. All seem to agree there is a crisis in defense of the indigent. To wait for legislative action strikes me as an unacceptable response to a crisis. I concur wholeheartedly with this much of the Commission’s report - there “is no need for further study – the time for action is now.”

²⁸ See, e.g., Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. Rev. 245 (2004).

²⁹ Part III of the Commission’s report is titled, “The Commission’s Recommendations.” The recommendations that follow relate almost exclusively to the statewide defense commission. In a footnote, the report references “a number of interim measures that the Unified Court System can take immediately to ameliorate a number of deficiencies that adversely affect the representation of indigent defendants.” Commission report at n.39. Given the overarching nature of the Commission’s original mandate, and the magnitude of the indigent defense crisis that has now been documented, it seems more appropriate to insert those “measures” directly into the relevant portion of the text, rather than relegate them to a footnote and “Addendum.” In fact, those measures represent the tip of the iceberg. Any number of additional steps could, and should, have been recommended in order to have an immediate, positive impact on the delivery of defense services.

Additional Commentary of Klaus Eppler In Which Hon. Penelope Clute,
Laurie Shanks, Hon. Elaine Jackson Stack And Steven Zeidman Join

June 19, 2006

I wholeheartedly support the recommendations of the Commission, not only in its principal recommendation for a fully state funded system and the establishment of an Indigent Defense Commission (“IDC”) directed and empowered to provide quality representation to indigent defendants, but also all the other recommendations in the Report including those in the Report Addendum. I believe that the truly monumental, thorough and detailed report of The Spangenberg Group will lend undeniably convincing support to the urgency of adopting the Commission’s principal recommendations. As the First Chair of the Indigent Defense Organization Oversight Commission (“IDOOC”) in the First Department and subsequently the Chair of the Committee in the First Department which issued the Report in 2001 on the Crisis in the Legal Representation of the Poor, I strongly believe that an independent agency’s power to set, monitor and enforce standards – and to provide funding to support such standards – is the key to the provision of quality mandated legal representation.

There are two reasons for my feeling compelled to add a separate writing to the Commission’s Report: First is the decision of this Commission – charged with making recommendations as to the future of indigent defense services in New York – not to make recommendations (or even express preferences) as to the system the IDC should strive for. It is my view that in the interest of the justice system, indigent defense services in New York State should be provided through a hybrid system that includes both an institutional provider component and a private bar – assigned counsel component.

Second, sharing Professor Zeidman’s concern that the “crisis of epic proportions” requires immediate attention -- and not just by the legislature, I would have preferred that the Commission strongly advocate for the immediate adoption of minimum standards by all institutional providers and assigned counsel plans, preferably at the direction of the court system.

Respectfully submitted,

Klaus Eppler

Additional Commentary of Hon. Patricia D. Marks In Which
Hon. Penelope Clute, Hon. Sallie Manzanet, Laurie Shanks And Steven Zeidman Join

The Indigent Defense commission was appointed by Chief Judge Kaye in 2004 to study the indigent defense system from top to bottom and make recommendations for improvement of the indigent defense system. The inquiry would include the quality of current services, the standards for those services, the training of those who represent the indigent and the system for financing these services. The commission would also develop a model for a whole new system of indigent defense in New York.

I have reviewed the final report of the commission as of the June 9 meeting and feel compelled to write a separate report. I have been advised that a final report will not be available to review before I leave on Sunday. While I concur in the Commission's report, I write separately to share my thoughts on what I believe is the role of the courts in assuring that indigent defendants receive quality representation. I also urge the adoption of standards of meaningful representation.

JUDICIARY ROLE

I do not feel in the face of information that we have received that we can wait for the creation of a permanent indigent defense commission. I have been a judge for over twenty years. For the last eleven years, I have served as the Supervising Judge of the Criminal Courts of the Seventh Judicial District. If a defendant appearing in my courtroom is not being provided with the effective assistance of counsel, then I am obligated to intervene and protect that defendant's rights. Yet many members of this Commission seem to believe that the Unified Court System is not under the same

obligation, even though we have concluded that "the right to the effective assistance of counsel...is not being provided to a large portion of those who are entitled to it" (Commission Report, p.15). I refuse to believe that the Judiciary has less of a legal and moral responsibility to protect the rights of indigent criminal defendants than do the individual judges who make up the Judiciary.

While I agree with the main recommendation in our report—the creation of a permanent Indigent Defense Commission-- the Judicial Branch cannot just stand back and wait for someone else to act while it presides over a system that this Commission has characterized as "both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York" (Interim Report, p. 16). It is my belief that the lack of involvement of the courts in this area has contributed to many of the problems identified in our reports. The creation of this Commission should be seen as only the first step in the Judicial Branch's aggressive campaign to address a crisis that is being played out in our courtrooms every day. In my view, it is time for the Executive, Legislative *and* Judicial branches to step forward.

