

INDIGENT LEGAL SERVICES BOARD

AGENDA

June 13, 2014

Association of the Bar of the City of New York

- I. Opening Remarks by the Chief Judge**
- II. Approval of Minutes from March 14, 2014 Board Meeting (see attachment A)**
- III. Approval of Upstate Quality Improvement Grant for Clinton County (see attachment B: May 5, 2014 letter from Joe Wierschem to Barbara Norton, OSC)**
- IV. Authorization to Prepare RFPs for New Initiatives**
 - Assigned Counsel Infrastructure Grants (see attachment C)
 - Model Upstate Parental Representation Office (see attachments D)
 - Wrongful Conviction Prevention Center (see attachment E)
- V. Proposed Legislative Amendments (as discussed at March meeting)(see attachment F)**
- VI. Status Reports**
 - Progress of Counsel at First Appearance Grants
 - May 29 City Bar Forum
 - June 5 Chief Defender Advisory Group Meeting
 - June 6 NYSBA Conference at Albany Law School
 - June 7 State Magistrates Association Executive Board Meeting
 - June 12 Andy Davies Webinar
- VII. Schedule of Remaining 2014 Board Meetings**
 - Friday, September 26
 - Friday, November 7
- VIII. Concluding Remarks**

Minutes for ILS Board Meeting

March 14, 2014

11:00 A.M.

Association of the Bar of the City of New York

Board Members Present: Chief Judge Lippman, Joe Mareane, Sue Sovie and Carmen Ciparick; Sheila DiTullio and Mike Breslin participated via conference call.

ILS Office Attendee(s): Bill Leahy and Joseph Wierschem

I. Opening Remarks by the Chief Judge

The Chief Judge welcomed and thanked all for attending. He briefly recapped the state budget process as it related to ILS. He briefly discussed the one-house Senate bill but remarked that it was just a starting point so the board should not be overly concerned that it did not include all of the items requested by the Office.

II. Approval of Minutes from November 22, 2013 Board Meeting

The Chief Judge inquired whether the board members had received copies of the minutes from the prior meeting. The board members acknowledged that they had in fact received the minutes. The Chief then asked the Board to vote to approve the minutes.

Carmen Ciparick moved to approve the minutes; her motion was seconded by Sue Sovie and unanimously approved by the board.

III. Update on Board Appointments/Reappointments

Bill reiterated the fact that Judge Ciparick was confirmed by the Governor just prior to the last meeting and had signed her oath of office shortly thereafter - making her an official member of the board. Vince Doyle, the Senate's nominee to replace Gail Gray, was still awaiting confirmation by the Governor. In addition, there was no action regarding the holdover members of the board (except Lenny Noisette who received a second term).

IV. FY 2014-2015 Budget Status

Bill Leahy reported that he was pleased about the \$4 million for upstate caseload relief being included in the Senate budget bill. He also remarked that when he was at an event in Schenectady, a judge in attendance quoted the Chief's State of the

Judiciary address and said that "ultimately the answer may be a statewide public defender system."

The Chief responded by noting that the climate in Albany is still focused on governmental restraint on spending.

Joe Mareane agreed and noted there is pressure on the counties to keep spending down to within the 2% cap recommended.

Mike Breslin said ILS is going about the "belt-tightening" the right way. The proposed regional centers are a variation on the Governor's consolidation efforts. Bill agreed that he received the most enthusiastic response from the Executive regarding the regional centers. Bill also noted continuing cooperation from Steve Acquario and provided some detail regarding Indiana's model which includes reimbursement to counties if standards are complied with. Bill has been in contact with Indiana administrators regarding their system.

The Chief stated that mandate relief is more in the realm of fiscal restraint and the message should resonate in not so great economic times.

Finally, Bill noted that the Assembly budget bill provided funds to ILS for the hiring of an assistant grant manager and he will work to get Senate support for that hiring as well.

V. Discussion of Approval Authority for Conflict Defender and Assigned Counsel Plans

The two areas where changes are suggested are: enforcement authority regarding compliance with standards and involvement with the plan approval process. Joe Wierschem authored a memo for board discussion regarding the enforcement mechanisms suggested. It detailed what the current statute provides for and suggestions for changes that the Office is asking the board to consider supporting.

The Chief agreed that OCA is not the best place for plan approval and suggested that court administration won't resist a change. However, he did note that the ILS Office proposal would require a statutory change. Judge Ciparick questioned whether making such a statutory change would open up the re-submission of all existing plans.

