New York State Office of
Indigent Legal Services

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INDIGENT LEGAL SERVICES BOARD MEETING

April 8, 2022

Association of the Bar of the City of New York
42 West 44th Street, New York NY

This meeting will occur in-person. A remote option is available via this link: https://meetny.webex.com/meet/peter.avery (hit: Ctrl + Click to follow link or copy and paste it into your web browser). We suggest that you check your connection 15 minutes prior to the meeting and contact Peter Avery at Peter.Avery@ils.ny.gov or 518-469-1594 if you have any trouble connecting.

AGENDA

I. Approval of Minutes of December 3, 2021 meeting (attachment)

II. State Fiscal Year 2022-23 Budget Update (materials to be forthcoming)

III. Tenth Annual Report of the Board **(vote)** (attachment)

IV. Parental Representation: Data Collection Initiatives (attachment)

V. Updates: WNY Regional Support Center and Statewide Appellate Support Center

VI. The Impact of Discovery Reform Implementation in New York: Report of a Defense Attorney Survey (attachment)

VII. Announcements About Next Board Meeting, June 3rd
- Board approval of the State Fiscal Year 2022-23 ILS Aid to Localities allocation
- JCOPE Ethics Training

Minutes for the Indigent Legal Services Board Meeting

December 3, 2021
11 A.M.
Virtual Meeting on WebEx

Board Members Present: Chief Judge Janet DiFiore, Judge Carmen Ciparick, Judge Sheila DiTullio, Joe Mareane, Lenny Noisette, Suzette Melendez, Vince Doyle

ILS Office presenters: Patricia Warth, Burton Phillips, Cynthia Feathers, Melissa Mackey, Lucy McCarthy, Nora Christenson

Minutes taken by: Mindy Jeng

I. Approval of Minutes of September 24, 2021 meeting

A board member moved to approve the minutes, and the motion was seconded. A vote was taken, and the minutes were approved unanimously.

II. Brief Updates

A. Staffing Updates & Introduction to Burton Phillips

Patricia Warth updated the Board and stated that the Grants Unit hired a new staff member, Petros Papanicolaou. The Grants Unit will also be hiring an additional staff member. The paperwork for Burton Phillips' Counsel position was finally approved, though the Division of Budget needed to do its due diligence before Burton can come on board. Thus, he has not officially started yet, but he has joined the call today.

Burton Phillips said he went to SUNY Buffalo Law School. He has lived and worked in Albany for the last thirteen years. He served as Albany Chief of Staff and Counsel to Senator Brad Hoylman. He worked with a diverse array of stakeholders in a wide variety of issues which will be applicable to his new position with ILS.

B. Approval of Statewide Appellate Support Center

Patricia stated that prior to the pandemic, there was an approval for a Western New York Regional Support Center. The pandemic delayed implementation of the resource center, but ILS has now started the process again, and they are looking for office space in Buffalo. More recently, the Division of Budget has also approved ILS' request to launch a Statewide Appellate Support Center.

Cynthia Feathers shared that the Statewide Appellate Support Center will be a gamechanger for ILS. It will assist attorneys with post-conviction procedures, 440.10 motions, litigation support (issue preservation, memoranda of law, etc.). It will involve intense consultation

but no direct representation. ILS is looking to hire 5 attorneys and 3 non-attorney professionals. They are looking into space for the Appellate Support Center.

A board member asked how the process will work. Cynthia Feathers said that ILS will educate the defense bar and chief defender groups that the services are available. They often do receive overtures for help. There will be structural approaches, such as more education on 440.10 motions, resentencing motions, and litigation support. Often defense counsel does not preserve the defendant's right to appeal. There are structural problems, and ILS will now have the resources to address these issues in a meaningful way and to use the Center as a forum for consultation and collaboration with appellate attorneys across the state on some of these structural issues.

Vince Doyle joined the meeting at this time.

III. *Hurrell-Harring* Statewide: October 2021 Caseload Report Overview

Patricia Warth said that Fall had been report writing season for ILS. The HH Statewide Expansion Team has submitted a comprehensive report on caseloads, and the HH Settlement Team submitted a report on caseloads and a report on counsel at arraignment. ILS is giving an update to the Board on all of these activities.

Melissa Mackey gave a slide presentation as an overview of the HH Statewide Expansion Team's caseload report. The report is required under Aid to Localities Budget (L. 2021, c. 53). It utilizes data from the ILS-195 form that all mandated representation providers must submit. Highlights of the report are as follows: the number of new case assignments in the 52 counties (not including NYC and the *Hurrell-Harring* counties) declined from 2019 in 2020 (a 39.7% decrease in new case assignments); the number of new case assignments in New York City was lower in 2020 than in 2019 (a 52.7% decrease in total new case assignments); there was a 63.8% increase in Family Court cases between 2019 and 2020 in New York City; in the 52 upstate counties, there was an increase in the number of attorney staff from 2019 to 2020, but a slight decrease in the number of non-attorney staff from 2019 to 2020; in New York City, between 2019 and 2020, there was an increase in the number of attorneys and non-attorneys.

The report also has data on the total expenditures for institutional and assigned counsel providers for the 57 upstate counties and for NYC. Between 2019 and 2020, the provider offices were still increasing their expenditures even in the midst of the pandemic, with the majority of the increase being driven by the institutional providers. The assigned counsel programs experienced a decrease in expenditures, but this is almost certainly a pandemic-related anomaly because of the reduction in new case assignments and the manner in which ACP attorneys are paid.

The data also showed that for assigned counsel attorneys, the average spending per weighted case increased from $270 per weighted case in 2019 to $389 per weighted case in 2020. They also found it concerning that the average spending per weighted case for criminal cases was $463, while average spending per weighted case for Family Court cases was $234.

Melissa finished by highlighting two overarching themes. First, there was still a significant increase in expenditures and staffing between 2019 and 2020, despite the pandemic. Second, there continues to be a discrepancy between funding for criminal court cases and Family Court cases.

Patricia thanked the support of the Division of Budget team. The funding continued to flow during the pandemic, and ILS was able to continue to pay counties and issue contracts to ensure continuity of ILS funded quality improvement initiatives.

A board member asked how ILS would address the reasons behind the discrepancy between the expenditures between criminal court cases and Family Court cases. Patricia emphasized that mandated providers have the motivation and expertise to improve the quality of Family Court representation but lack the resources; they cannot spend what is not there. ILS must continue to advocate for increased state resources for parental representation in Family Court

IV. Parental Representation: What We Learned from the Upstate Family Defense RFP Process

Lucy McCarthy gave a presentation on the parental representation RFP. ILS issued an RFP in August soliciting applications for grants totaling $2.5 million over three years, targeting Family Court Article 10 cases (neglect and abuse cases). There were 25 applications. It was a very competitive grant. The applications revealed compelling information about the status of mandated parental representation. Very few providers have the resources needed for multi-disciplinary representation, and very few providers have adequate funds to hire experts. Not all providers seem aware of the ILS practice standards. All of the providers noted that they knew about the caseload standards issued by ILS. Many of the counties reported double or triple the caseload standards compared to the current ILS standards. Many of the providers stated that their clients lacked the basic necessities of life to allow them to successfully parent their children despite government involvement in their family.

Many providers/counties are committed to initiating or formalizing pre-petition representation if the funding is provided.

A board member said that the team is spot on in terms of their findings, and it was consistent with what she has seen as well. The board member said that money is a huge issue for getting experts. She also sees the acute need for social workers to work together with providers.

Angela Burton noted that better financial support for more effective lawyering would in turn, help change the culture in Family Court, enhancing the fairness of proceedings and promoting access to the supports families need to keep them intact.

V. *Hurrell-Harring* Settlement: What Five County Arraignment Data Tells Us About Bail Reform Implementation

Nora Christenson gave a brief overview of the recent findings of the HH Settlement Team's Counsel at Arraignment report. Since the five HH counties began implementing the settlement

they have reported data on arraignments and counsel at arraignments. In recent years, ILS can say that the systems have been able to ensure counsel at arraignment in those counties.

They have also been collecting information on arraignment outcomes. Since bail reform, ILS has looked at various data to try to see the impact of bail reform on arraignment proceedings. There was a decrease overall in the number of case assignments. ILS is aware that COVID also has an effect on the data, but the data can still be useful to look at bail reform's impact. ILS looked at the time period prior to bail reform (July 2018 to June 30, 2019) and the time period from July 2020 to June 2021. There was a marked decrease in the use of pre-trial detention. This was most pronounced in misdemeanor/violation cases. There was also a reduction in pre-trial detention the non-violent felony cases. Violent felonies were the least affected by bail reform. If the judges had the option to use cash bail, it appears that they still opt to do so in those cases.

The data has shown that the bail reform laws are reducing reliance on pretrial detention. Washington County is a good example. Prior to the Settlement, the county did not have systems in place for counsel at arraignment. They quickly put those in place after the HH settlement, and they were one of the first counties to establish a Centralized Arraignment Part (CAP). After CAP implementation, ILS closely monitored arraignment data to see if the CAP impacted release rates and found a slight reduction in use of pre-trial detention. One thing ILS learned was that bail was often set, even in lower-level cases, at small amounts. But defendants could not pay even these small amounts, and therefore many were detained pre-trial. After bail reform implementation, this changed significantly, and there has been a dramatic reduction in pre-trial detention in lower-level cases – e.g., a 72% reduction in the use of bail in misdemeanor cases in Washington County.

VI. In Memoriam: Susan John, former Assembly Member and ILS Board Member (2010-2013)

The Chief Judge paid tribute to Susan John, who was a founding member of the Board. She was a lawyer, a graduate of Syracuse Law School. She served in the Assembly for 20 years. She served her constituents with distinction and honor. She served on the ILS Board from 2010 to 2013 as an engaged member. She was an invaluable source on the inner workings of government. She was an outstanding public servant, who made a meaningful contribution to ILS.

The Board sends its heartfelt condolences to her family, friends, and colleagues.

VII. Schedule of Board Meetings for 2022

The format and location will be determined.

April 8th, 2022
June 3rd, 2022
September 23, 2022
December 2, 2022

A motion was made to adjourn the meeting and seconded. The meeting adjourned at 12:03 pm.

New York State Office of Indigent Legal Services

Tenth Annual Report

INDIGENT LEGAL SERVICES BOARD

CALENDAR YEAR 2021

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Director's Summary

The Office of Indigent Legal Services (ILS) opened its doors in February 2011 with just one staff member: Director Bill Leahy. At that time, ILS was responsible for disbursing $77 million to localities for improving the quality of mandated representation. Fast forward to June 2021, when Bill retired. By then, the ILS Office had grown to over 30 staff members and the responsibility for disbursing quality improvement funds had more than quadrupled to just over $354 million.

This significant growth was not without challenges. Indeed, in its first year, ILS was met with legislative skepticism about the Office and a $10 billion State budget deficit that fueled reluctance to adequately fund it. Subsequent years saw, among other events, the ongoing *Hurrell-Harring v. State of New York* lawsuit, which had been reinvigorated by a 2010 Court of Appeals decision; the Office of Court Administration funding for the 2010 Chief Administrative Judge rule setting criminal caseload standards in New York City but allowing the problem of overwhelming caseloads to persist in the rest of the state; the 2014 settlement of the *Hurrell-Harring* litigation, which although historic in establishing a sound framework for public defense reform, left out 52 counties and New York City; the 2017 legislation extending the *Hurrell-Harring* settlement initiatives in criminal cases to every locality in the state, though still failing to address the crisis in parental defense; and the unprecedented public health emergency that led to a budget crisis in 2020.

Bill navigated these challenges with an uncanny ability to perceive and seize opportunities to further ILS' mission. In so doing, he set for the Office a tone of respect and collaboration. Because of Bill, every dollar of ILS funding is disbursed after collaboration with local officials, which must include meaningful consultation with public defense providers about how the funding will be used to bolster the quality of representation. By requiring meaningful consultation with defenders, Bill effectively elevated their stature and importance. Requiring an explanation as to how the funds will improve quality is a constant reminder that quality improvement is ILS' fundamental mission.

The same tone of respect and collaboration has informed the development of ILS standards. Between 2011 and 2021, ILS promulgated caseload standards for criminal defense and parental representation, standards for determining financial eligibility for assignment of counsel in criminal and Family Court matters, standards for assigned counsel programs, standards for appellate and post-conviction representation, and standards for representing parents in state intervention matters. All these standards were developed via a collaborative process that included public hearings, utilization of working groups, or both, allowing ILS to draw upon the experiences and expertise of defenders and other stakeholders from across the state.

The strong foundation that Bill created over the 10 years he led ILS was evident in 2021, which proved to be another challenging year as the Covid-19 pandemic ebbed and flowed in ways that were often dispiriting. Yet, as discussed in this report, ILS persisted in its progress towards improved quality representation. Highlights include:

- Ongoing implementation of the *Hurrell-Harring* (HH) settlement resulting in the five settlement counties having the resources needed to meet the challenges posed by the Covid-19 pandemic and still fully implement bail and discovery reforms.

- The State appropriating $200 million in the State Fiscal Year 2021-22 budget for the fourth year of the five-year phase-in of the HH settlement's extension statewide, with the HH Statewide Team continuing its collaboration with localities to develop plans pursuant to Executive Law § 832(4) for improved quality public criminal defense.
- ILS conducting five virtual ACP Summits, bringing together assigned counsel program leaders from across the state to discuss issues relevant to transforming the quality of criminal defense representation delivered by assigned counsel attorneys.
- ILS developing caseload standards for parental representation, awarding a second Upstate Model Family Representation Office to Monroe County to build upon the success of the first such award to Westchester County, and successfully reaching a memorandum of understanding with the New York State Office of Children and Family Services to make federal Title IV-E funding available to localities for enhanced quality representation of parents in state intervention matters.
- ILS persisting in its efforts to improve the quality of appellate and post-conviction representation by, for example, continuing our weekly *Decisions of Interest* email and providing a platform for the DVSJA Statewide Defender Task Force, demonstrating the value of statewide collaboration to promote full implementation of a new law.
- ILS conducting six virtual convenings for county-based Data Officers to enhance the quality of data collected from public defense providers, consistent with the recommendation of the Kaye Commission that a comprehensive system for statewide data collection be established.
- The ILS Grants Unit continuing its focus on ensuring that funding flows to the counties and New York City, processing $16 million more in claims than in previous years and enhancing efficiencies to pay claims and process contracts in a timely manner.

Despite the progress made over 10 years, challenges still exist. The two most significant are the statutory rates paid to assigned counsel under County Law § 722-b, which have remained stagnant for 18 years, and the dire need for a State fiscal commitment to improve the quality of legal representation delivered to parents in Family Court matters. In 2006, the Kaye Commission warned that "[f]amily court matters are an integral part of New York's indigent defense system and cannot be removed from an overall consideration of the current system…" Yet, while the State has made a commendable fiscal commitment to improving the quality of indigent public defense, the representation of parents in Family Court matters has been left out – effectively removed from an overall consideration of New York's current public defense system for purposes of State funding. The Covid-19 pandemic, which has added fiscal and emotional stress to families, further exacerbated the crisis in parental representation.