I strongly urge the creation of a Judicial Office to address indigent defense services and respond in a meaningful way to assure that indigent defendants receive quality representation.

PERFORMANCE STANDARDS

I believe that a report from this commission should set standards for indigent

defense representation. I would propose the following as performance standards to be monitored and enforced by whatever means deemed appropriate by the Chief Judge¹:

DEFINITIONS

"Public defense representation" means legal representation of any person financially unable to obtain counsel without substantial hardship who is (1) accused of an offense, other than a traffic infraction, for which a sentence to a term of imprisonment is authorized upon conviction thereof or (2) entitled to representation under article 6-C of the Correction Law or section 259-i of the Executive Law.

"Providers of public defense representation" include individual attorneys; public defender offices; legal aid bureaus or societies; corporations, voluntary associations or organizations permitted to practice law under the authority of Judiciary Law § 495 (7); and assigned counsel plans.

"Institutional providers of public defense representation" are those providers of indigent defense representation identified in County Law §§ 722(1) and (2), including public defenders; legal aid bureaus or societies; any corporation, voluntary association or organization permitted to practice law under the authority of Judiciary Law § 495 (7). An assigned counsel plan is not an "institutional provider of public defense representation."

"Assigned counsel plan" means a plan for the assignment of private attorneys pursuant to County Law § 722 (3).

"Assigned counsel" are private attorneys assigned to provide public defense representation pursuant to County Law § 722 (3).

A. INDEPENDENCE

1. The function of providing public defense representation, including the selection, funding and payment of counsel, must be independent. In the performance of their legal duties, providers of public defense representation should be free from political influence or any influence other than the interests of the client, and should be

¹These standards are from the staff and I believe that they are based on the NYSBA standards but I would note that they do not include standards of representation in Specialty courts such as drug courts. "Critical Issues for Defense Attorneys in Drug Court" published by the National Drug Court Institute begins to address such issues.

subject to judicial supervision only in the same manner and to the same extent as all other practicing lawyers. The selection of providers of public defense representation, including the head of any institutional provider of public defense representation, shall be made solely on the basis of merit.

B. EARLY ENTRY OF REPRESENTATION

1. Effective representation should be available for every eligible person whenever counsel is requested during government investigation or when the individual is in custody. Provision of counsel shall not be delayed while a person's eligibility for public defense representation is being determined or verified.

2. Eligible persons shall have counsel available for any court appearance.

3. Counsel shall be available when a person reasonably believes that a process will commence which could result in a proceeding where representation is mandated.

4. Institutional providers of public defense representation are encouraged, whenever possible, to make counsel available to arrested or charged defendants even before formal commencement of the criminal action.

C. QUALIFICATIONS OF COUNSEL

1. Attorneys who provide public defense representation must have sufficient qualifications and experience to enable them to render excellent representation to their clients in each particular case. Providers of public defense representation shall never allow an attorney to accept a case if that attorney lacks the experience or training to handle it competently unless the attorney is associated with another attorney on the case who does possess the necessary experience and training.

D. TRAINING

1. All attorneys and staff who provide public defense representation must be provided with continuing legal education and training sufficient to ensure that their skills and knowledge of the substantive and procedural law and ethical rules relevant to the area of law in which they practice are sufficient to enable them to provide excellent representation.

E. SUPPORT SERVICES AND FACILITIES

1. Public defense counsel must be provided with the investigative, expert, social work, secretarial, foreign language interpretation and other support services and facilities necessary to provide high-quality legal representation.

2. All providers of public defense representation must have adequate working space for each attorney and staff member, private office and conference room space in which attorneys can meet with clients, sufficient library facilities and/or access to online legal research materials, and computers and other necessary technical and communication equipment.

3. All institutional providers of public defense services shall maintain a ratio of one investigator, secretary and paralegal for every three staff attorneys.

F. ATTORNEY-CLIENT RELATIONSHIP

A public defense attorney must:

1. Communicate with his or her client on a regular basis during the course of representation, preferably in person. Such communications should be private. The attorney should respond promptly to the client's mail inquiries, and should have the capacity to accept collect calls from clients. In no event should public defense lawyers place "blocks" on their telephones to avoid receiving client phone calls from jail.

2. Communicate with family or friends of the client, to the extent that the client waives the attorney-client privilege as to such communication.