Sue Sovie suggested that re-certification maybe necessary to bring some existing plans into compliance.

Joe Mareane questioned when such a statutory change would happen. Bill said that the Chief's suggestion regarding a more technical, clarifying bill might be possible if there was a widespread report.

Joe W then mentioned the second, more ambitious proposal of having the Office approve the entire county plan. Mike B noted that counties may fear such a plan from a financial perspective. The Chief noted that ILS is here to provide a vision for the future despite fears and striking the right balance is the difficult part.

Judge DiTullio commented that change happens in different ways and cited the counsel at first appearance initiatives. Joe M. Said change is possible if there's a funding strategy.

Bill stated that the board discussion seems to support a decision to pursue a technical change to the existing statute with support by NYSAC, OCA, etc. He also noted that they should work toward formulating standards for ACPs using existing standards and then bring them back to the board for approval.

VI. New Procedures within Executive Branch Administration: Out of State Travel Approval and Empire Fellows

Bill briefly mentioned to the board that there are new spending controls in place and that they now fall under the Deputy Secretary of Public Safety.

VII. Status Reports

- **Quality Enhancement (non-competitive) Distributions; Release of Distribution #4**

Bill reported that they are in receipt of some good proposals. He will update the board further at the next meeting.

- **Competitive Grants: Counsel at First Appearance, and Upstate Quality Improvement and Caseload Reduction**

Bill reported that there has been great support from OCA and the local administrative judges regarding counsel at first appearance.

Regarding upstate quality improvements and caseload reduction, tentative awards to all counties that submitted proposals are awaiting OSC approval.

Finally, regarding the regional immigration centers, ILS will be meeting with OSC shortly to discuss ideas. Bill noted that not many states are doing anything with *Padilla* requirements yet so New York can be a leader in this area.

- **National Developments; letter to Attorney General Holder; and personal notes**

Bill provided a copy of the March 4, 2014 letter to AG Holder regarding the

proposed White House Commission.

Bill also mentioned that he was invited by the Robina Institute of Criminal Law and Criminal Justice to be part of an advisory board that will study, among other things, existing parole and probation revocation practices. Bill will also participate in the European Association for American Studies (EEAS) anniversary conference at The Hague in April. He will be on a personal vacation in Europe at that time and it coincides with the conference.

VIII. Schedule for 2014 Board Meetings

The remaining dates for the 2014 meetings are as follows:

Friday, June 13
Friday, September 26
Friday, November 7

VIII. Concluding Remarks

Joe M mentioned that he and Bill attended a meeting with county administrators and they were very well received. He noted the importance of such relationships.

The Chief stated that success in this area is all about credibility and the availability of the ILS staff. Sue Sovie noted that Bill has a great staff of very down-to-earth individuals.

The Chief then thanked everyone for attending either by phone or in person and the meeting was adjourned.



Andrew M. Cuomo
Governor

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Improving the Quality of Mandated Representation Throughout the State of New York

Barbara Norton
Contract Management Specialist
NYS Office of the State Comptroller
Bureau of Contracts, 11th Floor
110 State Street
Albany, NY 12236

May 5, 2014

Dear Ms. Norton:

The Office of Indigent Legal Services ("Office") is requesting "Single Source" approval of a three-year contract with Clinton County in the amount of \$80,000/year (total of \$240,000 over three years) to support a Clinton County initiative¹ for improving the quality of indigent legal services representation in its assigned counsel program².

The Office³ has worked collaboratively with Clinton County to accomplish its statutory mission of assisting counties in the exercise of their responsibility under County Law Article 18-B to provide the effective assistance of counsel to persons who are legally entitled to counsel, but cannot afford to hire an attorney. To date, the Office has entered into three contracts with Clinton County for the Office's first three quality enhancement, non-competitive distributions, and is currently in the process of working with the County to develop an acceptable proposal for the Office's fourth quality enhancement, non-competitive distribution. Like these four non-competitive distributions, Clinton County is expected to benefit from this single source funding; indeed, it is essential if Clinton County is to continue improving the quality of its indigent legal services.