Over his 10 years as Director, Bill laid a foundation for ILS that will serve us well as we build upon the progress made thus far and meet the challenges that lie ahead. We do so inspired by Bill's unrelenting commitment to and fearless advocacy for quality representation. For that reason, it is only appropriate that we dedicate this Tenth Annual Report to Bill Leahy.

Patricia J. Warth
April 2022

Criminal Defense Reforms and Quality Initiatives

Hurrell-Harring Settlement Implementation

The *Hurrell-Harring v. State of New York* settlement entered the sixth year of implementation in 2021. Under the leadership of Chief *Hurrell-Harring* Implementation Attorney Nora Christenson, the HH Team continued efforts in Onondaga, Ontario, Schuyler, Suffolk, and Washington counties to ensure meaningful access to justice and improve the quality of criminal defense representation. The HH Team also began working with seven additional counties (Livingston, Madison, Nassau, Oswego, Tompkins, Warren, and Wayne), as part of the statewide expansion of HH reforms under Executive Law § 832(4).

Eligibility and Counsel at Arraignment

In April 2021, the HH Team issued its fifth update on implementation of Eligibility Standards in the five HH counties, which demonstrated that despite Covid-19, the HH providers had the tools and structures needed to ensure timely access to counsel due to the settlement and strong leadership. Some HH providers also worked to connect with clients earlier for eligibility screening and assignment, including prior to arraignment, consistent with Eligibility Standard III. Timely assignment has meant earlier connection to services, immediate case work, and efficient court proceedings.

In November 2021, the HH Team issued the sixth update report on implementing the settlement's counsel at arraignment obligations in the HH counties. This report demonstrated the continued success of providers' systems for ensuring that people are represented by counsel at their arraignment. As the second full year of bail reform implementation, 2021 also provided an opportunity for the HH team to examine its preliminary impact on providers' arraignment practice. Since 2016, providers in the HH counties have collected and reported information on arraignments, including the type of arraignment (custodial or non-custodial) and outcomes (incarceration or release). An analysis of this information comparing pre- and post-bail reform periods was striking. Across all five HH counties, pre-arraignment and pretrial incarceration declined. The impact was particularly evident in misdemeanor and violation cases. There was also a modest reduction in reliance on pretrial incarceration in non-violent felony cases and a slight reduction in violent felonies. We preliminarily concluded that in the HH counties bail reform is having the intended impact of reducing reliance on pretrial incarceration.

Caseloads Standards and Quality Improvement

In January 2021, as part of ILS' ongoing obligation under section IV(E) of the settlement, the HH Team began a multipronged effort to assess the efficacy of caseload standards implementation in the HH counties. An attorney survey on the impact of Covid-19 on defender practice and 18 virtual interviews and focus groups culminated in an October 2021 update report, *Evaluating the Effectiveness of Caseload Standards in the Hurrell-Harring Counties*. The report sheds light on improvements due to settlement funding and initiatives, as well as external pressures at play. The infrastructure and resources implemented pursuant to the settlement allowed HH leaders to meet

the challenges of Covid-19, as well as adapt their organizations to the recently enacted discovery reforms. However, defenders have been adversely impacted by low compensation rates for assigned counsel and a lack of funding for parental representation. This information will help guide both the HH Team's ongoing implementation work as well as the Office's overall work to improve the quality of mandated representation.

Statewide Expansion of the Settlement

The Statewide expansion of the *Hurrell-Harring* reforms continued with the fourth installment of State funding in State Fiscal Year 2020-21, increasing to $200 million the funding available to extend reforms statewide. The Statewide Team has continued to negotiate budget proposals and develop work plans with each locality. Due to the conscientious process of crafting the original five-year plans and the fact that implementation could not start until after the first allocation of funding in the State Fiscal Year 2018-19 budget, the county budgeting process has operated with a lag of about one year. In 2021, however, under the leadership of Interim Chief Statewide Implementation Attorney Matt Alpern, ILS took steps to advance the budget negotiation process. First, the HH Team collaborated with the Statewide Team in seven counties. This joint effort reflects ILS' commitment to a smooth transition in combining the Teams' resources under one umbrella when the original settlement concludes in 2023. Second, the Statewide Team simultaneously negotiated many Year 3 and 4 budgets and completed Year 4 budgets for some counties that had completed their Year 3 budget process. As we enter Year 5, these efforts have brought many counties current. ILS expects to further close, if not erase, the gap in 2022 by negotiating combined Year 4 and 5 budgets, as well as moving forward with Year 5 budgets for counties that have finished their Year 4 process.

Early Impact of Statewide Expansion: Caseloads, Quality, Counsel at First Appearance

Throughout 2021, counties progressed in caseload reduction, quality improvement, and providing defense counsel at first appearance. The Statewide Team focused on ensuring that, as counties negotiate their Year 3 and 4 budgets, they are on track to meet caseload standards. This entailed careful analysis of each provider's current staffing and an allocation of resources to hire additional attorneys.

A commonly seen obstacle to caseload standard compliance is the struggle many counties continue to experience in recruiting staff. To improve recruitment, the Statewide Team has negotiated competitive salaries, increased office space, and enhanced resources for providers. Given vastly increased funding available from the State, counties can significantly enhance resources for all providers in supervision, training, access to non-attorney professional services, client communication, and attorney qualifications.

As a result of these efforts, localities are developing the structure of their Assigned Counsel Programs, increasing supervisory capacity, providing broad training options, bolstering their investigation, expert, and sentencing advocacy resources, ensuring that attorneys can communicate effectively with their clients, and supporting providers in recruiting and retaining qualified staff.

In 2021, nearly all localities had programs in place to provide counsel at arraignment. The lack of an attorney at arraignment is now the exception, rather than the unconstitutional norm that existed prior to the creation of ILS. These efforts have been aided by ILS' partnership with the judiciary and other stakeholders, as well as the creation of Centralized Arraignment Parts. ILS has provided funding to compensate attorneys for the extra time they must remain on call, as well as for technology and other resources to support counsel at the first appearance. In 2022, ILS expects to focus on the quality of representation provided at arraignment, as well as ensuring that counsel is present at arraignments in youth parts and during returns on arrest and parole warrants.

Other *Hurrell-Harring* and Statewide Team Quality Initiatives

In 2021, ILS hosted five virtual Statewide ACP Summits, which were well attended by Assigned Counsel Program (ACP) leadership from across the state. ACP leaders discussed topics such as how to creatively use ILS funding, regional immigration centers, the development and implementation of mentoring and second-chair programs, data collection, and ACP handbooks. Most importantly, ACP leaders across the state have continued to forge connections and strengthen the statewide ACP community through these summits.

ILS also partnered with the nationally acclaimed organization Gideon's Promise to pilot a New York-tailored leadership program for public defense leaders across the state. Gideon's Promise created content on topics ranging from client-centered representation to values-based recruitment for presentation to leaders during eight monthly hour-long sessions. Eleven leaders from a cross-section of New York State representing both HH and Statewide counties are participating. The program began in October 2021 and will run through May 2022 and has offered defense leadership an opportunity to discuss culture change and other related topics, including brainstorming concrete steps to achieve it in their offices.

Finally, with the 2019 changes to the state's discovery laws for criminal cases, public defense providers have seen an increased need for forensics resources and discovery management tools. In 2021, ILS worked with providers statewide to support these needs by funding programs intended to enhance access to forensics resources, as well as funding technology to assist with processing voluminous discovery materials.

Quality Enhancement: Parental Representation

Under the leadership of Angela Burton, the Director of Quality Enhancement for Parent Representation, ILS effectively used the very limited State funding available for improved quality parental representation for several important initiates in 2021.

Caseload Standards

In 2021, ILS finalized the *Caseload Standards for Parents' Attorneys in New York Family Court Mandated Representation Cases*. Contingent on the availability of State funding to implement them, the ILS Board approved the standards, which were the product of collaboration among the ILS Parent Representation and Research Units, the Office of Court Administration, Welfare

Research Inc., and the ILS Parental Representation Advisory Council. The process used to create the revised standards included a time-tracking study, a review of data on Family Court petitions, and extensive consultation with parental representation attorneys. The development of the standards was spurred in part by the *Interim Report of the Commission on Parental Legal Representation*, which declared that excessive caseloads prevent effective parental representation.

Eligibility

The Parent Representation and HH Teams updated existing ILS Eligibility Criteria and Procedures to apply to Family Court. The revised *Standards for Determining Financial Eligibility for Assigned Counsel*, approved by the ILS Board in December 2020 and issued in February 2021, represent a critical next step in safeguarding access to counsel for all mandated representation. ILS conducted trainings for judges and providers of Family Court and criminal court representation. We updated model applications and related eligibility forms and provided a fillable PDF to facilitate electronic transmittal of this information. The updated standards provide a streamlined, fair, and comprehensive basis for determining financial eligibility for counsel.

Funding

In 2021, ILS and the New York State Office of Children and Family Services reached a Memorandum of Understanding (MOU) as to the State's plan to access federal matching funds under Title IV-E of the Social Security Act, which reimburses state and local governments for certain expenditures for representation of children and parents in child welfare matters. The MOU requires each county applicant to collaborate with ILS to create a plan that ensures that federal funding will be used to enhance the quality of legal representation provided to parents in child welfare matters. FAQs and forms on the ILS website facilitate enrollment.

The State Fiscal Year 2021-22 budget also included $2.5 million in new State funding for an Upstate Family Defense (Child Welfare) Quality Improvement and Caseload Reduction Grant RFP. This grant was awarded to five counties—Cortland, Erie, Monroe, Steuben, and Suffolk. Each county will receive a total of $500,000 over three years to support innovative programs to improve the quality of representation for parents accused of child maltreatment.

Upstate Model Offices

In 2021, ILS continued its work to implement the first Upstate Model Family Representation Office via the competitive grant awarded to Westchester County in 2019. Westchester selected Legal Services of the Hudson Valley (LSHV) to operate the model office. ILS, LSHV, and the Westchester County Department of Social Services developed protocols for pre-petition representation of clients during child protective services investigations. This pilot is the first State-funded program offering such timely representation—as envisioned by the ILS *Standards for Parental Legal Representation in State Intervention Matters* and the *Interim Report of the Commission on Parental Legal Representation*. None of the cases closed during the initial six months of this model office operation resulted in an indicated report, Family Court Article 10 petition, or removal of a child. To help provide stability and address poverty and safety concerns of families involved in child welfare cases, LSHV also provided representation or assistance

regarding custody, family offenses, support, housing, public benefits, and immigration. Building on the success of the Westchester Model Family Representation Office, last year, ILS awarded a grant for a second model office to Monroe County.

Quality Enhancement: Appellate Representation

The Director of Quality Enhancement for Appellate and Post-Conviction Representation, Cynthia Feathers, continued to work with providers on several fronts to improve the quality of appellate and post-conviction representation.

Appellate Defender Council

The ILS Appellate Defender Council is devoted to advancing quality in mandated appellate representation in New York criminal and Family Court appeals. The Council's membership reflects the diversity of appellate representation in New York State. Many of the Council's members lead institutional programs, while others provide appellate representation at upstate rural public defender offices and 18-B appellate panels. The Council meets several times a year and seeks to address appellate issues of statewide importance.

In November 2021, the Council partnered with the New York State Bar Association to offer an innovative full-day CLE program. A centerpiece of the program was a fascinating panel discussion about criminal leave applications, featuring New York Court of Appeals Associate Judge Jenny Rivera and two seasoned practitioners. Other cutting-edge topics included discovery reform and statutory speedy trial dismissals. Another full-day CLE program, presented in May 2021 with the Erie County Bar Association, featured a presentation by an Appellate Division justice on harsh and excessive sentences, and sessions on *Carpenter v. U.S.* issues and post-conviction representation for noncitizens, among other topics.

DVSJA and Other Activities

ILS also provided ongoing support for the implementation of the Domestic Violence Survivors Justice Act (DVSJA). The Appellate Director continued to serve as a hub in providing information about the recently enacted law to pro se defendants with convictions in upstate counties and connecting them with attorneys. In addition, ILS continued to provide a platform for the DVSJA Statewide Defender Task Force. This 40-member group—which includes defenders, defender associations, and a victimology scholar—meets monthly to brainstorm about cases and coordinate research, resources, and trainings to meet the challenges of the new law.

Another continuing ILS appellate initiative in 2021 was the *Decisions of Interest*—summaries of key appellate decisions from the prior week, which are transmitted to public defense attorneys via the ILS appellate listserv. ILS continues to receive a steady flow of positive comments about the value of the weekly decision summaries to the daily practice of both trial and appellate attorneys.

Finally, a highlight of 2021—and a harbinger of great things to come—was the State's approval of funding for a Statewide Appellate Support Center. The Center will allow ILS to fulfill a long-

held vision in the appellate realm starting in 2022. The Center's appellate attorneys and support staff will work together with the Appellate Director to implement initiatives to improve appellate representation, to provide robust consultation on appellate and post-conviction matters, and to offer litigation support.

Immigration Assistance

In *Padilla v. Kentucky* the U.S. Supreme Court held that the Sixth Amendment requires defense counsel to provide clients with specific advice about clear immigration consequences of a plea bargain. Giving such advice requires knowledge of complex immigration laws, and many defender offices cannot afford to hire in-house experts. To ensure that defense attorneys have access to the requisite expertise, in 2016 ILS created a statewide network of six Regional Immigration Assistance Centers (RIACs). Last year, RIAC attorneys continued their essential functions, which include providing institutional defenders and assigned counsel panel attorneys with detailed written advisals about immigration consequences for noncitizen clients.

The RIACs collectively responded to more than 2,000 requests for assistance, primarily about criminal defense, but also about appellate, post-conviction, and family law matters. To encourage attorneys to use their services, the RIACs conducted strategic outreach efforts. They also offered extensive trainings to both attorneys and judges. All such activities receive significant support from ILS, which fully funds the RIACs through three-year grants and provides ongoing assistance via meetings with individual RIACs and providers in target counties and plenary meetings to discuss best practices. ILS research analysts also streamlined the instrument used to collect annual data from the RIACs and in 2021 produced a statewide report to measure the contributions of each RIAC and identify areas for future attention.

In each of the six regions in the RIAC network, defense attorneys and the immigration law experts at the RIACs continued to join forces to ensure effective representation of noncitizen clients. Much is at stake in such collaborations. The way plea bargains are shaped may mean the difference between clients maintaining their lives in the United States or being permanently separated from a community of family and friends and banished from a country long considered home. Often the RIACs can help defense counsel persuade a prosecutor to use an alternative plea deal providing for a conviction of the same level for the same jail time, while avoiding an equitable penalty of deportation or inadmissibility.