3. Inform the client on a regular basis of the progress of the case.

4. Ensure that the client receives copies of all documents prepared or received by the attorney.

5. Provide the client with the opportunity to make an intelligent and well-informed decision in those instances when such decision is to be made by the client (i.e., whether to plead guilty, whether to be tried by a jury or judge, whether to testify, and whether to appeal).

6. Abide by the Disciplinary Rules of the Code of Professional Responsibility (Part 1200 of Title 22, of the New York Codes, Rules and Regulations), and in particular those Disciplinary Rules concerning conflicts of interest (§§ 1200.20, 1200.24, 1200.26 and 1200.27) .

G. CONTINUITY OF REPRESENTATION

1. To the greatest extent possible, the same attorney should represent a client continuously from the inception of the representation until the initiation of the appellate proceeding, if any, unless a court determines that (a) there is a conflict of interest;(b) there has been a breakdown in the attorney-client relationship which interferes with counsel's ability to provide zealous, effective and high-quality representation; or (c)

some unforeseen circumstance, such as illness, prevents counsel from continuing to provide zealous, effective and high-quality representation.

2. When a client has multiple pending proceedings, the attorney on any one of them shall immediately and thereafter regularly communicate with the attorney(s) on the other matter(s), to the extent that the client waives the attorney-client privilege as to such communication. If feasible, and with the approval of the client, the attorneys shall make every effort to transfer the representation on all pending matters to a single attorney.

3. Counsel assigned at the appellate or post-conviction stage shall provide continuity of representation during that proceeding.

4. Under no circumstances may any attorney who has represented a person pursuant to assignment to provide mandated legal representation accept any payment whatsoever on behalf of the client in connection with the matter that is the subject of the assignment.

5. Institutional providers of public defense representation are encouraged to provide holistic services to the greatest extent possible.

H. QUALITY OF REPRESENTATION

No attorney shall accept a criminal case unless that attorney can provide, and is confident that he or she can provide, zealous, effective and high-quality representation. Such representation at the trial court stage requires, at a minimum:

1. Obtaining all available information concerning the client's background and circumstances for purposes of (a) obtaining the client's pretrial release on the most favorable terms possible; (b) negotiating the most favorable pretrial disposition possible, if such a disposition is in the client's interests; (c) presenting character evidence at trial if appropriate; (d) advocating for the lowest legally permissible sentence, if that becomes necessary; and (e) avoiding or minimizing, if at all possible, any potential collateral consequences of the conviction or the charge.

2. Investigating the facts concerning the offense charged, including (a) interviewing the client; (b) seeking discovery and disclosure of the People's evidence, exculpatory information and impeaching material; (c) obtaining relevant information from other sources; (d) interviewing witnesses to the relevant events; and (e) obtaining corroborating evidence for any relevant defenses.

3. Researching the law, including, as appropriate, state statutory and state and federal constitutional law, relevant to (a) the offenses charged (and any lesser-included offenses); (b) any possible defenses; (c) the relevant sentencing provisions; and (d) any other relevant matters, such as issues concerning the

accusatory instrument, the admissibility of evidence, the prosecutor's obligations, speedy trial rights, or any other relevant federal or state, constitutional, common-law, or statutory issue. Counsel has a continuing obligation to stay abreast of changes and developments in the law.

4. Preserving the client's options at all stages of the proceedings, including (a) to seek a jury trial; (b) to proffer a defense; (c) to seek dismissal of the indictment; (d) to seek dismissal of the charges for denial of statutory or constitutional speedy trial rights; (e) to seek preclusion or suppression of evidence; (f) to seek discovery, exculpatory information and impeaching material; and (g) to seek an appropriate disposition consistent with the client's best interests and instructions.

5. Providing the client with full information concerning such matters as (a) potential defenses and their viability; (b) the weaknesses in the People's case; (c) plea offers; (d) potential sentencing exposure, including the relationship of all potential sentences to any other sentences, potential release dates, or available correctional programs; and (e) all direct and potential collateral consequences, including those concerning immigration, housing, employment, education, family, licensure, civic participation, government benefits, and financial penalties. No guilty plea should be taken without an assessment of the potential collateral consequences of the plea.

6. Ensuring that a foreign language interpreter is present at every court appearance of a client not proficient in English, and that a sign language interpreter is present at every court appearance of a hearing-impaired client in need of such services, and objecting to the court's going forward with any court proceeding until such interpreter is provided.

7. Filing appropriate pretrial motions for, among other things, (a) dismissal of the charging instrument for facial or evidentiary insufficiency; (b) joinder or severance; (c) dismissal of the charges for denial of statutory or constitutional speedy trial rights; (d) suppression or preclusion of evidence; and (e) provision of additional resources not otherwise available because of the client's financial circumstances. Counsel should research and update relevant case law in an effort to ensure that all written motions are of the highest quality.

