

# **INDIGENT LEGAL SERVICES BOARD**

## **AGENDA**

**September 26, 2014**

**Association of the Bar of the City of New York**

- I. Opening Remarks by the Chief Judge**
- II. Approval of Minutes from June 13, 2014 Board Meeting**
- III. Allocation of FY 2014-2015 Aid to Localities Appropriation**  
(See Memorandum A)
- IV. Budget Request for FY 2015-2016** (See Memorandum B with Attachments)
- V. Publication of 2013 Upstate Cost Estimate on Wednesday, September 24**
- VI. Proposed Upstate Caseload Standards, Contingent on Full State Funding**  
(Bill will provide on Wednesday)
- VII. Status Reports**
  - Integrating Social Workers into Practice
  - Recent Training Programs and Public Events
  - Status of Development of Standards for Appellate and Family Court Representation
  - Status of Proposed Legislative Amendments
  - Distribution of *Padilla* RFP
  - Status of 3 RFPs Authorized at June 2014 Meeting
- VIII. Schedule of Remaining 2014 Board Meetings**
  - Friday, November 7
- IX. Concluding Remarks**

# **Minutes for ILS Board Meeting**

**June 13, 2014**

**11:00 A.M.**

**Association of the Bar of the City of New York**

**Board Members Present:** Chief Judge Lippman, Joe Mareane, John Dunne, Sue Sovie, Lenny Noisette, and Sheila DiTullio

**ILS Office Attendee(s):** Bill Leahy, Joseph Wierschem, Andy Davies, Angela Burton, and Matt Alpern

## **I. Opening Remarks by the Chief Judge**

The Chief Judge welcomed and thanked all for attending. He briefly spoke about the unpredictability of the state budget process generally and as it related to ILS. He remarked that even though the end result was not getting everything the ILS Board and Office requested, the Office was still doing a terrific job.

The Chief also spoke about the NYSBA summit he attended earlier in the month. The summit focused on the past, present, and future of indigent defense. It gave the Chief Judge an opportunity to reflect on all of the progress that has been made but also on the continuing need for resources to further his broader vision for the future of indigent defense. The Chief Judge said that it is necessary to study the criminal justice system as a whole and not look at individual advances in a "vacuum" - progress must be made in areas affecting the system of bail, line-ups, videotaped interrogations, juvenile justice, record sealing, etc. In order to level the playing field, many challenges exist - the system as a whole needs attention.

Sue Sovie asked if there was any progress on the "raise the age" legislation for juveniles. The Chief was pleased to refer to Governor Cuomo's recently formed commission that was asked to produce a report by the end of the year.

## **II. Approval of Minutes from March 14, 2014 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.

**Joe Mareane moved to approve the minutes; his motion was seconded by Sue Sovie and unanimously approved by the board.**

### **III. Approval of Upstate Quality Improvement Grant for Clinton County**

Bill Leahy requested the Board's approval on a single-source contract to support a Clinton County initiative for improving the quality of indigent legal services representation in its assigned counsel program. Clinton attempted to participate in the Office's earlier RFP process aimed at Upstate Quality Improvement and Caseload Reduction. Counsel Joe Wierschem worked with the Office of the State Comptroller to authorize a 3-year contract in the amount of \$80,000/year subject to the Board's approval. The contract would support, among other improvements, investigative services, training and mentoring. Bill explained that there is a new assigned counsel administrator that will work with his office and a lot of good will was established by getting the contract authorized after the county missed the RFP process.

**Joe Mareane moved to authorize the 3-year \$240,000 contract; his motion was seconded by Shella DiTullo and unanimously approved.**

### **IV. Authorization to Prepare RFPs for New Initiatives**

Bill Leahy explained that even though the Office did not get additional funds in the budget process, there was \$2.7 million in unspent local aid money. His office discussed several proposals for the use of these funds.

- **Assigned Counsel Infrastructure Grants** *(presented by Andy Davies)*

Andy explained that the current lack of an information infrastructure makes it incredibly difficult to obtain information from the individual counties. He is working with many informal systems. This program would fund six grants of \$150,000 per year for three years for the creation or enhancement of assigned counsel programs. This would allow counties and, in turn, the Office, to oversee the quality of representation provided. Joe Wierschem noted that these grants would jump-start what is happening with the non-competitive grants.