Research

Under the leadership of Melissa Mackey, Director of Research, ILS' Research Unit continued its efforts to realize the recommendation of the 2006 Kaye Commission that a comprehensive statewide data collection system be developed to provide a better picture of the mandated representation in New York.

Data Reporting

Pursuant to ILS' responsibility for collecting financial, workload, and other information, in April 2021 providers submitted Part 1 (Expenditure and Staffing data) and Part 2 (Case Assignment data) of the ILS-195. This marked the first time that providers submitted aggregate caseload data aligned with the ILS caseload standards categories. In January 2021, providers were also required to begin the collection of ILS-195 Part 3 data on case outcomes. ILS also used our Performance Measures Progress Report Form (PMF) to gauge the pace of implementation of the statewide expansion of the HH settlement. Analysis of data received formed the basis of the second Performance Measures Annual Report submitted to the Division of Budget in 2021. ILS continued to work with providers who do not have a case management system to ensure that plans are in place to begin collecting both Parts 2 and 3 of the ILS-195. ILS also reached out to case management software vendors to create a comparison chart summarizing the functionality of each vendor's system.

Following the award of the first Upstate Model Family Representation Office Grant to Westchester County, ILS collaborated with Legal Services of the Hudson Valley to create data-reporting requirements to assess the impact of pre-petition practice. Beginning in April 2021, LSHV began quarterly reporting of data to ILS and will continue to do so throughout the three-year grant cycle. This information will also inform practices regarding the second model office awarded to Monroe County in July 2021.

Data Officers

County data officers continued to play a critical role in data collection and reporting. ILS hosted six data officer trainings in 2021. Topics included the ILS-195, the PMF, and the importance of data in the annual reports ILS produces on provider caseloads and the Performance Measures. ILS also created a Data Officers Best Practices Guide. After a year-long delay due to Covid-19, ILS welcomed two internal data staff members. Data Scientist Cie-Nicholas Watson assists Manager of Information Systems Peter Avery with various technology matters within the office and works closely with the county data officers in monitoring their efforts to ensure timely collection and reporting of data. Data Outreach Officer Reilly Weinstein is the primary liaison between ILS and county data officers, and she played a key role in data officer trainings.

Other Activities

As set forth in the Parental Representation section of this report, in 2021 the ILS Board approved Caseload Standards regarding parental representation, following a comprehensive process in which the ILS Research Team was deeply involved.

ILS and Cornell University joined forces to create a summer intern program for undergraduate students interested in public defense, and two interns worked at ILS in summer 2021.

Grants

The Grants Unit continued to increase the efficiencies developed in 2020, processing 1,056 claims for a total of $83,455,640 in payments sent to counties in 2021. Although 2021 produced approximately the same number of claims as processed in 2020, the total payments increased by over $16 million, an expected increase given the HH Statewide expansion funding.

In addition to processing claims, the Grants Unit sent out 231 contracts and contract extensions, which are essential to maintaining and enhancing the work of public defense providers throughout the state. On average, these contracts and contract extensions were processed within 27 days, which includes the receipt of signed copies from the counties, approval by the Office of the Attorney General and Office of the State Comptroller when appropriate, execution by ILS, and transmittal to counties of fully executed documents.

Although ILS only recently started to track contract processing times, the Grants Unit receives continuous praise from counties and providers on the improved speed and consistency with which contracts are executed and claims are processed and paid. This is due in large part to Jennifer Colvin, Manager of Grants Solicitation and Distributions, who has cultivated a team attitude centered around customer service. In addition to the guides *General Guidelines for Claim for Payment Processing* and *The Art of Good Grant Proposals: Effective Budgets & Budget Narratives*, developed in 2020, Jennifer and her team provide individualized and ad hoc training to county and provider staff responsible for submitting and managing ILS claims.

The Grants Unit also coordinated the release of two new Requests for Proposals (RFPs) in 2021, supporting improvements in Family Court representation. Together, the Second Upstate Model Family Representation Office Grant and the Upstate Family Defense (Child Welfare) Quality Improvement & Caseload Reduction Grant resulted in 32 proposals and six awards for a total of $5 million over three years. For each RFP, the Grants Unit developed the procurement record, coordinated the review and scoring of each proposal, and put together contracts for final awards.

In addition, the Grants Unit developed an Audit Plan to begin strategically assessing the expenses charged to ILS contracts and the internal controls and protocols utilized by contractors to ensure that those expenses comply with the terms and conditions of the contracts. The Audit Plan is an internal document used to outline the audit process, including pre-audit/survey work, the audit site visit, and a post-audit review and report.

All of this has been accomplished despite being only 50% staffed for a majority of 2021. The Grants Unit was able to onboard Petros Papanicoloau in late October, adding another Assistant Grants Manager 1 to the team. Petros brings a wealth of knowledge pertaining to Vendor Responsibility inquiries and continues to develop that process for the office. Additionally, the Grants Unit released a vacancy announcement for a Grants Administrator 2 position in late October with a plan to interview candidates and fill the position in early 2022. Inching closer to full staffing, the Grants Unit looks forward to working even more closely with counties and New York City to ensure that they have the tools necessary to manage the growing number of ILS contracts and funding opportunities.

Administrative

The Covid-19 pandemic posed many administrative challenges in 2021. After more than a year of working mostly remotely, State employees returned to the office in September. At that time, ILS updated the Office's telecommuting policy, allowing staff to request a hybrid work schedule. This model was designed to meet the operational needs of our agency, ensure that we work effectively toward our mission of improving the quality of mandated representation, and offer maximum practicable flexibility for our employees to enhance job satisfaction, remain competitive, and retain employees.

In September 2021, Governor Hochul suspended the pandemic-related hiring freeze that had been in effect for more than a year. ILS had several significant staffing changes, noted previously in this report, including the appointment of Patricia Warth as Director and the hiring of Burton Phillips as Counsel, Cie-Nicholas Watson as our first Data Scientist, Reilly Weinstein as our first Data Outreach Officer, and Petros Papanicolaou as Assistant Grants Manager 1. Additionally, in our Grants Unit, Patricia Cadrette was promoted to Assistant Grants Manager 2, and Hannah Andrews O'Hara was promoted to Assistant Grants Manager 1.

ILS continued to make advancements in Diversity, Equity, and Inclusion (DEI). We expanded our recruitment efforts beyond the StateJobsNY website, using external job boards to advertise employment opportunities and attract a more diverse applicant pool. We focused job descriptions on substitutions for education and experience to eliminate unnecessary barriers. We named Luchele Chisunka, Statewide Implementation Analyst, as ILS' DEI liaison charged with creating a framework to support DEI initiatives both internally and with mandated representation providers, who are encouraged to use State funding for DEI officers, trainings, consultants, and other resources. In 2021, ILS and 10 providers presented a program to guide office leaders in developing a client-centered and values-based culture, so that the dignity and humanity of every client is honored, the quality of representation is advanced, and a positive work environment is nurtured.

ILS Board Members*

Hon. Janet DiFiore, Chairperson
Chief Judge, New York Court of Appeals

Michael G. Breslin
Former Albany County Executive

Hon. Carmen Ciparick
Greenberg, Traurig LLP; Former Senior Associate Judge of the New York State Court of Appeals

Hon. Sheila DiTullio
Judge of Erie County Court, Buffalo

Vincent E. Doyle III
Partner, Connors LLP, Buffalo

Joseph C. Mareane
Former Tompkins County Admin.

Suzette M. Melendez
Asst. Prof. & Director of Children's Rights & Family Law Clinic, Syracuse University College of Law

Leonard Noisette
Program Director, Criminal Justice Fund, Open Society Foundations, U.S. Programs; Executive Director, Neighborhood Defender Service of Harlem (1995-2008)

ILS Staff*

Patricia J. Warth, Director
Burton W. Phillips, Counsel

Jennifer Aguila
Statewide Implementation Paralegal

Matthew Alpern
Director of Quality Enhancement for Criminal Defense Trials; Chief Statewide Implementation Attorney

Peter W. Avery
Manager of Information Systems

Christine Becker
Administrative Officer

Jami Blair
Assistant Counsel

Jessica Bogran
Hurrell-Harring Implementation Analyst

Angela Olivia Burton
Director of Quality Enhancement for Parent Representation

Marian Bush
Auditor

Patricia Cadrette
Assistant Grants Manager 2

Jennifer Chenu
Hurrell-Harring Implementation Attorney– Caseload Standards

Luchele Chisunka
Statewide Implementation Analyst

Nora Christenson
Chief Hurrell-Harring Implementation Attorney

Alyssa Clark
Hurrell-Harring Senior Research Associate

Lisa Coleman
Assistant Grants Manager 1

Jennifer Colvin
Manager of Grant Solicitation and Distribution

Cynthia Feathers
Director of Quality Enhancement for Appellate and Post-Conviction Representation

Tammeka Freeman
Executive Assistant

Brendan Keller
Hurrell-Harring Implementation Attorney– Counsel at First Appearance

Claire Knittel
Statewide Implementation Attorney– Caseload Standards

Karlijn Kuijpers
Statewide Implementation Senior Research Associate

Melissa Mackey
Director of Research

Lucy McCarthy
Assistant Counsel, Parent Representation

Kathryn Murray
Statewide Implementation Attorney– New York City

Hannah Andrews O'Hara
Assistant Grants Manager 1

Petros Papanicolaou
Assistant Grants Manager 1

Lisa Joy Robertson
Hurrell-Harring Implementation Attorney– Eligibility Standards

Ummey Tabassum
Hurrell-Harring Implementation Research Specialist

Cie-Nicholas Watson
Data Scientist

Reilly Weinstein
Data Outreach Officer

Claire Zartarian
Statewide Implementation Attorney– Counsel at First Appearance

as of December 31, 2021

Parental Representation Data Collection Initiatives

Upstate Model Family Representation Office Grants

County/Provider	Data Metrics

Westchester County (Legal Services of Hudson Valley)
➢ Data meetings began May 2020
➢ Data collection began April 2021
➢ Quarterly data reporting began July 2021
 	
Monroe County (Public Defender Office)
➢ Data meetings to begin April 2022
➢ Data collection begin date TBD
➢ Quarterly data reporting begin date TBD
 	
<u>Quarterly data reporting schedule:</u>
Q1 – January thru March
Q2 – January thru June
Q3 – July thru September
Q4 – January thru December
	• Total number new clients
	• Client demographics (i.e., race, ethnicity, age, immigration status)
	• Total new pre-petition (investigation) cases opened
	• Of new pre-petition (investigation) cases opened
	  ○ Case not indicated/unfounded (Y/N)
	  ○ Abuse/Neglect petition filed (Y/N)
	  ○ Child removed (Y/N; under FCA §1021, §1022, §1024)
	  ○ FCA §1027 hearing (Y/N) and outcome
	  ○ FCA §1028 hearing (Y/N) and outcome
	  ○ If child removed, reunification (Y/N); if yes, when
	  ○ Permanency Hearing (Y/N) and outcome
	  ○ TPR (Y/N)
	  ○ Other legal matters (e.g., family court, criminal court, immigration, housing, etc.) (Y/N)
	• Total pre-petition (investigation) cases closed
	• Total cases pending at the end of the reporting period
	• Number of attorney and non-attorney trainings and total number of those attending

Upstate Family Defense Quality Improvement and Caseload Reduction Grants

County/Provider	Data Metrics
Cortland County (Public Defender Office) ***Erie County (Assigned Counsel Program)*** ***Monroe County (Conflict Defender Office)*** ***Steuben County (Public Defender Office)*** ***Suffolk County (Legal Aid Society & Assigned Counsel Program)*** ILS has had at least one data meeting with each of the above providers.	Same as above with the following additions: • Nature of the initial allegations (when possible); of those allegations which were substantiated? • Use of social worker (Erie, Monroe, and Suffolk LAS) • Client addresses/zip codes (Suffolk ACP) • Overall provider caseloads and total number of all new proceedings by proceeding type (caseload relief) • Provider-wide total FTE Family Court attorney numbers (caseload relief) And with the following exception: • The Steuben County Public Defender will not be providing pre-petition representation and therefore will be collecting data on petitions filed and not on questions related to the "investigation stage".

The Impact of Discovery Reform Implementation in New York

Report of a Defense Attorney Survey Conducted Jointly by:

Chief Defenders Association of New York
New York State Defenders Association
NYS Association of Criminal Defense Lawyers
NYS Office of Indigent Legal Services

March 28, 2022

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Defense Attorney Survey About Discovery Reform Implementation

Background

To assess the impact of New York's 2019 discovery law reforms[1] on criminal defense practice and the fairness of criminal proceedings, the Chief Defenders Association of New York (CDANY), the New York State Defenders Association (NYSDA), the New York State Association of Criminal Defense Lawyers (NYSACDL), and the New York State Office of Indigent Legal Services (ILS) developed a survey for practicing criminal defense attorneys. On February 25, 2022, CDANY, NYSDA, and NYSACDL distributed the survey to their respective memberships, which include attorneys who engage in criminal defense representation for public defender offices or legal aid societies, attorneys who engage in criminal defense representation as part of an assigned counsel program (ACP), and attorneys who engage in criminal defense representation as a privately retained attorney. ILS created the survey link using SurveyMonkey. The survey was open until March 13, 2022, and during these two weeks, ILS received unique responses from 563 criminal defense attorneys.

Notably, because discovery reform has been discussed as a topic of potential legislative action this legislative session, we decided to provide the survey results as quickly as possible to inform decision-making about Criminal Procedure Law (CPL) Article 245. As a whole, these survey results show that discovery reform has had a significant positive impact on the quality of criminal defense representation and the fairness of criminal case processing. As we state further in this report, attorneys responding to this survey provided detailed and voluminous comments about discovery reform implementation, and thus, this survey is rich with information. We hope to conduct a deeper analysis of these comments in the future.

Methodology

The survey included 16 questions: five demographic questions, 10 close-ended questions, and one open-ended question inviting attorneys to provide any "additional information about the implementation of discovery reform." (The survey instrument is attached as Appendix A). Surveyed attorneys were also given the opportunity to provide additional comments under each of the 10 close-ended questions (Questions #6-15 of Appendix A).

Of the 563 unique survey participants, 509 completed the survey and 54 submitted an incomplete survey. After eliminating the incomplete survey responses, we analyzed the remaining 509 survey responses. The following analyses are based on the 509 respondents who completed the survey.

The survey results are divided into three parts. The first part is an analysis of the survey's demographic questions, the second part is an analysis of the close-ended Questions #6-15, and the third part is an overview of the written comments attorneys provided in response to Questions #6-16.

[1] *See* Part LLL of Chapter 59 of the Laws of 2019, codified in Criminal Procedure Law (CPL) Article 245.

Conclusion

New York's previous criminal law discovery scheme, embodied in CPL Article 240, was considered by many to be one of the most regressive in the nation, and as a result was often referred to as the "blindfold law."[2] The enactment of CPL Article 245 sought to lift the blindfold to ensure more just and fair case outcomes.