The Office recognizes that providers of indigent legal services in New York face multiple challenges in providing effective representation to clients. Like institutional providers of indigent legal services, assigned counsel programs suffer from caseload issues when they are forced to make excessive numbers of assignments to certain attorneys, or find that it is necessary to curtail services to clients in an effort to control costs. Assigned counsel programs also suffer from unique challenges unrelated to caseload concerns. Due to resource constraints, attorneys in these

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Karen Jackuback
Grants Manager

Jeanne Masci
Director of Regional
Initiatives

¹ Clinton County attempted to submit this initiative in response to the Office's Upstate Quality Improvement and Caseload Reduction Grant (issued August 22, 2013), but failed to submit it in accordance with the terms of the RFP. When attempting to submit the initiative, the County used an incorrect e-mail address, so it was never received by the named contact person in the RFP.

² Clinton County is an "assigned counsel county," which means that its assigned counsel program is the sole method by which the County delivers indigent legal services under County Law Article 18-b.

³ The Office operates under the direction and pursuant to policies established by the Indigent Legal Services Board ("Board").

programs often lack ready access to investigative or social services, and may receive inadequate training, support or oversight.

The initiative submitted by Clinton County, if funded, would partially address issues of inadequate training and investigative services, thereby moving Clinton County into greater compliance with the guidelines and criteria for quality representation adopted by the Indigent Legal Services Board.⁴ It would provide funding to (1) contract for on-call private investigative services; (2) add CLE credits for in-house trainings and provide locally relevant trainings, including partnering with locally certified providers such as the Rural Law Center; and (3) develop an attorney mentoring program for the assigned counsel program.

In addition, we believe that certain characteristics of Clinton County merit consideration for Single Source approval of a three-year contract with the Office. These include that the County is small in population, relatively poor, lacks adequate county resources and has little infrastructure to provide indigent legal services.

In particular, Clinton County had a total population of 82,487 in 2011, which has changed very little from year to year; a high employment rate that regularly tops 11 percent, placing it among the highest rates among counties in New York State; low County government revenues (in 2011, County revenues were \$2,008 per capita; for upstate counties overall, revenues ranged from a low of \$1,239 to a high of \$4,487 per capita); and the lack of any institutional provider (public defender office, legal aid society or conflict defender office) to provide indigent legal services.

Significantly, in a report released by this Office in November, 2013, this Office found that Clinton County spends less than half of the total amount needed to meet national standards for providing indigent legal services.⁵ Indeed, according to that report, Clinton County would need to boost spending by 102% to meet these basic standards. Furthermore, the report indicated that, overall, assigned counsel programs across the state needed to increase spending by 67% to meet national standards or 35% less than Clinton County. Clinton County is clearly in need of significant additional resources to provide quality mandated representation.

"Single Source" approval of a three-year contract with Clinton County would be in the best interests of the state. Approval will allow for the provision of critical investigative services and training and mentoring of attorneys, thereby allowing the County to continue to improve the overall quality of indigent legal services.

Finally, providing funding to Clinton County will not adversely affect applicants for funding under the Upstate Quality Improvement and Caseload Reduction Grant Counsel at First Appearance grant - the full \$12 million of available funding for that grant was awarded to the 45 counties that submitted proposals

⁴ See "Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest," as adopted by the ILS Board and extended by the Board to all trial level mandated representation (at its September 28, 2012 Board meeting). The Standards and Criteria can be found at <http://www.ils.ny.gov>

⁵ See, *An Estimate of the Cost of Compliance with Minimum National Caseload Limits in Upstate New York*, which can be found at <http://www.ils.ny.gov>

Sincerely,

Joseph W. Schram

In a timely manner. Funding for this contract would be derived from the Office's FY 2014-15 Local Aid appropriation and its subsequent two local Aid appropriations.

C

Assigned Counsel Infrastructure Grants

The Problem

New York counties commonly lack independent, professional administrators to oversee the provision of representation through assigned counsel. Consequently these systems lack transparency and oversight. These grants will enable counties to create or enhance their assigned counsel infrastructure in order to assure high quality representation is being provided, and that they are getting value for money.

An 'independent assigned counsel administrator' is defined as a single individual or office (not employed by or contained within another office such as a public defender or a county attorney office) with responsibility for the assignment of counsel in criminal, family and appellate cases, and processing of vouchers for representation.

The Grant Program

This program would fund six grants of \$150,000 per year for three years for the creation or enhancement of assigned counsel programs. Three grants would be made to localities which presently lack an independent assigned counsel administrator of which there are 31 at present. Three would go to the remaining 27 localities to enhance their existing infrastructure. Dividing the funds in this way assures that counties which lack assigned counsel infrastructure at present will be in a position to compete for funds. It also assures that established programs can also receive support to improve their programs.