8. Filing appropriate responses to motions, including motions in limine, brought by the People.

9. In the event of, and in advance of, trial, (a) developing a legal and factual strategy, using whatever investigative and forensic resources are appropriate; (b) preparing to select a jury; (c) preparing for cross examination of the People's witnesses and direct examination of defense witnesses; (d) developing a foundation for the introduction of defense evidence and for objecting to inadmissible evidence offered by the People; (e) formulating an opening statement; (f) crafting an effective

summation; and (f) drafting requests for jury instructions.

10. In the event of, and in advance of, sentence, (a) gathering favorable information and, where appropriate, presenting that information in written form; (b) reviewing the probation department report to ensure that it is accurate and taking whatever steps are necessary to correct errors; and (c) utilizing forensic resources if appropriate.

11. Preserving all appropriate objections for appeal.

12. Following a final disposition other than a dismissal or acquittal, (a) advising the client of the right to appeal and the requirement to file a notice of appeal; (b) filing a notice of appeal on the client's behalf if the client so requests; (c) advising the client of the right to seek appointment of counsel and a free copy of the transcript; (d) assisting the client in applying for appointment of counsel and a free copy of the transcript if the client requests; and (e) cooperating fully with appellate counsel.

13. Following a disposition from which the prosecutor has a right to appeal, (a) advising the client of the possibility that the prosecutor will pursue an appeal; (b) advising the client of the client's right to appointment of counsel should the prosecutor appeal; and (c) assisting the client in applying for appointment of counsel if the client so requests.

I. APPEALS

Zealous, effective and high-quality representation at the appellate stage means, at a minimum:

1. Obtaining and reviewing all portions of the record.
2. Researching the applicable law, including substantive law, procedural law and rules regarding the appeal.
3. Pursuing all appropriate post-conviction remedies.
4. Strategically selecting among the issues presented by the facts, considering the strength of authority, the facts, and the standard and scope of review. The selection of issues must be made with an awareness of the consequences for later post-conviction proceedings.
5. Preparing a statement of facts that accurately sets out the significant and relevant facts, with supporting record citations.
6. Presenting legal arguments that apply the most relevant and persuasive law to the facts of the case.

7. Writing in a clear, cogent and persuasive manner.

8. Requesting oral argument when such argument would be in the client's interests and, when oral argument is granted, being thoroughly prepared and presenting the argument in a clear, cogent and persuasive manner.

9. Preparing and filing an application for leave to appeal to the Court of Appeals should the client not prevail on the appeal to the appellate court, and preparing and filing an opposition to the prosecutor's application for leave to appeal to the Court of Appeals should the client prevail on the appeal to the intermediate appellate court.

10. In the event of an affirmance of the client's conviction by the Court of Appeals, or the denial of leave to appeal, advising the client of (a) the right to and procedures by which the client may seek certiorari to the United States Supreme Court; (ii) the circumstances under which the client may file a state court application for post-conviction relief; and (c) the circumstances under which the client may file a federal petition for a writ of habeas corpus, including the time limitations and the requirements of preservation and exhaustion.

J. SUPERVISION AND EVALUATION

1. All institutional providers of public defense services shall maintain a ratio of one supervisor for every ten staff attorneys.

2. The performance of each attorney and support staff shall be evaluated annually, by written evaluation compiled by the attorney's supervisor.

3. Every public defense attorney assigned to carry a general caseload shall conduct a sufficient number of hearings and trials to maintain proficiency in criminal defense litigation. It shall be the responsibility of the attorney's supervisor to ensure that each attorney maintains a sufficiently active litigation practice as evidenced by a demonstrated ability and willingness to take appropriate cases to hearing and trial.

K. CASELOAD

1. Under no circumstances shall a public defense attorney annually handle more than 150 felonies, 400 misdemeanors, or 25 appellate assignments, as the case may be.

2. These caps should be appropriately weighted and adjusted for attorneys who handle both misdemeanors and felonies, or both trial-level cases and appeals.

3. No attorney employed by an institutional provider of public defense representation shall be permitted to maintain a private law practice.)

Such standards should also include performance and caseload standards for defense attorneys representing clients in problem solving courts.

I conclude by expressing my gratitude to Judge Kaye for appointing me to this commission. It was a terrific learning experience. I also express my appreciation to the staff who enthusiastically provided support and information throughout the process specifically John Amodeo, Paul Lewis, Robert Mandelbaum and David Markus. They were smart, resourceful, and respectful. It was a pleasure to work with them.

Respectfully submitted,

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