The survey results below show that the vast majority of criminal defense attorneys believe that discovery reform has achieved the desired results and has positively impacted not only their ability to provide competent representation, but also the fairness of New York's criminal justice system. The survey results also suggest the need for more research on compliance with CPL Article 245 because, as defense attorneys aptly noted in their survey responses, the benefits of CPL Article 245 can be fully realized only if there is compliance.

[2] See, for example, the January 8, 2020 *Forbes* article describing New York's discovery reform, available at: https://www.forbes.com/sites/insider/2020/01/08/blindfold-removed-from-justice-in-state-criminal-cases-in-2020/?sh=55e6e05c207c.

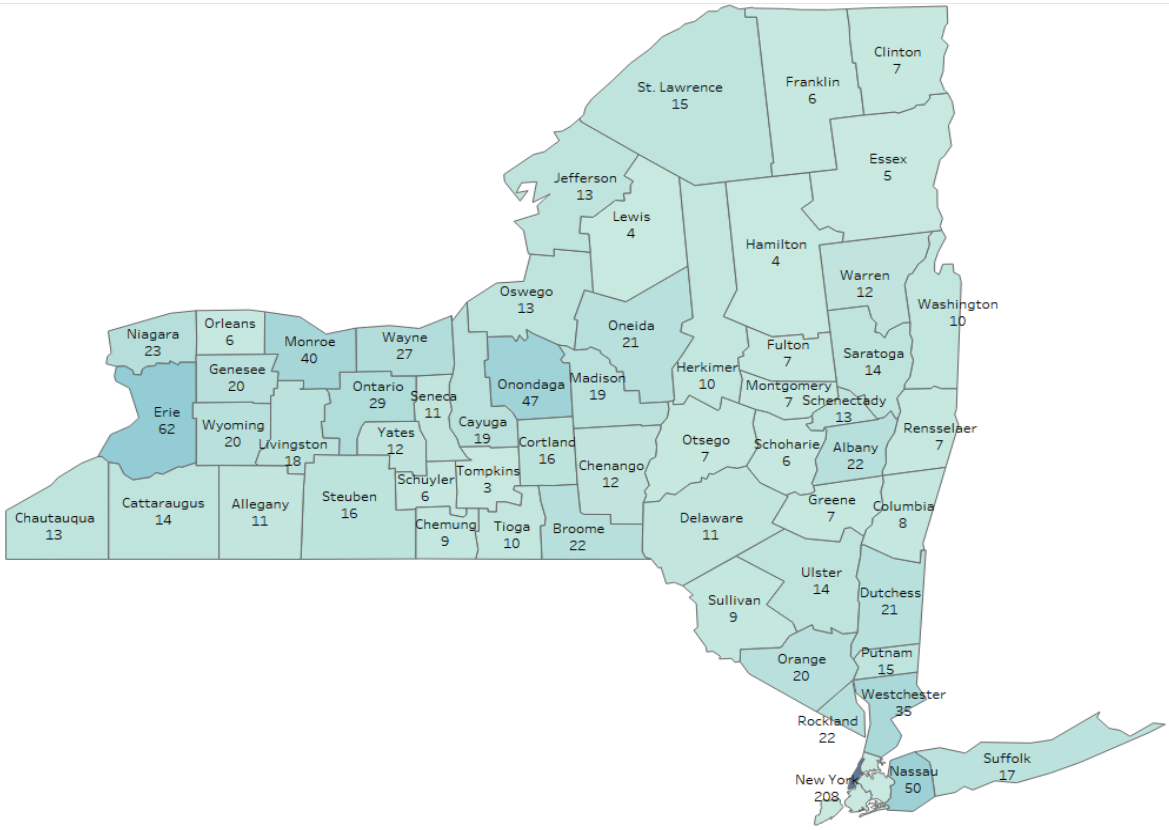
Part I: Analysis of Demographic Information

The survey asked attorneys questions about the counties in which they provide representation, their employment affiliation, how long they have been providing criminal defense representation in New York, and the types of cases they handle.

Counties in Which Responding Attorneys Practice

Question #3 asked attorneys to indicate the county or counties in which they had provided representation over the past year. Slightly more than three-quarters of the survey respondents (76%) represented clients in criminal cases in at least one of the 55 counties outside of New York City and Long Island within the past year, and around 24% of the survey respondents provided criminal defense representation in New York City, Nassau County, and/or Suffolk County over the past year.[3] The map below indicates the number of attorneys who indicated providing representation within each county. Notably, every county is represented in this survey.

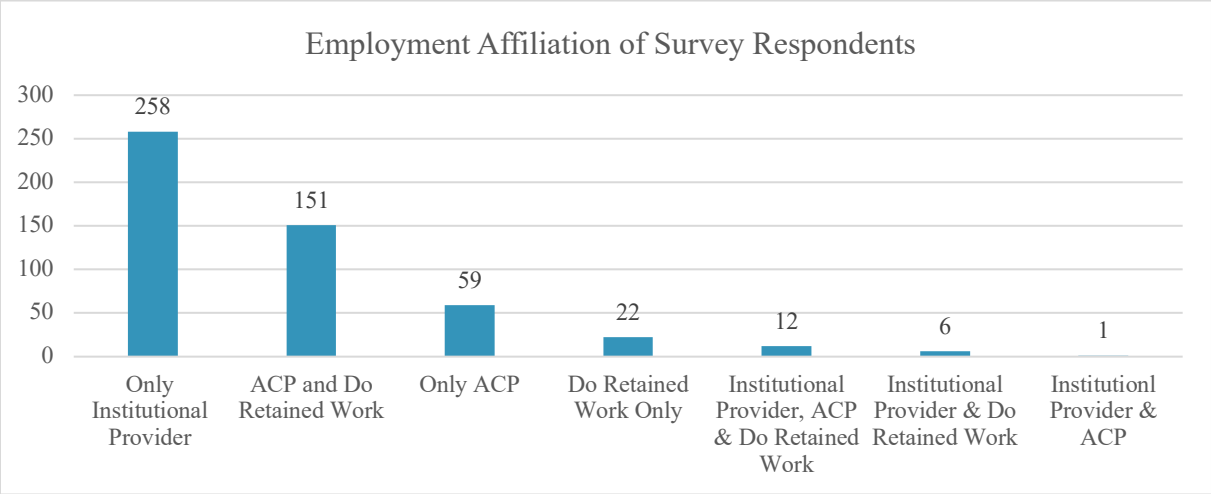
Counties in Which Responding Attorneys Practice



[3] Please note that because some criminal defense attorneys practice in more than one county, these numbers are not mutually exclusive.

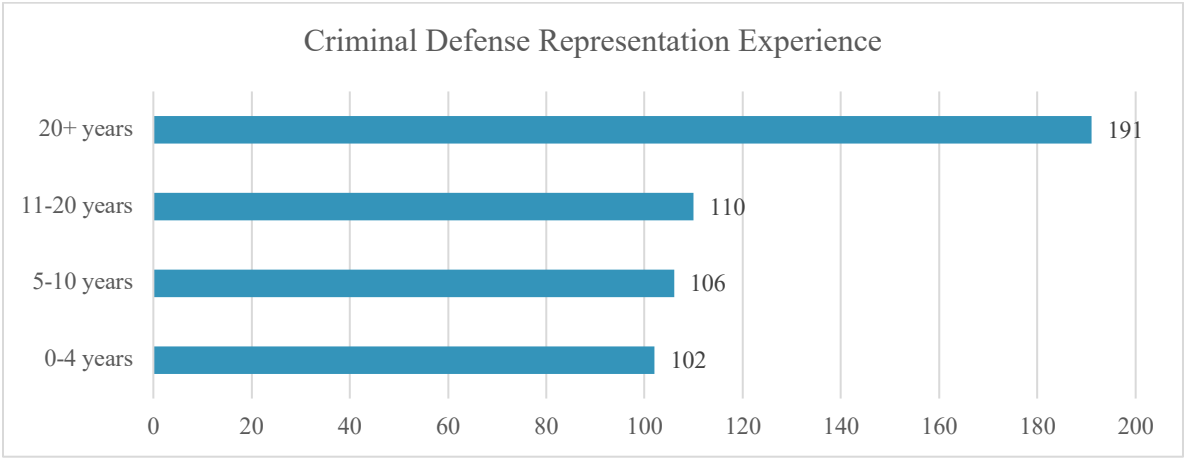
Employment Affiliation of Responding Attorneys

Question #2 asked attorneys to indicate if they work for a Public Defender Office, Conflict Defender Office, or Legal Aid Society/Bureau, if they are assigned cases through one or more assigned counsel programs, or if they do retained work. Attorneys were instructed to check all these work situations that apply, and many did check more than one. Of the 509 responding attorneys, 51% (258) reported they only work for a Public Defender, Conflict Defender, or a Legal Aid Society ("institutional provider"). Thirty percent (151) of the attorneys perform a combination of assigned counsel program (ACP) and retained work. Twelve percent (59) indicated they only perform ACP work, and 4% (22) indicated they only do retained work.



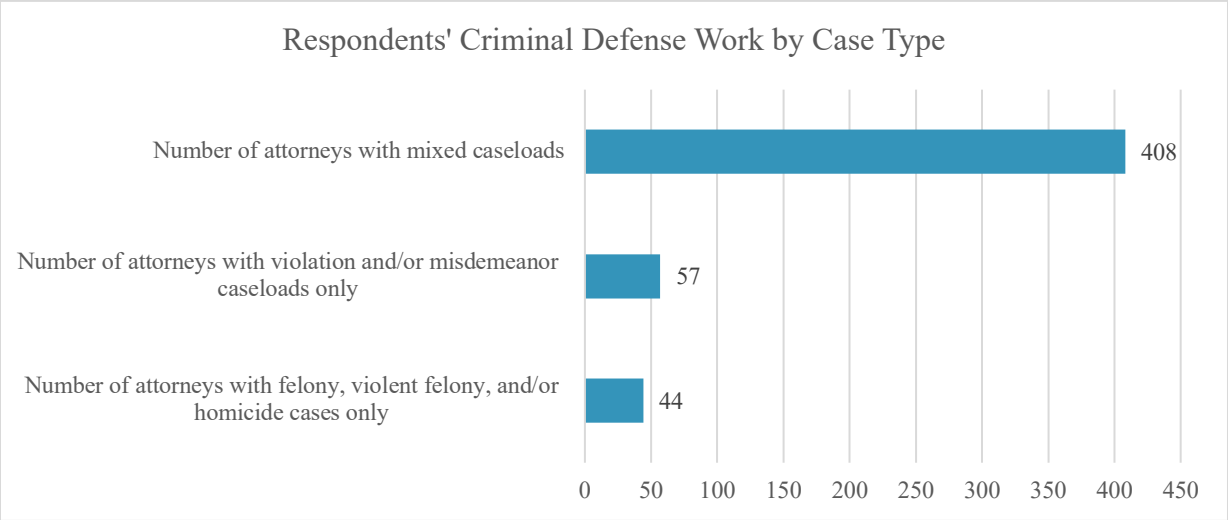
Criminal Defense Experience of Responding Attorneys

Attorneys were asked to indicate how long they have been providing criminal defense representation in New York State. Thirty-seven percent (191) of the survey respondents have 20 or more years of experience, 22% (110) have 11-20 years of experience, 21% (106) have 5-10 years of experience, and 20% (102) have 0-4 years of experience in criminal defense representation in New York.

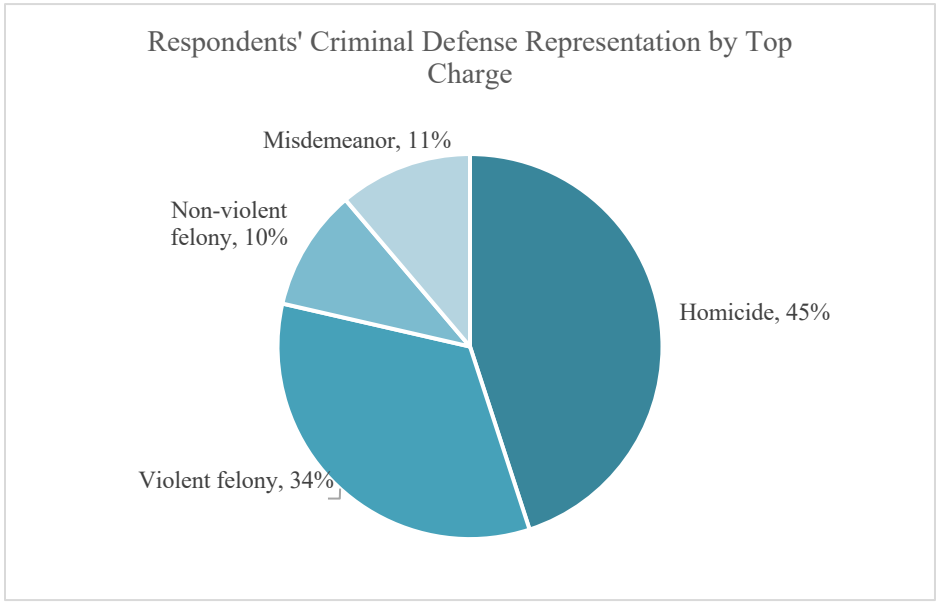


Respondents' Criminal Defense Work by Case Type

Finally, attorneys were asked to indicate the type of cases on which they provide representation. The chart below depicts their responses, showing that nearly all attorney respondents represent clients in various types of criminal matters:



We also examined the responses based on the seriousness of the types of cases, by top-level charge, on which attorneys reported providing representation. Forty-five percent (229) of survey respondents listed homicide as the top-level charge on which they provide representation, 34% (171) of attorneys reported violent felony, 10% (52) of attorneys listed non-violent felony, and 11% (57) of attorneys selected misdemeanor as the top-level charge on which they provide representation.

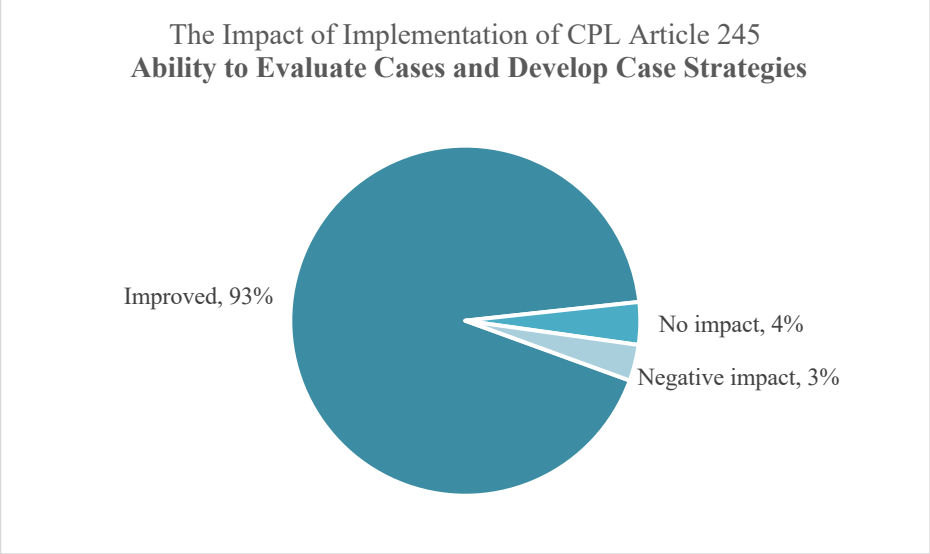


Part II: Analysis of the Responses to the Closed-Ended Questions

Survey questions #6-15 were close-ended, each providing responding attorneys with three to four response options. Below is an analysis of attorney responses to these questions.