The small number of grants means the grant process will be highly competitive. To qualify for funding, localities must show they will create or enhance their assigned counsel system such that it:

- Complies fully with NY County Law section 722-3-a, ILS' Standards and Criteria for the Provision of Mandated Representation and NYSBA's 2013 Revised Standards for Providing Mandated Representation
- Is overseen by an professional administrator with adequate resources
- Has procedures in place to monitor the quality of representation being provided
- Is in a position to make complete annual data submissions to ILS, as required by law, and
- Spans the entire assigned counsel process, from assignment to billing, for all case types.

Counties which do not have an assigned counsel plan for representation approved by the Office of Court Administration, or which are operating their assigned counsel plan in a manner that diverges from such a plan, will also be required to create or revise their plan to accurately reflect the operation of the assigned counsel system.

Funds may be used to improve the quality of assigned counsel administration only, including appointing an independent assigned counsel administrator, hiring attorney staff with oversight responsibilities such as training, supervision or mentoring, hiring ancillary staff, and paying for other infrastructural needs such as equipment or supplies. Funds may not be used to pay for representation, or any other services related to representation typically reimbursed under NY County Law sections 722-b or 722-c.

The Ultimate Goal

The goal of this program is to assist counties in creating or enhancing their organization and oversight of their assigned counsel program. Creating or supporting the position of an independent assigned counsel administrator will enable counties to oversee the quality of representation provided, and to assure they are getting value for money. A small amount of state support can go a long way in filling this deficit, and it is hoped many counties will be persuaded of the benefits of enhancing their assigned counsel programs in this way.

New York State Office of Indigent Legal Services

Summary of a Proposal for a Model Upstate Parental Representation Office

Introduction: The institutional, interdisciplinary model of parental representation in child protective proceedings contributes to better outcomes for children and families. Lawyers, social workers, and peer advocates working together with parents from the earliest stages of the government’s intervention into a family and throughout the life of the case protects the due process rights of accused parents, contributes to a better-functioning child welfare system, promotes expeditious and effective court proceedings, and ensures that judges and litigants have comprehensive and useful information upon which to make critical, life-altering decisions about the parent-child relationship. The proposed Model Upstate Parental Representation Office (“Model UPRO”) would enhance the quality of publicly-funded parent representation by establishing a replicable model of a high quality institutional, interdisciplinary law office for indigent parents and other assigned-counsel eligible adults in Family Court Act Article 10 child protective and termination of parental rights (“state intervention”) cases. The purpose of the project is to lay the groundwork for the expansion of this model of parental representation, which now exists only in New York City, to counties throughout New York State.

Rationale: Since 2007, New York City has contracted with The Center for Family Representation, The Bronx Defenders and The Brooklyn Family Defense Project to provide legal representation for the majority of indigent parents in state intervention cases. Along with highly qualified, well-trained lawyers, these offices employ social workers, parent advocates and paralegals to provide comprehensive legal and social work services to each client. This model of representation allows the legal professionals to provide expert legal representation in court, while the social worker helps to identify appropriate services and assists in shaping the formal services plan endorsed by the agency and the court. The parent advocates, who have personally experienced the child welfare system themselves, provide emotional support and encourage the client to engage and participate in services to completion.¹

On the other hand, outside of New York City attorneys often lack access to even the most basic resources necessary to adequately represent parents in child protective proceedings. High caseloads and limited to no access to paralegals, investigators, experts or social workers seriously undermine the ability of lawyers to provide meaningful and effective assistance to parents who are at risk of losing their children temporarily or permanently to state custody. Although critically important to successful outcomes in state intervention cases, indigent parents in Upstate New York do not have access to social workers to help them navigate the numerous out-of-court activities imposed by the child welfare agency and/or the court, or to identify and access services such as public assistance, housing, employment training, medical, disability or mental health services, drug treatment, and domestic violence counseling that may improve their ability to maintain a safe and stable home for their children. Moreover, there is a woeful lack of training and continuing legal education opportunities specifically tailored to child welfare law and practice.

Perhaps most destructive of attorneys’ ability to provide clients with meaningful and effective representation is the failure to appoint counsel to parents in a timely manner in advance of the first court hearing. While these problems – excessive caseloads, lack of supportive services, training and continuing education, failure of timely

¹ See Martin Guggenheim and Susan Jacobs, *A New National Movement in Parent Representation*, Clearinghouse REVIEW Journal of Poverty Law and Policy, pp. 44-45 (May-June 2013).

appointment - are prevalent where representation is provided by institutional providers (public defenders, conflict defenders, legal aid societies), they are greatly magnified when parents are represented by individual assigned counsel who often operate with little or no institutional oversight, supervision or support.

A May 1999 report² ("*Justice Denied*") issued by then New York City Public Advocate Mark Green concluded that:

If New York State is to meet its statutory and constitutional duties of providing representation to indigent adults involved in Family Court matters, fundamental changes must be made. If parents have access to adequate representation, everyone will gain; money will be saved, Family Court will function more effectively, and children will receive the stability and permanence to which they are entitled [t]he best way to combine all of the recommended changes -- accountability, specialization, social work support services and institutional resources -- is to establish a legal organization to represent parents in child protective proceedings."³

In the wake of similar calls by legislators, bar association committees, parent's attorneys and others,⁴ beginning in 2007 New York City entered into contracts with the Center for Family Representation, Inc. in Manhattan (and subsequently, in 2010, in Queens County), with the Brooklyn Family Defense Project in Kings County, and with the Bronx Defenders in Bronx County to provide representation for the majority of assigned counsel eligible adult respondents in Article 10 proceedings throughout the City (with the exception of Richmond County). In validation of the resounding success of this approach, in its most recent RFP issued in 2013, New York City sought to award contracts to multiple institutional providers in all five counties (including

² Mark Green, Pub. Advocate for the City of N.Y. & C-PLAN: Child Planning and Advocacy Now, Accountability Project, Inc., *Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Protective Proceedings* (May, 2001) ("*Justice Denied*").

³ *Justice Denied* at 44-46.

⁴ See, e.g., Roger Green and William Parment, *Legislative Report: Losing our Children: An Examination of New York's Foster Care System*, New York State Assembly, Committee on Children and Families and Committee on Oversight, Analysis and Investigation (July 1999) (advocating funding for programs providing "comprehensive representation" to parents using "experienced attorneys and social workers to present evidence that children were not abused or neglected" and "legal assistance to help families with their housing, public assistance and domestic relations problems to alleviate any conditions which may have caused abuse or neglect."); *Families in Limbo: Crisis in Family Court, Recommendations & Solutions*, Child Welfare Watch (Winter 1999) (urging "the creation of a government funded organization analogous to Legal Aid's Juvenile Rights Division (JRD), to provide an institutional legal base for the defense of poor parents."); Sherrie Bonstele and Christine Schlessler, *Adjourning Justice: New York's Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 *Fordham Urban Law Journal* 1151 (2000) (arguing that parent representation based on the Legal Services or the Legal Aid model would be a long-term solution that likely would have the greatest impact on the representation provided for parents in Family Court . . . comprehensive legal representation for parents would result in efficiency in court proceedings and a reduction in the amount of time children spend in foster care, thus reducing wasteful expenditures in the current system."); Beth Harrow and Sue Jacobs, *Report of the Parent Representation Working Group*, 70 *Fordham Law Review* 399 (2001) (recommending creation of "a dual system for the representation of parents that would include an institutional organization and a panel of attorneys . . ."); Appellate Division First Department, Committee on Representation of the Poor, *Crisis in The Legal Representation of the Poor: Recommendations for a Revised Plan to Implement Mandated Governmentally Funded Legal Representation of Persons Who Cannot Afford Counsel*, pp. 11-13 (March 2001) (noting that "the need for interdisciplinary services involving at least a social worker in addition to an attorney suggests that an institutional provider to represent parents in Family Court should be established . . . to be truly effective, the institutional provider . . . should also have the staffing capability to reach out to community services, mental health facilities, parent education, and drug counseling programs. It should also have access to other attorneys who could advise or represent parents in housing, public assistance, disability, and domestic violence problems."); see also Ann Moynihan, Mary Ann Forgey, and Debra Harris, *Foreword, Fordham Interdisciplinary Conference - Achieving Justice: Parents and the Child Welfare System*, 70 *Fordham Law Review* 287, 309-313 (2001).

Richmond) with the goal of ensuring “the use of a multi-disciplinary service model, including social workers, paralegals, investigators, experts and parent advocates” for all parents in Article 10 proceedings in the City.