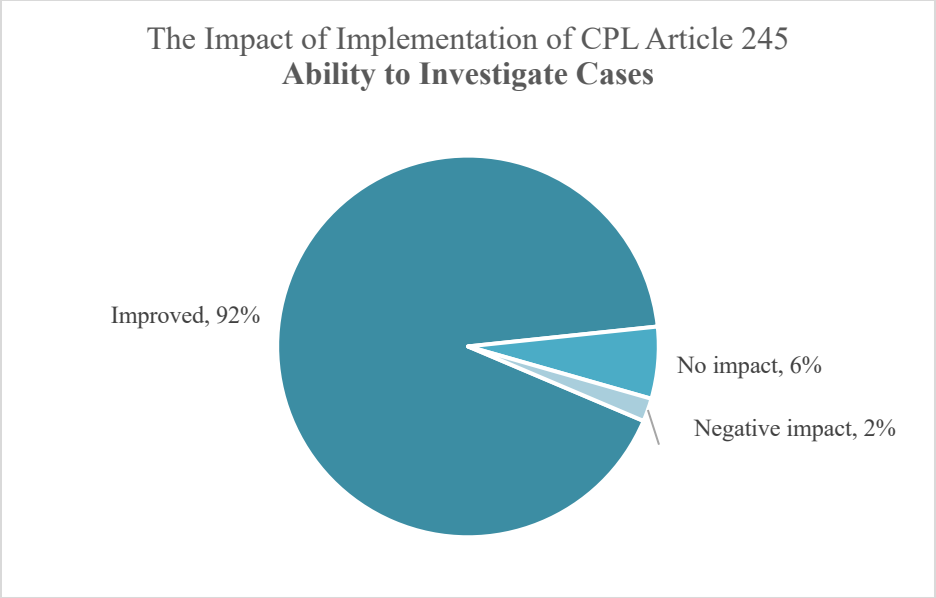
Question #6: Ability to Evaluate Cases and Develop Case Strategies

Question #6 asked attorneys the following question: "Has the implementation of CPL Article 245 impacted your ability to evaluate your cases and develop case strategies?" The vast majority of survey respondents, 93% (472), checked that implementation of CPL Article 245 has improved their ability to evaluate cases and develop case strategies. Only 4% (20) of survey respondents checked that implementation of CPL Article 245 has had no impact, and 3% (17) of responding attorneys reported that implementation of discovery reforms has had a negative impact on their ability to evaluate cases and develop case strategies.



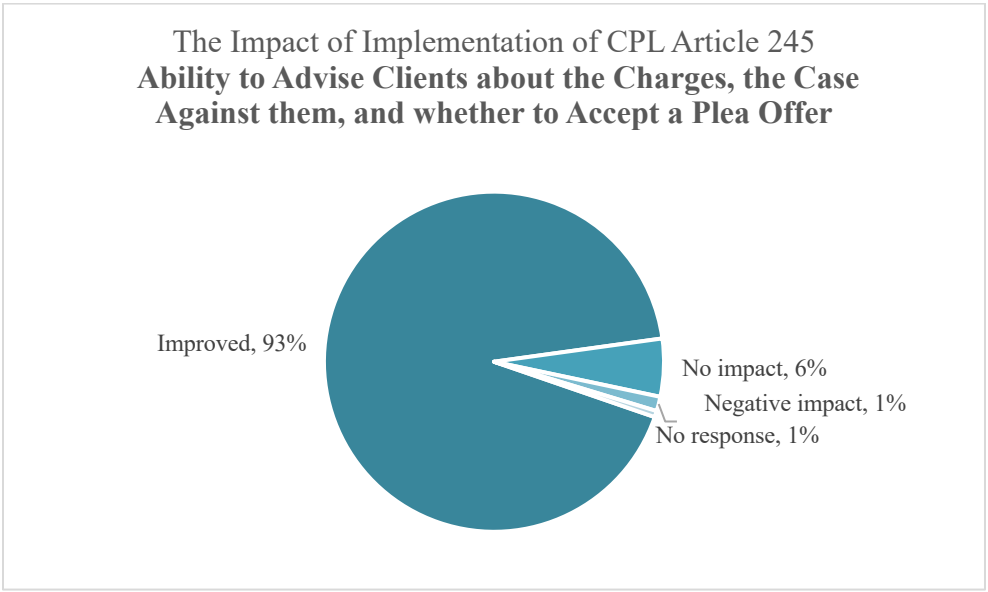
Question #7: Case Investigation

To evaluate if discovery reform has had an impact on defense attorney case investigations, Question #7 asked: "Has the implementation of CPL Article 245 impacted your ability to investigate your cases?" Ninety-two percent (468) of attorneys responded that it has improved their ability to investigate their cases, 6% (31) indicated that it has no impact, and only 2% (10) responded that it negatively impacted their ability to investigate their cases.

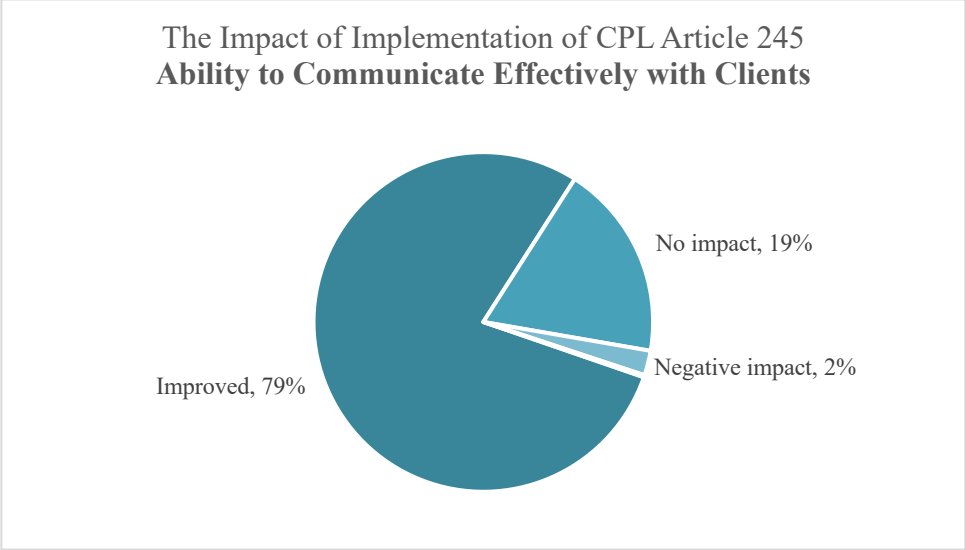


Questions #8 and #12: Client Advice and Effectiveness of Client Communication

Survey Question #8 asked attorneys: "Has the implementation of CPL Article 245 impacted your ability to advise your clients about the charges, the case against them, and whether to accept a plea offer?" Ninety-three percent (471) of the responding attorneys believe that the implementation of CPL 245 has positively impacted their ability to advise their clients, while 6% (28) responded that it has no impact on their ability to advise their clients, and 1% (7) of attorneys indicated that discovery reform has negatively impacted their ability to advise their clients.

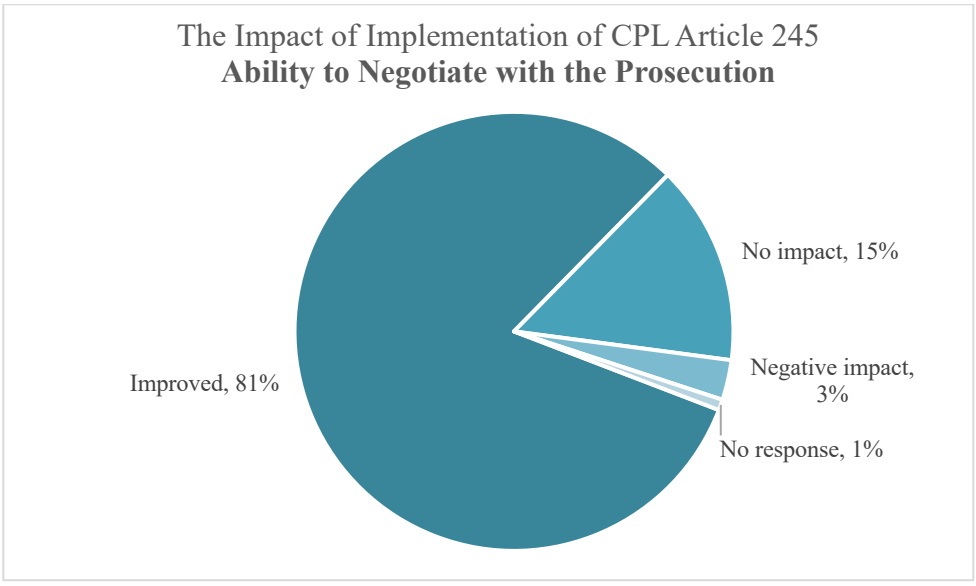


Relatedly, Question #12, asked attorneys the following question about client communication: "Has the implementation of CPL Article 245 impacted your ability to communicate effectively with your clients?" Seventy-nine percent (401) of responding attorneys believe it improved their client communication, approximately 19% (95) of respondents reported that it has had no impact on their ability to communicate with their clients, and 2% (12) of attorneys expressed it has a negative impact on their ability to provide effective client communication.



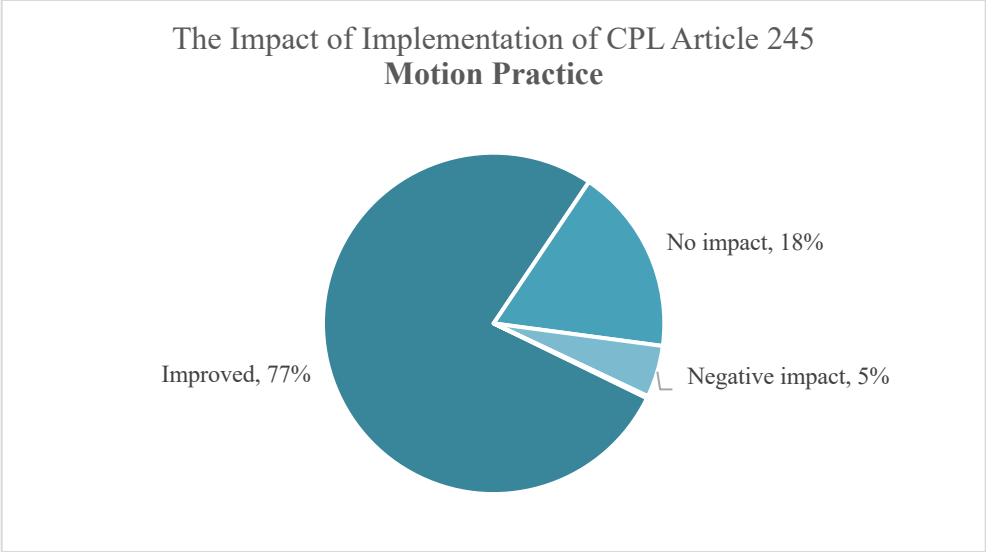
Question #9: Ability to Negotiate with the Prosecution for a Disposition

Question #9 asked attorneys to indicate if implementation of CPL Article 245 has improved their ability to negotiate with the prosecution for agreed upon dispositions in their cases. The vast majority – 81% (415) – of attorneys responded that it has had a positive impact on their ability to negotiate with the prosecution, while 15% (75) of attorneys indicated that it has no impact, and only 3% (15) of attorneys responded that it has negatively impacted their ability to negotiate with the prosecution.



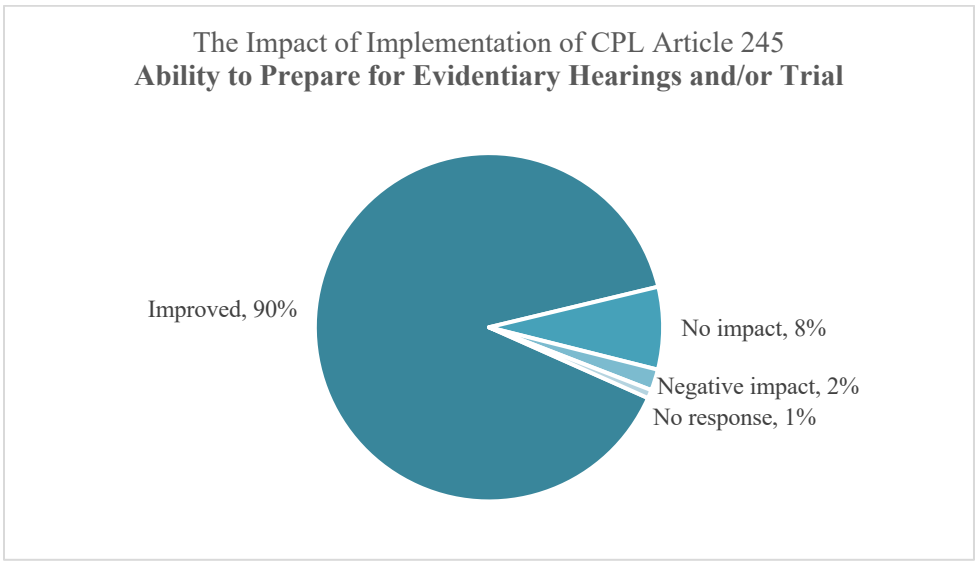
Question 10: Motion Practice

Question #10 asked attorneys if discovery reform has had an impact on their motion practice. Seventy-seven percent (393) of responding attorneys reported that it has improved their motion practice; 18% (90) said it has had no impact on their motion practice, and 5% (25) responded it has had a negative effect on their motion practice.



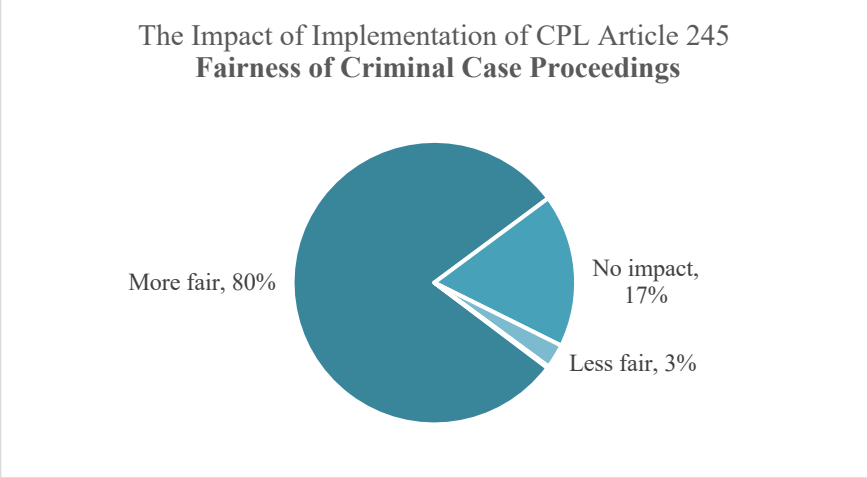
Question #11: Ability to Prepare for Evidentiary Hearings, Trial, or Both

Question #11 asked attorneys to indicate if discovery reform has impacted their ability to prepare for evidentiary hearings, trials, or both. Ninety percent (456) of responding attorneys reported that it has had a positive impact, 8% (39) expressed that it has no impact, and 2% (10) indicated it has a negative impact on their ability to prepare for evidentiary hearings, trials, or both.



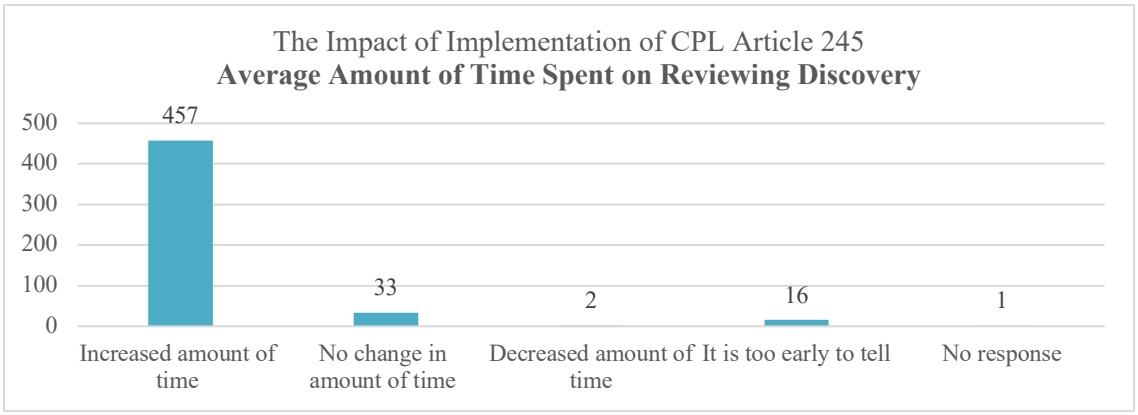
Question #13: Fairness of Criminal Case Proceedings

Question #13 asked attorneys if discovery reform has impacted the fairness of criminal case proceedings. The vast majority – 80% (405) - of the attorneys responded that it has made criminal case proceedings fairer, while 17% (89) feel that it has no impact on the fairness of criminal case proceedings. Only 3% (14) believe it has made criminal case proceedings less fair.

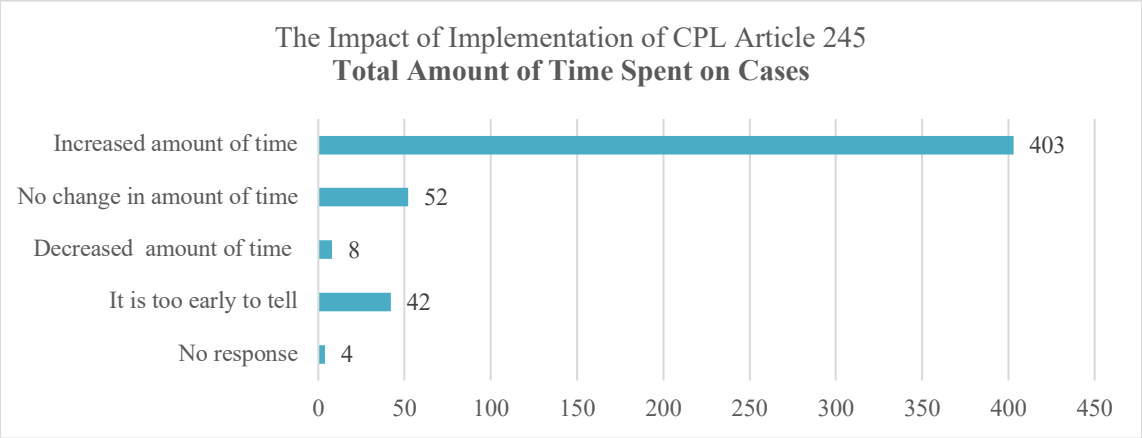


Questions #14 and #15: Time Spent Reviewing Discovery and Time Spent on Cases Overall

Finally, the survey asked the criminal defense attorneys two questions regarding the amount of time they now spend on discovery review and on their cases to determine if they are now spending more time than prior to discovery reform. The first question addressed the time spent reviewing discover, asking "Has the implementation of CPL Article 245 changed the average amount of time you spend reviewing discovery?" Approximately 90% (457) of the survey respondents report that they are now spending more time on discovery review. Only 6% (33) indicate that their time spent on discovery review has not changed. A small number - 3% (16) – reported that it is too early to tell. Only two attorneys responded that they are now spending less time now reviewing discovery.



The survey also asked the attorneys: “Has the implementation of CPL Article 245 changed the total amount of time you spend on cases?” Seventy-nine percent (403) of attorneys said it has increased their total time spent on cases, 10% (52) reported that it has no effect on the amount of time they spend on cases, and 8% (42) believe it is too early to tell. Only 3% (8) of attorneys reported that it has decreased the amount of time they spent on cases.



Part III: Overview of Written Comments

In addition to the quantitative analysis of the responses to the survey questions, this preliminary report provides an overview of the written comments to the survey questions. For each of Questions #6–15, defense attorneys were invited to submit written comments. Additionally, Question #16 invited defenders "to describe any additional information about the implementation of discovery reform." Many of the 509 survey respondents accepted the invitation to provide written comments, and as a result, there are approximately 69 pages of comments.

Consistent with the percentage of defense attorneys who responded that discovery reform has had a positive impact, an overwhelming majority of these written comments elaborated on the positive impact enactment of CPL Article 245 has had on improving both criminal defense practice and the fundamental fairness of criminal proceedings. Of the much smaller number of comments indicating that discovery reform has had no impact or has had a negative impact, most defense attorneys wrote about the lack of prosecutorial and judicial compliance, the challenge of reviewing voluminous amounts of information disclosed, and the timeframes (most often the defense's obligation to challenge Certificates of Compliance filed by prosecutors within 30 days).

Comments are organized below by the most common themes that emerged. The 69 pages of comments are rich with information, and we hope to conduct a more detailed analysis of the comments at a future date. For purposes of this overview, however, the thematic approach punctuated by use of representative defense attorney comments serves as an effective manner by which to capture the tone and substance of the survey's written comments.

1. **Discovery reform has significantly improved the fairness of criminal proceedings.**

Throughout the survey, defense attorneys commented on the enhanced fairness of criminal proceedings since implementation of CPL Article 245. The following phrases are repeated throughout their written comments: "levels the playing field;" "no longer ambushed;" "no longer defending in the dark;" "defendants now know the evidence against them when making decisions;" "greater accountability;" "transformative;" "best thing that has happened to criminal practice;" "a blessing;" "much needed reform;" "life changing;" "long overdue."

Many defense attorneys characterized New York's prior criminal discovery scheme as "fundamentally unfair" and still others noted that the previous scheme most certainly led to wrongful convictions. Others acknowledged the costs of discovery reform, given the voluminous information typically disclosed, but noted that the benefit of increased fairness outweighs the costs. As one defense attorney wrote:

> "The amount of Brady [exculpatory] information found in the Discovery is significant. It means for years the prosecutors have not turned over information which was required. The man hours to review everything and then hire experts to provide greater understanding of the information has increased dramatically. The cost of storage of the discovery is astronomical. The costs are worth it; the outcomes are far more fair than before discovery."

Some defense attorneys who have practiced in other jurisdictions, who have been prosecutors, or who have handled civil matters commented. Their unique perspectives are reflected below:

> "Having worked for several years in a jurisdiction with open discovery (FL) prior to working in NY State, I was shocked, appalled, and horrified that discovery was not available to criminal defendants. It is impossible to have a fair proceeding, effectively negotiate, or advise clients without open and available discovery. It boggles my mind that it was allowed to go on for so long in NY. After discovery reform, it's much easier (and now possible!) to strategize, prepare motions, negotiate, advise clients, and prepare for trial. Clients don't have to make decisions that will impact their lives significantly with zero information or go into a hearing or trial blindfolded. It is much better for judicial efficiency if everyone has the same information so appropriate pleas can be negotiated and appropriate cases taken to trial."

> "I used to work as a defender in NJ which has open file discovery, and the Superior Court prosecutors there had no issue collecting discovery from dozens of municipal police departments and handing it over to the defense within 5 days of arrest."

> "I am a former prosecutor and have been doing defense work for over 20 years since. This discovery change has been monumental in basic fundamental fairness. In the past, discovery was withheld until the last minute on criminal cases where a client's liberty or freedom was a risk, yet in civil cases - disputes over money- discovery was provided well in advance of trial. Thank you for eliminating the antiquated unfair discovery procedures of the past."

> "I would never handle a civil case without the opportunity for discovery in the way we used to handle criminal cases before the new discovery rules."

Many defenders compared their defense practices prior to discovery reform to their practices post discovery reform, establishing a vivid "before and after" picture. The comment below is illustrative:

> "My first felony case I went to trial with one police report in my hand. 10 pieces of paper for a client facing a mandatory life sentence. In contrast, the hearings I did this year, I have nearly 1000 pages of discovery in each case and ended up with two suppressions because I actually knew what I was walking into, instead of being totally blindfolded."

The following comment perhaps best captures the overall sentiment of the defense attorney responses about discovery reform's positive impact on the fairness of criminal proceedings:

> "One of the most important acts in criminal justice reform. Thank you to the legislature for delivering this for our clients."

2. **Discovery reform has improved criminal defense attorneys' ability to meaningfully investigate their cases.**

Many defense attorneys commented on the positive impact CPL Article 245 has had on defense investigations. Because evidence must be disclosed early in the case, the defense can now investigate before evidence is lost or spoiled, which decreases the chances of wrongful convictions, as discussed in the comments below:

> "Knowing early what the issues may be allow us to search for cameras that may be helpful before the information is over-written, speak to witnesses [while] the events are fresh in their minds and before things like address and phone numbers change. It is a huge benefit."

> "Having evidence early on means the ability for the investigator to go to [the] scene and speak with witnesses prior to evidence spoiling and memory fading."

Moreover, defense attorneys now know what investigation leads to follow and who to question, as opposed to investigations under the prior discovery scheme in which they usually had to speculate. Defense attorneys commented on the fact that they can now use investigators and other experts more effectively, as captured in the following:

> "Getting body cam, grand jury testimony, witness lists surveillance, etc., has allowed better investigator requests. Prosecution witnesses have given recorded statements contradicting police reports and testimony, or their own prior statements to the police or the grand jury."

> "A sea-change - allows a more focused investigation by narrowing the factual areas needed to be explored early on, allowing for the preservation of evidence/locating & interviewing witnesses."

> "[H]aving names and contact information provided has made it a lot easier to give the investigators directions rather than a wild goose chase sometimes."

Defense attorneys also noted that because they can now initiate informed case investigations earlier in the case, they are no longer forced to rely on law enforcement's characterization of the evidence. They can make their own assessments, and at times, find evidence or locate witnesses overlooked by law enforcement:

> "Being able to see all the parties present on BWC [body worn camera] during an arrest has allowed me to investigate individuals outside of those named on paperwork."

> "Getting access early and fully to the discovery materials enables the defense to investigate the allegations, interview witnesses and locate additional witnesses and evidence that may be inculpatory or exculpatory, depending on the circumstances."

> "Discovery [reform] has allowed me to identify witnesses and surveillance that show what really happened."

Some defense attorneys noted that because they are carefully reviewing evidence and engaging in better case investigations, the prosecution is also now scrutinizing evidence more carefully, enhancing the opportunity for more timely dismissal of cases for lack of evidence, as noted in the comment below:

> "Disclosure of all witnesses under the new laws allows more time for investigators to speak to witnesses and develop trial strategy. In turn, it prompts the DA to investigate earlier, resulting in the timely dismissal of cases that cannot ultimately be proven. Before, without the [CPL Article] 245 requirements, cases lingered longer, clogging up the system and putting the accused at risk of collateral consequences."

Finally, prior to discovery reform, defense attorneys who sought discovery earlier in their cases were typically met with the response: "Ask your client." The following written comment channels that oft-heard phrase to serve as a reminder that assuming clients can identify evidence undermines the presumption of innocence:

> "I now know what and whom to investigate. It is particularly helpful with clients who are innocent who can provide zero guidance as to what happened."

3. **Discovery reform enables defense attorneys to develop informed case strategies and provide their clients with informed advice about the charges against them and possible case strategies, including potential plea negotiations.**

A significant majority (92.73%) of the 509 defense attorneys who completed the survey responded that discovery reform has positively impacted their ability to evaluate their cases and develop case strategies. A similar percentage (92.53%) of defense attorneys responded that discovery reform has positively impacted their ability to advise their clients about the charges, the case against them, and whether to accept a plea offer. Their comments reveal that the two concepts are linked: being able to develop an informed strategy early in the case is foundational to advising clients about the case against them, whether to engage in plea negotiations and if so, determining an effective negotiation strategy. The comments below speak to this link:

> "Seeing the evidence early on against my client has allowed me to effectively advise my client as to whether to testify before the Grand Jury, waive time to negotiate a pre-indictment plea, or whether to file motions or try to resolve a case."

> "The amount of information we now can access, especially pre-indictment, is staggering compared to before discovery reform. I am now much more able to formulate defenses and better advise clients in plea negotiations."

> "Because discovery is required to be provided before the case can move forward, I can evaluate whether there is a good defense to the charges against my client or whether we should consider taking a plea more readily."

> "CPL Article 245 has had an invaluable impact on my ability to counsel my clients about defenses [and] ways to proceed. Although the DA's office does not abide by the statutory timelines, getting full discovery before an ADA can announce ready for trial facilitates open and honest discussions with clients about the strength of a DA's case and potential defenses."

> "Discoverable information is provided earlier in the adjudicative process, permitting a fuller and more immediate understanding of the client's potential liability and improving the quality of my counsel regarding possible trial outcomes and the advisability of entering a plea agreement."