Project Description: The proposed Model Upstate Parental Representation Office would be staffed by a full-time supervising attorney and 3 (or 4) full-time staff attorneys experienced and trained in family law, child abuse and neglect, social service delivery and alternative dispute resolution (ADR) models. Support staff would include one full-time office manager/administrative assistant (and one part-time, if there are 4 attorneys); a social worker; one or more paralegals, a parent advocate and an investigator. Following nationally recommended standards, attorneys would carry a manageable case load, with a limit of no more than 55 open client case files at any given time.⁵

A defining component of the proposed UPRO is early entry of counsel into the case. Recognizing the value of early representation, New York State law already requires that an Attorney for the Child be assigned when the social services agency *has removed or is about to remove a child from parental custody*.⁶ However, the law requires only that parents be advised of their right to an attorney “when such person first appears in court,”⁷ and in some parts of Upstate New York it is commonplace that a parent may not meet with a lawyer until weeks or even months after having been forcibly separated from his or her child. The Upstate Parental Representation Office would address this inequity by providing representation to parents at the earliest stage of the case, including during the pre-filing period when the social services agency is contemplating removal, and in any event as far as possible in advance of the first court appearance as is feasible. Representation at the beginning of the government’s intervention into the family’s life will allow the parent defense team to front-end legal counseling, advocacy, and social services referrals that may prevent removal of a child and/or the filing of a petition, to speed return of a removed child through vigorous advocacy, and to advocate for appropriate and timely preventive and supportive services to which children and their parents are legally entitled.⁸

⁵ Although New York State has not established mandatory caseload caps for parent’s attorneys, the maximum caseload for attorneys assigned through the Attorney for the Child program is 150 children at any given time. See Rules of the Chief Administrative Judge, § 127.5 Workload of the Attorney for the Child. Using the conservative limit of 138 cases per attorney cited in ILS’s report *An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York*, and assuming an average of 2.5 petitions per adult client in child protective cases, the equivalent caseload limit for a parent’s attorney would be 55 adult clients per attorney.

⁶ N.Y. Fam. Ct. Act §1016.

⁷ N.Y. Fam. Ct. Act §262.

⁸ See, e.g., Judge Leonard Edwards (Family Court, ret.), *Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment*, *Juvenile and Family Court Journal* 63, no. 2 (Spring 2012) (“Unless the court appoints the [attorney] well before the initial hearing and the client receives representation from the beginning of the case, the representation will likely be ineffective.”), at http://www.maine-court-improvement.org/fileLibrary/file_52.pdf; Trine Bech, et al., *The Importance of Early Attorney Involvement in Child Welfare Cases Representation of Parents in Pre-Petition Proceedings*, (prepared for Second National Parents’ Attorney Conference, American Bar Association, July 13-14, 2011) (“Providing parents with realistic access to counsel BEFORE the filing of court petitions alleging abuse or neglect can go a long way toward protecting the rights of parents and preventing unnecessary foster care and other out-of-home placements. . . attorneys . . . can help parents advocate for the services they need to keep their children safely in their homes; inform parents about their rights and options regarding voluntary placements with relatives; advise parents of the consequences of sharing information during CPS interviews and family engagement meetings; and advocate on behalf of parents against third parties who create unsafe environments, such as abusive domestic partners or unscrupulous landlords.”), at http://www.americanbar.org/groups/child_law/what_we_do/projects/parentrepresentation/conference_materials.html; Mark Hardin & Susan Koenig, *Early Appointment of Counsel for Parents*, in *Court Performance Measures in Child Abuse and Neglect Cases: Technical Guide*, U.S. Department of Justice, Office of Justice Programs (2nd Printing, 2009) (“The earlier appointment occurs, the sooner the interests of the parent begin to be represented. Early appointment may enable the case to proceed faster, minimizing the length of separation between parent and child and clearing the way for delivery of needed services earlier rather than later.”)

The Model UPRO staff attorneys would provide representation in all phases of Family Court Article 10 and termination of parental rights proceedings, related interlocutory and final appeals, and in ancillary Family Court Act §262 mandated cases as necessary (custody, visitation, guardianship, paternity, family offense, etc.). Attorneys would also either represent clients in-house or refer them to civil legal services providers in related proceedings as necessary (e.g., housing; child support; SSI and other public benefits; education-related hearings; mental health proceedings; immigration proceedings; central registry expungement, etc.), and would engage in community outreach and education activities.

E

Proposal: Creation of a Wrongful Conviction Prevention Center

Wrongful convictions present an enormous challenge for the criminal justice system in New York State. To begin to remedy this problem, the Office of Indigent Legal Services proposes a demonstration project: the creation of a Wrongful Conviction Prevention Center that will provide the resources necessary for the highest quality legal representation in Class A, A-1, and B felony cases. The Center will provide direct representation in those cases presenting one or more of a constellation of factors known to correlate with an increased risk of wrongful convictions.