Some defense attorneys noted that the ability to determine earlier in the case if resolution via plea negotiations is the best strategy has, at times, negated the need for extensive litigation, as reflected in this comment:

> "While it has improved my motion practice when I have had to make motions it has also allowed for better plea negotiations and therefore alleviating the need for motion practice on every file."

Defense attorneys also commented that discovery reforms have allowed them to learn of evidentiary weakness in the prosecution against their clients, and that this information can lead to better litigation strategy, plea negotiations, or both:

> "As a result of open discovery, I have been able to file real motions to dismiss indictments, uncovered some standard inappropriate grand jury techniques, and actually to prepare for hearings in a meaningful way. I hear about more successful motions to dismiss and suppressions than I ever have in 8 years. The fact that we were ever expected to practice in the dark is abhorrent."

> "Things like seeing body camera footage, finding out about prior police misconduct, and getting witness contact information can all be helpful in identifying arrests not supported by probable cause or other suppression issues. That information is certainly useful in plea negotiations."

Finally, defense attorneys wrote of the importance of no longer being "blind" or "blindfolded" by lack of information when talking with their clients about case strategy, and now being able to provide informed answers to questions instead of speculation:

> "Access to the complete Discovery package makes everything better. Conversations with my clients don't need to rely on hypotheticals. Can find mitigating information to adjust an offer, and occasionally have exculpated my clients completely."

> "Before discovery reform our county's DA Office took the prior discovery law literally and would not give us any discovery. Our client would plead in the dark and in a lot of instances, go to trial in the dark. On the Friday before a jury trial, the defense attorney could expect to pick up a 200–500-page packet of Rosario material. Discovery reform has been a complete awakening from the dark age, a renaissance in this county. It has completely transformed our practice. I can't believe it was ever otherwise."

4. **Discovery reform has enhanced clients' trust in their defense attorneys and in the criminal legal system.**

Defenders noted that the previous discovery scheme often placed them in the untenable position of having to tell their clients that they had little to no access to the prosecution's evidence. This lack of information required the defense attorneys to speculate about the evidence against their clients and, as a result, created a wedge between defense attorneys and their clients. Under CPL Article 245, defense attorneys have more information earlier in the case, which fosters the better attorney-client relationships, as highlighted by the comments below:

> "The lack of early and complete discovery regularly threatened the functionality of the attorney-client relationship. Clients were incredulous in the past when their attorney told them that we did not have access to all of the evidence. They struggled to trust us because we could not get them the information they understandably felt they deserved. Now, we can represent that we have all of the same information as the prosecutor. This enhances our ability to form productive relationships with our clients that result in clients accepting our advice about the plea v. trial decision."

> "Engenders so much trust when you can show your client all the evidence that exists. Really important for lawyer/client relationships."

> "I think the more we are armed with information about a case and able to have meaningful conversations with clients about the strengths and weaknesses of cases, to discuss defenses, and to combat prosecution arguments, the more we build trust in the attorney client relationship -- all of which leads to better communication and overall representation."

> "I cannot stress enough how hamstringing defense counsel by withholding information is bad for the public's trust in the system, for the accused, and for the ability of the parties to get to a fair result that protects the rights of the accused and the safety of the community."

5. **For plea negotiations, discovery reform has levelled the playing field, allowing the defense to identify weaknesses in the prosecution's case and to meaningfully discuss exculpatory and mitigating information.**

Because defenders can now evaluate and vet the prosecution's evidence and discover weaknesses and inaccuracies in the case against their clients, they can engage in more meaningful plea negotiations. Below are example comments:

> "I have had two cases in which I got favorable dispositions by pointing out certain evidence to the DA. Both times I was asked where I got that information. My response was to watch the entire video from beginning to end as opposed to the 'good parts.'"

> "Often, I can use the discovery provided to show the ADA why they can't prove their case at trial, which has resulted in good plea offers."

> "It has immensely impacted negotiations. I have been able to demonstrate for the ADA why their case is weak, in addition to providing mitigating information and have obtained so many more reductions or ACDs for my clients than I did prior to discovery reform. These are reductions and ACDs that made sense given the weight and quality or sometimes lack of evidence."

Some defense attorneys commented that discovery reform has resulted in prosecutors now reviewing the evidence more carefully. For example, in responding that discovery reform has had a positive impact on plea negotiations, this defense attorney commented:

> "Mostly because the Assigned ADA knows his or her case better and sooner, so a disposition can be reached sooner."

Other defense attorneys noted that discovery reform has exposed the fact that prosecutors do not always review all the evidence, as reflected in the comment below:

> "I have heard complaints that the new discovery obligations are a burden on prosecutors. But it is obvious that many prosecutors don't even take the time to review the discovery before providing it to the defense - they simply email a download received from law enforcement to the defense. This often raises issues about whether the People are in fact fulfilling their statutory duty of due diligence; how can you say you've exercised due diligence to gather and produce discovery when you've never even looked at what the police have given you and what you've passed on to the defense? I recall in one case I complained to an ADA that I couldn't access a body cam video the People had produced. The ADA responded that he couldn't access it either -- but the People had already filed a Certificate of Compliance affirming that after due diligence they had produced everything they were supposed to produce."

6. **Discovery reform has allowed defense attorneys to file more substantive and meaningful motions.**

In describing their motion practice since implementation of CPL Article 245, defense attorneys repeatedly used these or similar terms: "reasoned and researched;" "grounded in information;" "relevant;" "strategic;" "substantive;" "effective;" "specific and targeted;" "meaningful;" "informed;" and "focused." Many described the "boilerplate motions" they previously filed as a relic of the past. Other general comments about improved motion practice include the following:

> "With the information, drafting motions to dismiss are a better quality than before."

> "Being able to have a document stating whether there are tangible items to challenge in suppression makes certain motion practice much more straight forward. It also allows for a more focused and specific approach since we do not have to rely on scattershot blanket motions when we already have substantial evidence to review."

> "Boilerplate motions are largely a thing of the past now. We definitely file more motions now, but they are meaningful and often successful."

Many defense attorneys emphasized the importance of receiving grand jury testimony early in the case as opposed to the previous discovery scheme in which the defense generally did not receive grand just testimony unless the case was tried, and even then, only on the eve of trial. Defense attorneys noted that getting the grand jury testimony allows them to identify fact-based arguments to dismiss the case for lack of sufficient evidence, as opposed to guessing what happened during the grand jury proceedings and making arguments based on "information and belief." The following comments are typical of the many written comments about the importance of receiving grand jury testimony early in the case:

> "My omnibus motions actually mean something now. I can actually challenge the sufficiency and the integrity of the Grand Jury presentation and not just file a meaningless boiler plate motion. I got one indictment dismissed and the ADA never re-presented [the case to a new grand jury] b/c once it was re-assigned the new ADA realized how ridiculous the case was. This never would have happened before."

> "Receiving grand jury minutes prior to making motions had led to many dismissals and reductions of indictments."

Some defense attorneys noted that because of discovery reform, they are filing fewer motions, as reflected in this comment:

> "Less motions are necessary, and we are not wasting valuable court resources quibbling over discovery. Motions, when necessary, are much more focused and specific, since we have the information needed."

Others wrote however, that they are filing more motions, typically to ensure compliance with CPL Article 245. Ultimately, of those who commented about motion practice, most agreed that

there would be a decreased need to file motions if the prosecution more consistently complied with CPL Article 245. Indeed, the few defense attorneys who responded that discovery reform has not had a positive impact on their motion practice tended to focus on the need to litigate compliance with CPL Article 245. Defense attorney comments about compliance are discussed further below.

7. **Defense attorneys acknowledged that the discoverable information disclosed is often voluminous, and they expressed concerns about the disorganized way this voluminous information is disclosed.**

A salient theme emerging from the survey comments is the voluminous amount of discovery that is now disclosed and the increased amount of time that defense attorneys must spend to review discovery. Below are typical comments:

> "The amount of discovery is extensive. Some cases involve voluminous discovery. It can be a time consuming and taxing process going through it all. Sometimes it is under rushed circumstances, especially if discovery is provided late and not in accordance with the [CPL] 245.10 timelines."

> "The time necessary to review discovery is significant. For example, yesterday we received 163 videos which we will need to review and then set aside the time to review all of them with our client."

> "Although often more voluminous discovery packets have added to the time required to review and expense to the payor (client, county in assigned cases, etc.), it has resulted in more honest and, in some cases, earlier negotiations with the prosecution resulting in more informed and better outcomes generally."

> "Time has increased because now I have all discovery to review & evaluate a case before a plea is considered. I believe this allows me to be a more effective counsel."

Defense attorneys also noted that discovery is typically disclosed electronically via password protected links or portals. Some attorneys commented that they prefer having discovery disclosed in paper format, while others noted the convenience of electronic disclosure. The comments below reflect the differing opinions on paper versus electronic disclosure:

> "The electronic discovery programs the DA's use are HORRIBLE. Why do the passwords expire after a short period of time? Frequently I download zip files only to be unable to open them up later, and then I can't access the materials without a new password. Also, additional discovery is uploaded without notice, or notice goes to SPAM. I miss the days of paper discovery and USB drives."

> "I appreciate being able to have the entire file, including digital images and video, on file with me in court. All files were paper before."

When commenting about the voluminous nature of the information disclosed, most attorneys expressed concerns about the disorganized way it is disclosed, adding to the time involved in organizing, reviewing, and evaluating it. Defense attorneys noted that prosecutors tend to disclose information in a "discovery dump," without labeling, indexing, or organizing information and with duplicate information. The video information often requires different types of software (media players) to view, causing technical difficulty in viewing the evidence. Defense attorneys also noted that prosecutors tend to supplement the information originally disclosed without notifying the defense. Finally, some defense attorneys commented that the electronic portal or link for discovery is kept open for a limited amount of time. Below are representative comments:

> "Having discovery available to defense attorneys is crucial for the best representation of clients. But it needs to be provided in a format that is organized and labeled with a link that does not expire. If requested, we should also be provided the same discovery in hard copy form--paper and CD/DVD/thumb drives."

> "The delivery of discovery is horrendous. District Attorneys use links that expire and don't send alerts when new files are added. I constantly check for new materials by going back and forth to the links before they expire. Once accessed, the files are often lumped into giant PDFs with no clear label. The PDFs then must be separated so that documents can be sorted, labelled, organized, and reviewed. The audio / visual files are too large to download and due to propriety software can often only be viewed while accessing the DA's cloud service. It's close to impossible to gather and send this discovery and the ability to review it to clients."

> "Access to electronic files [is] not user friendly and requires downloading of often voluminous number of files in multiple locations. Files and documents (both video and audio) expire after thirty days, placing burden on counsel to assume measures to protect discovery materials. Permanent file access must be provided rather than present dysfunctional system."

Some defense attorneys had specific suggestions for improving electronic access to information, as reflected below:

> "It would be preferable to have the People copy all Discovery: documents & video on a 2 TB Harddrive supplied by the Attorney rather than via Microsoft One Drive. Allows shareable with Client & does not expire before resolution of the case."

> "The reform is excellent. NYS needs a statewide online system to distribute discovery to counsel. Now each county uses a different system. Also, video and audio files are slow to download, and some need special viewers or players. This needs to be corrected. Lastly, a system needs to be developed for counsel to forward discovery directly to clients. This will provide a more secure and uniform discovery process and provide for greater transparency."

8. Defense attorneys expressed concerns about compliance with CPL Article 245.

The survey did not specifically ask defense attorneys about or otherwise seek to obtain information about compliance with CPL Article 245. Nonetheless, the lack of compliance emerged as a theme in the written comments. Many of the defense attorneys who responded that discovery reform has had no impact or has had a negative impact cited compliance as a reason for their responses. But even defenders who responded positively about the impact of discovery reform qualified their answers, emphasizing that the full positive impact is realized only if there is compliance. As one defender succinctly cautioned in responding that discovery reform has had a positive impact, "When actually enforced." The comment below captures what other defense attorneys wrote about compliance:

> "Discovery reform removed the blindfold that prevented fair outcomes. We still need more discovery sooner and we need judges to actually enforce the discovery requirements the law imposes instead of constantly excusing DAs' failures to provide statutorily required materials, but it's impossible to overstate the importance of the changes that discovery reform already has brought."

Other comments discussed prosecutors filing Certificates of Compliance when, in fact, they have not disclosed all the information required. Sample comments include the following:

> "These reforms should have happened a long time ago. Glad that they're finally here. I wish that judges would actually deem the government's certificates of compliance invalid when they so clearly have not turned over all of the discovery in their possession. That has become the new battle."

> "[Discovery reform] has definitely helped [case evaluation] but everything is more time-consuming because there are still some things that DA's 'dump' on us without necessarily explaining what they are or labeling them (like body cam - none of them are labeled as to which officer they pertain to and/or whether there is any info in them directly related to the case). AND there are still things we have to litigate because ADAs don't believe they have to turn over certain things (sometimes even things we used to get)."

Some defense attorneys identified issuance of discovery protective orders as a problem. CPL § 245.70 authorizes judges, at the request of the prosecution, to issue an order prohibiting defense attorneys from disclosing certain information to their clients. Several defense attorneys opined that there is an overreliance upon such protective orders:

> "I am a HUGE fan of [CPL Article] 245's discovery rules, however, there are situations, especially with respect to protective orders, where 245 can be weaponized by a Court or prosecutor to drive a wedge between attorney and client."

> "Overall [attorney-client relationships have] improved, but on virtually all my homicides and the majority of my violent felony cases, DAs are getting protective

> orders (often with "for attorney's eyes only" provisions) so then I have the added burden of having to make I do not disclose info in violation of the court order."
>
> "While [CPL Article] 245 helps in many cases, the Protective Order option by the DAs has been pursued in too many cases and approved by too many judges. Those cases have had negative consequences for the client and the cases, including a client who was wrongfully incarcerated for nearly 2 years after a PO was granted."

In this regard, defense attorneys commented on the need for judges to be more vigilant about compliance overall. Sample comments include the following:

> "It would be nice if the Judges had more instruction as to recourse for failure to comply with CPL 245. I have had some blatant violations where there are no repercussions to the DA."
>
> "As a retired County Court Judge, in my opinion the biggest impediment to discovery reform is the court not following the plain language of the statute and still allowing the prosecution to delay or not provide discovery without any consequence. This is particularly true with police disciplinary records…. The relationship between the certificate of compliance and a valid declaration of readiness is also an issue to be clarified. Some courts are simply allowing prosecutors to file supplemental certificates of compliance at their leisure with no discussion of whether due diligence was exercised prior to the initial filing of the certificate of compliance and announcement of readiness. In addition, the good faith component is being completely misused to allow non-compliance, again because the due diligence component is being ignored. The speedy trial relationship to the valid certificate of compliance is also being ignored by the courts to avoid dismissals on speedy trial grounds…."