The Wrongful Conviction Prevention Center will be staffed by three to four attorneys, an investigator, an information technology expert, an executive assistant, and several law clerks selected from law schools that offer externships or permit third year practice in lieu of classes. Of the staff attorneys, two or three shall function as trial attorneys, with at least one who possesses demonstrated expertise in litigating cutting edge forensic science issues. The other attorney shall possess expertise in litigating appellate matters and will function in a litigation support capacity working in tandem with the trial attorneys. The Wrongful Conviction Prevention Center will also possess resources sufficient to hire expert witnesses as required by the particular facts of the case. Upon receiving a case referral, the WCPC will provide direct representation and utilize all of its resources in defending the case.

Rationale

Combatting the scourge of wrongful convictions constitutes a moral imperative. As aptly stated by Chief Judge Jonathan Lippman, "[e]very wrongful conviction is a stain on the reputation of the courts, eroding public trust in the legitimacy of our institutional status and the fairness and accuracy of our decisions." Thus, the prevention of wrongful convictions is "a mission that every single one of us can dedicate ourselves to without the slightest reservation, because none of us can afford the luxury of being wrong when it means imprisoning someone for a crime he or she did not commit." Justice Derailed; *Criminal Justice*, Volume 26, Number 3, Fall 2011.

This proposal also furthers New York State's demonstrated commitment to eradicate the problem of wrongful convictions. New York has already taken several important initial steps to reduce the likelihood of wrongful convictions from occurring. First, both the State Bar Association and the Judiciary have created task forces to study the problem of wrongful convictions, identify their causes, and make recommendations. Second, several of the larger prosecutorial agencies have created conviction integrity units to review convictions and implement broad policy changes. The creation of a Wrongful Conviction Prevention Center will strengthen New York State's efforts to lead the nation in addressing this seemingly intractable problem.

The efforts already underway, while laudable and necessary, will not suffice to eradicate the problem, particularly in upstate New York, where prosecutorial agencies and defenders lack the resources to make significant progress instituting reforms. Additionally, waiting for changes in legislation or internal prosecutorial policy that will reform police and prosecutorial practices relating to video-taped interrogations, eyewitness identification, pretrial discovery, or the misuse of forensic evidence will not solve the problem of wrongful convictions. Simply put, these reforms may or may not occur; and even if they do occur, the danger of convicting an innocent person will remain because these steps cannot ameliorate a critical aspect of the problem, the quality of defense representation.

Numerous studies, including those conducted by the National Institute of Justice and the New York State Bar Association's Task Force on Wrongful Convictions, have identified poor defense practices as a key cause of wrongful convictions. Implementing this proposal would have a dramatic effect on eliminating poor defense practices as a contributor to wrongful convictions. As noted by the New York State Bar Association's Task Force, "organizations which currently operate a resource center for public defenders and assigned counsel should be given additional resources that would enable them to increase their ability to provide guidance and counsel to an attorney, assigned or retained, who seeks assistance." This proposal not only follows the Bar Association's recommendation, but strengthens it by providing direct representation. The creation of a Wrongful Conviction Prevention Center as a demonstration project would also lay the foundation for a more systematic approach to reform.

Perhaps most importantly, this proposal addresses the problem of wrongful convictions proactively, instead of retroactively, after the miscarriage of justice has occurred. Although there has been a concerted effort across the country to seek out and overturn wrongful convictions, similar resources have not been applied to cases at the pre-trial stage. With the exception of New York City, which benefits from caseload caps and a number of very strong indigent defense offices, mandated providers of indigent defense services in upstate New York utterly lack the resources to properly address the problem of wrongful convictions and have not, therefore, been able to develop or implement effective solutions.

Feasibility

Because numerous studies have exposed the causes of wrongful convictions, the Wrongful Conviction Prevention Center would have a built-in referral evaluation mechanism. The Center would accept cases that involve one or more of the issues that create a risk of a wrongful conviction: failure of the prosecution to disclose exculpatory evidence, eyewitness misidentification, false confessions, forensic error, police misconduct, use of jailhouse informants, and systemic error. Second, the Wrongful Conviction Prevention Center would ease the financial burden on the County selected for the demonstration project. The types of cases which present the greatest risk of a wrongful conviction also require the greatest expenditure of resources to defend. For instance, issues regarding forensic science require not only attorneys with specific expertise, but defenders with sufficient resources to hire a variety of expert witnesses. Similarly, cases with pretrial discovery issues, eyewitness identification issues, potentially false or coerced confessions, or "cooperating witnesses," require greater resources and expertise than currently exist in most defender offices and assigned counsel plans throughout New York State. ILS funding would relieve the County where the demonstration project is located of the financial burden of the cost of litigating a significant number of complex cases. It would serve the two important goals of providing proper, high quality representation in high risk cases while reducing the County's financial burden of providing that representation.