Others had legislative suggestions for achieving better compliance with CPL Article 245, such as the following:

> "The new law is certainly a massive improvement, but there are few ways that it could be better. The legislature could clarify that there is no time excluded grace period for discovery compliance in [CPL] 30.30(4) that some judges are reading into it and that "substantial compliance" is not a permissible substitute for complying with the law. Too many DAs are filing certificate of compliance without actually furnishing all the discovery required by [CPL Article] 245 and claiming that they've "substantially complied," (rather than avail themselves of the other mechanisms within 245 to get more time). The legislature should also specify that either discovery compliance must be complete before motion practice or that motion practice does not stop the clock until discovery compliance is complete. Otherwise, too many judges are setting omnibus motion schedules regardless of discovery compliance, effectively relieving the DA's Office of the primary inducement to comply within [CPL Article] 245's timeframe, the ticking speedy trial clock."

In responding to questions about how enactment of CPL Article 245 has impacted their motion practice, some defenders commented that they are often litigating compliance, and that better prosecutorial compliance would not only reduce the amount of time the defense spends on motions it would also reduce burdens on the judiciary. As one defender succinctly stated: "It's very time consuming just trying to get DAs to comply." Another defense attorney noted that improved compliance with CPL Article 245 would diminish the number of motions that need to be filed:

> "There is no doubt that the new law has increased the number of pre-trial motions filed. However, if the ADA complies with [CPL Article 245], there should be no reason for so many. COC challenges are frequent at present, but as the court adjusts to the requirements of Article 245 and the ADA improves compliance, that issue should be alleviated."

This preliminary report does not examine the extent to which compliance with CPL Article 245 varies among jurisdictions and prosecutors, though the comments suggest such variance, with compliance better in some jurisdictions than others. Though this survey did not specifically ask defense attorneys about compliance with CPL Article 245, the sheer number of comments about compliance indicates that this is an issue that warrants further research.

9. **Survey responses suggest that defense attorneys who are solo practitioners face particular challenges in managing the amount of information disclosed.**

The fact that a very small percentage of defense attorneys indicated that discovery reform has had a negative impact provided us an opportunity to look more deeply at this group. Specifically, the number of defense attorneys who responded negatively ranged from seven (for Question #8) to 25 (for Question #10). We looked at the type of practice for these defense attorneys and learned that for each question, those who identified as attorneys who do assigned counsel (ACP) and retained work constituted the biggest percentage of defenders who responded negatively. This is detailed in Appendix B.

A review of these defense attorneys' written comments suggests that many are solo practitioners and that their negative responses illuminate the unique challenges they have faced in adjusting to the change in practice that discovery reform requires. The following comment best captures this unique challenge:

> "As a solo practitioner I don't have the staff and resources to download, label, organize and digest the discovery. I also don't have the technical knowledge of the various players that are needed for the different types of media files. While the panel members do have access to discovery management paralegals, there are not enough to go around and there is a long wait to find one available to work on the case with me. There is no funding available to 18B attorneys for technology purchases or training, so we have to purchase it ourselves and absorb the cost on our own. Panel members are getting cases at the 'tail end' (eve of trial) and often receive multiple cases ready to proceed to trial. There is a lot of pressure to take these cases and the judges are reluctant to grant the time to fully prepare. The discovery laws and

> processes are too time-consuming to allow for attorneys to 'inherit' cases on the eve of trial and be ready in a short period of time. Judges still seem to think that a few weeks 'turnaround' time from assignment to trial is still possible."

As with the issue of compliance, this is another issue that warrants further research and, with more time, a deeper analysis of the information set forth in this survey.

APPENDIX A

Defense Community Survey About Discovery Reform

Introduction

This survey was developed to assess the impact of the 2019 discovery law reforms on criminal defense practice in New York State and the fairness of criminal proceedings. It was developed through coordination between the Chief Defenders Association of New York (CDANY), the New York State Association of Criminal Defense Lawyers (NYSACDL), the New York State Defenders Association (NYSDA), and the New York State Office of Indigent Legal Services (ILS).

The survey contains 16 questions about the impact that implementation of Criminal Procedure Law Article 245 has had and continues to have on your case strategies, investigations, plea deals, dispositions, motion practice, client communication, etc. It should take approximately 10-15 minutes to complete. At the end of the survey, you will have an opportunity to provide additional information you consider relevant to the impact of the 2019 discovery law reforms.

Your participation will better allow policymakers and the public to understand the impact that the discovery law reforms have had on criminal defense attorneys and their practice. Survey responses will be reported in the aggregate, and your identity will be kept anonymous. We recognize that you may receive more than one email with a link to this survey; please complete the survey just one time. However, note that we are asking your name, so if you complete more than one survey, we will be able to eliminate the duplicate survey. Please complete and submit the survey by March 11, 2022.

Defense Community Survey About Discovery Reform

Basic Demographic Information

* 1. Your Name

* 2. Check all that apply:

- [ ] I work for a Public Defender Office, a Conflict Defender Office, or a Legal Aid Society/Bureau
- [ ] I am assigned cases through one or more Assigned Counsel Programs
- [ ] I do retained work

* 3. In what county/counties have you provided representation over the past year? (check all that apply)

- [ ] Albany County
- [ ] Allegany County
- [ ] Broome County
- [ ] Cattaraugus County
- [ ] Cayuga County
- [ ] Chautauqua County
- [ ] Chemung County
- [ ] Chenango County
- [ ] Clinton County
- [ ] Columbia County
- [ ] Cortland County
- [ ] Delaware County
- [ ] Dutchess County
- [ ] Erie County
- [ ] Essex County
- [ ] Franklin County
- [ ] Fulton County
- [ ] Genesee County
- [ ] Greene County
- [ ] Hamilton County
- [ ] Herkimer County

- [ ] Jefferson County
- [ ] Lewis County
- [ ] Livingston County
- [ ] Madison County
- [ ] Monroe County
- [ ] Montgomery County
- [ ] Nassau County
- [ ] New York City
- [ ] Niagara County
- [ ] Oneida County
- [ ] Onondaga County
- [ ] Ontario County
- [ ] Orange County
- [ ] Orleans County
- [ ] Oswego County
- [ ] Otsego County
- [ ] Putnam County
- [ ] Rensselaer County
- [ ] Rockland County
- [ ] St. Lawrence County
- [ ] Saratoga County
- [ ] Schenectady County
- [ ] Schoharie County
- [ ] Schuyler County
- [ ] Seneca County
- [ ] Steuben County
- [ ] Suffolk County
- [ ] Sullivan County
- [ ] Tioga County
- [ ] Tompkins County
- [ ] Ulster County
- [ ] Warren County
- [ ] Washington County
- [ ] Wayne County

- [ ] Westchester County
- [ ] Wyoming County
- [ ] Yates County

* 4. How long have you been providing criminal defense representation in New York State? (check one)

- ( ) 0-4 years
- ( ) 5-10 years
- ( ) 11-20 years
- ( ) 20+ years

* 5. Indicate the type of cases on which you provide representation (check all that apply):

- [ ] Violation cases
- [ ] Misdemeanor cases
- [ ] Non-violent, non-homicide felony cases
- [ ] Violent felony cases
- [ ] Homicide cases

Defense Community Survey About Discovery Reform

Impact of Discovery Reform

Enacted in April 2019 to take effect January 1, 2020, the new discovery statute, Criminal Procedure Law (CPL) Article 245, requires greater openness and the sharing of discoverable information earlier in the case. This survey explores the impact implementation of CPL Article 245 has had on the quality of representation and the overall fairness of the criminal case processing. Please note that each question has space for you to explain or comment on your answer if you wish to do so.

6. Has the implementation of CPL Article 245 impacted your ability to evaluate your cases and develop case strategies?

- ◯ It has **improved** my ability to evaluate cases and develop case strategies
- ◯ It has had **no impact** on my ability to evaluate cases and develop case strategies.
- ◯ It has had a **negative impact** on my ability to evaluate cases and develop case strategies.

Explanation or comment:

7. Has the implementation of CPL Article 245 impacted your ability to investigate your cases?

- ◯ It has **improved** my ability to investigate my cases.
- ◯ It has had **no impact** on my ability to investigate my cases.
- ◯ It has had a **negative impact** on my ability to investigate my cases.

Explanation or comment:

8. Has the implementation of CPL Article 245 impacted your ability to advise your clients about the charges, the case against them, and whether to accept a plea offer?

- ◯ It has **improved** my ability to advise my clients about the charges, the case against them, and whether to accept a plea offer.
- ◯ It has had **no impact** on my ability to advise my clients about the charges, the case against them, and whether to accept a plea offer.
- ◯ It has had a **negative impact** on my ability to advise my clients about the charges, the case against them, and whether to accept a plea offer.

Explanation or comment:

9. Has the implementation of CPL Article 245 impacted your ability to negotiate with the prosecution for agreed upon dispositions in your cases?

- ◯ It has **improved** my ability to negotiate with the prosecution for agreed upon dispositions in cases.
- ◯ It has had **no impact** on my ability to negotiate with the prosecution for agreed upon dispositions in cases.
- ◯ It has had a **negative impact** on my ability to negotiate with the prosecution for agreed upon dispositions in cases.

Explanation or comment:

10. Has the implementation of CPL Article 245 impacted your motion practice?

- ◯ It has **improved** my motion practice.
- ◯ It has had **no impact** on my motion practice.
- ◯ It has had a **negative impact** on my motion practice.

Explanation or comment:

11. Has the implementation of CPL Article 245 impacted your ability to prepare for evidentiary hearings and/or trials in your cases?

- ◯ It has **improved** my ability to prepare for evidentiary hearings and/or trial in your cases.
- ◯ It has had **no impact** on my ability to prepare for evidentiary hearings and/or trial in your cases.
- ◯ It has had **a negative impact** on my ability to prepare for evidentiary hearings and/or trial in your cases.

Explanation or comment:

12. Has the implementation of CPL Article 245 impacted your ability to communicate effectively with your clients?

- ◯ It has **improved** my ability to communicate effectively with my clients.
- ◯ It has had **no impact** on my ability to communicate effectively with my clients.
- ◯ It has had **a negative impact** on my ability to communicate effectively with my clients.

Explanation or comment:

13. Has the implementation of CPL Article 245 impacted the fairness of criminal case proceedings?

- ◯ It has made criminal case proceedings **fairer.**
- ◯ It has had **no impact** on the fairness of criminal case proceedings.
- ◯ It has made criminal case proceedings **less fair.**

Explanation or comment:

14. Has the implementation of CPL Article 245 changed the average amount of time you spend reviewing discovery?

- ◯ It **increased** the amount of time I spend reviewing discovery
- ◯ There is **no change** to the amount of time I spend reviewing discovery
- ◯ It **decreased** the amount of time I spend reviewing discovery
- ◯ It is too early to tell

Explanation or comment:

15. Has the implementation of CPL Article 245 changed the total amount of time you spend on cases?

- ◯ It has **increased** the amount of time I spend on cases
- ◯ There has been **no change** on the amount of time I spend on cases
- ◯ It has **decreased** the amount of time on spend on cases
- ◯ It is too early to tell

Explanation or comment:

16. Please use the space below to describe any additional information about the implementation of discovery reform.

APPENDIX B

Attorneys Who Responded that Discovery Reform Has Had a Negative Impact: Employment Affiliation/Practice Type

A very small number of attorneys responded that discovery reform has had a negative impact. To learn more about these attorneys, we examined their employment affiliation/practice type. For all questions, attorneys who indicated that they do assigned counsel (ACP) and retained work constituted most of the attorneys who responded negatively, as the charts below reveal:

Q6: Implementation of CPL Article 245 has had a negative impact on my ability to evaluate cases and develop case strategies.

Employment Affiliation/Type of Practice	Total #	% Total Responses	% Negative Impact Responses
ACP and Do Retained Work	14	2.75%	82.35%
Only ACP	1	0.20%	5.88%
Only Institutional Provider	2	0.39%	11.77%
Total	**17**	**3.34%**	**100%**

Q7: Implementation of CPL Article 245 has had negative impact on my ability to investigate your cases.

Employment Affiliation/Type of Practice	Total #	% Total Responses	% Negative Impact Responses
ACP and Do Retained Work	9	1.77%	90%
Only ACP	1	0.20%	10%
Total	**10**	**1.96%**	**100%**

Q8: Implementation of CPL Article 245 has had a negative impact on my ability to advise clients about the charges, the case against them, and whether to accept a plea offer.

Employment Affiliation/Type of Practice	Total #	% Total Responses	% Negative Impact Responses
ACP and Do Retained Work	5	0.98%	71.42%
Institutional Provider, ACP & Do Retained Work	1	0.20%	14.29%
Only Institutional Provider	1	0.20%	14.29%
Total	**7**	**1.38%**	**100%**

Q9: Implementation of CPL Article 245 has had a negative impact on my ability to negotiate with the prosecution for agreed upon dispositions in cases.

Employment Affiliation/Type of Practice	Total #	% Total Responses	% Negative Impact Responses
ACP and Do Retained Work	7	1.38%	46.66%
Institutional Provider, ACP & Do Retained Work	1	0.20%	6.67%
Both Institutional Provider & Do Retained Work	1	0.20%	6.67%
Only Institutional Provider	4	0.79%	26.66%
Only ACP	2	0.39%	13.34%
Total	**15**	**2.95%**	**100%**

Q10: Implementation of CPL Article 245 has had a negative impact on my motion practice.

Employment Affiliation/Type of Practice	Total #	% Total Responses	% Negative Impact Responses
ACP and Do Retained Work	13	2.55%	52%
Only Institutional Provider	6	1.18%	24%
Only ACP	4	0.79%	16%
Only Do Retained Work	2	0.39%	8%
Total	**25**	**4.91%**	**100%**

Q11: Implementation of CPL Article 245 has had a negative impact on my ability to prepare for evidentiary hearings and/or trial in my cases.

Employment Affiliation/Type of Practice	Total #	% Total Responses	% Negative Impact Responses
ACP and Do Retained Work	7	1.38%	70%
Institutional Provider, ACP & Do Retained Work	1	0.20%	10%
Only ACP	1	0.20%	10%
Only Institutional Provider	1	0.20%	10%
Total	**10**	**1.96%**	**100%**

Q12: Implementation of CPL Article 245 has had a negative impact on my ability to communicate effectively with clients.

Employment Affiliation/Type of Practice	Total #	% Total Responses	% Negative Impact Responses
ACP and Do Retained Work	9	1.77%	75%
Institutional Provider, ACP & Do Retained Work	2	0.39%	16.67%
Only Institutional Provider	1	0.20%	8.33%
Total	**12**	**2.36%**	**100%**

Q13: Implementation of CPL Article 245 has made criminal case proceedings less fair.

Employment Affiliation/Type of Practice	Total #	% Total Responses	% Negative Impact Responses
ACP and Do Retained Work	9	1.77%	64.29%
Institutional Provider, ACP & Do Retained Work	1	0.20%	7.14%
Only Institutional Provider	4	0.79%	28.57%
Total	**14**	**2.75%**	**100%**