F

Legislative Recommendations

As a follow-up to the discussion held by the Board at its March 14, 2014 meeting, the following two recommendations, if adopted, would authorize the Office to develop the following legislation and take all necessary steps for its enactment:

Recommendation #1: Amend County Law § 722 (3) (b) to transfer approval authority of bar association plans for assigned counsel plans and conflict defender offices from the Office of Court Administration (OCA) to the Office of Indigent Legal Services (Office).

- **County Law § 722 (3)(b).** County Law § 722 (3)(b) requires that a plan of a bar association for an assigned counsel program or office of conflict defender receive approval of the "state administrator" (now Chief Administrative Judge/OCA) before the plan is placed in operation.
- **Rationale for transfer of authority.** ILS has been tasked with overseeing the delivery of indigent legal services in New York. To fulfill its statutory mission "to improve the quality" of indigent legal services, obtaining approval authority of bar plans for assigned counsel programs and conflict defender offices is essential for oversight. At present, when considering approval of an office of conflict defender, OCA is statutorily required to "employ" the standards and criteria for conflict cases that were established by this Board at its June 8, 2012 meeting.
- **Continued oversight.** ILS approval authority would extend to amendments or revisions of plans, and would include oversight authority to monitor plans in operation, to ensure compliance with plans, as approved, revised or amended.
- **Amendment.** The amendment to County Law § 722 (3)(b) would consist of substituting references to "state administrator" in § 722 (3)(b) with the "office of indigent legal services." The effective date of the legislation would provide that the approval authority of the Office is prospective, to ensure that plans approved prior to such effective date remain in effect. Finally, for plans submitted by counties under § 722 (3)(c), for authority to operate an office of conflict defender under the so-called "grandfather clause," approval authority would be transferred to the office of indigent legal services for any plan that has not been approved or disapproved by OCA prior to the effective date of this legislation. See attached County Law § 722 (3)(b)&(c).

Recommendation #2: Amend County Law § 722-f to require counties and indigent legal service providers to file the reports required under § 722-f (1)&(2) with the Office of Indigent Legal Services¹.

- **County Law § 722-f (1).** County Law § 722-f (1) requires providers of mandated representation under County Law article 18-B to file a report with the judicial conference (now State Administrator/OCA) "at such times and in such detail and form as the judicial conference may direct." In fulfillment of that requirement, OCA currently requires each indigent legal service provider within a county (i.e., public defender, private legal aid bureau or society and

¹ At its March 14, 2012 meeting, the Board authorized the development of legislation for the amendment to County Law § 722-f (2). Authority is being sought at today's meeting for development of a broader legislative package, of which the amendment to § 722-f (2) is a part.

administrator of an assigned counsel plan²) to annually submit a UCS-195, which asks for caseload, staffing level and expenditure data.

- **County Law § 722-f (2).** County Law § 722-f (2) require the county executive or chief executive officer of each county to file an annual report with the Office of the State Comptroller which “specifies in detail” the total expenditures of such county for providing mandated representation under County Law article 18-b, “identifying” local funds, state funds, federal funds and funds received from a private source.
- **Rationale for filing reports with the Office.** Having direct access to the reports required under County Law § 722-f (1)&(2) is critical to the effective operation of the Office. With these two reports, the Office is able to track caseloads, staffing levels and county expenditures across the state. The Office has assisted the Office of State Comptroller and OCA with obtaining reports from counties and indigent legal service providers that have not filed reports in a timely manner. Notably, the report released by the Office this past fall, *An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York*,² relied heavily on data derived from these two reports.
- **Amendment.** The amendment to County Law § 722-f (1)&(2) would consist of adding the “office of indigent legal services” as a recipient of the two reports. In addition, a technical amendment would be made to § 722-f (1) to extend the reporting requirement to include an “office of conflict defender.” See attached County Law § 722-f (1)&(2).

² In an apparent oversight to the 2010 legislation which added an “office of conflict defender” to the menu of ways a county is authorized to deliver mandated representation under County Law 18-b, “office of conflict defender” was not added to § 722-f (1).