**John Dunne moved to authorize this proposal; his motion was seconded by Sue Sovle and unanimously approved.**

Lenny Noisette questioned whether we would ever get long-term uniformity with the counties approach to assigned counsel programs (ACPs). Bill noted that the counties fall into 3 categories: those with vibrant ACPs, those that have an administrator but are trying to enhance their roles, and those who have administrators that simply process the bills. The above proposal would force applicants to adhere to the standards set by the Office. The goal is to get the counties to model their programs after Erie and Tompkins.

- **Model Upstate Parental Representation Office** *(presented by Angela Burton)*

Angela proposed a Model Upstate Parental Representation Office (UPRO) to 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 Art. 10 child protective and termination of parental rights cases. A key component is similar to the Counsel at First Appearance Model whereby "early entry" into the case would be promoted. In addition, it was noted that standards are currently being created and this model would permit testing of the standards in a well-resourced area.

Sue Sovie inquired where this model might be tested. Angela foresees a locale that has an average of 150-300 cases per year. There are approximately 15 counties that fit this general criteria. Also necessary is a coalition and collaboration among the necessary parties. Sheila DiTullio noted that Chautauqua has a strong group that might be willing to put the time in for such a project.

Sue Sovie also asked if it would provide assistance to other counties. Angela envisions a possibility of providing training programs for others and possibly a "hot-line" service. It would not be a regional center but perhaps a resource.

**Sue Sovie moved to authorize this proposal; her motion was seconded by Joe Mareane and unanimously approved.**

- **Wrongful Conviction Prevention Center** *(presented by Matt Alpern)*

Matt proposed a demonstration project that would create a Center to provide resources necessary for the highest quality legal representation in class A, A-1, and B felony cases. The Center would provide direct representation in those cases presenting factors that have been known to correlate with an increased risk of wrongful convictions.

Matt has done a lot of traveling and observed many trials in serious cases. While he noted that much is being done retroactively in this area, he also noted that poor defense practices can be fixed by this proposed model. He also found that many upstate offices are not equipped to handle complicated forensic issues. This model would build in a resource for those cases.

Lenny Noisette said it would be best to have a resource center as opposed to a single county resource just "beefing up" the needs in one place. While Matt agreed, the funding is just not available. However, Matt said this model could provide an informal resource to multiple areas. Bill also added that this project could be a model that shows a well-resourced attorney makes a difference. It supports the notion that these services should be available "up-front" not after-the-fact. Bill said this complements the previously proposed Regional Centers that drew attention but did not gain approval.

Joe Mareane noted the need to have a flexible approach since the counties have natural differences.

**John Dunne moved to authorize this proposal; his motion was seconded by Sue Sovie and unanimously approved.**

## **V. Proposed Legislative Amendments**

A memo was provided to all board members in advance of the meeting outlining two proposed recommendations and to authorize the Office to develop the actual legislation and take all necessary steps to promote enactment. These proposals were previously discussed at the March 2014 board meeting.

The first involved an amendment to County Law § 722 (3)(b) to transfer approval authority of bar associations plans for assigned counsel plans and conflict defender offices from the Office of Court Administration to the Office of Indigent Legal Services.

The second proposal would involve the amendment of County Law § 722-f to require counties and indigent legal services providers to file the reports required under § 722-f (1) and (2) with the Office of Indigent Legal Services.

The Chief Judge noted that these proposed legislative changes would institutionalize the Office.

**Joe Mareane moved to authorize this proposal; his motion was seconded by Shella DiTullio and unanimously approved.**

## **VI. Status Reports**

An ILS fact sheet was distributed detailing the non-competitive distributions (#1 through #4) and the competitive grants in furtherance of Counsel at First Appearance, Upstate Quality Improvement and Caseload Reduction and Immigration Regional Resource Centers.

In addition, feedback was provided regarding attendance at the following meetings: 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, and June 12 Andy Davies Webinar.

The Chief Judge noted the support of the new NYSBA bar president. The Chief also noted that the NYSBA conference was attended by a very energized group.

## **VII. Schedule for 2014 Board Meetings**

The remaining dates for the 2014 meetings are as follows:

Friday, September 26

Friday, November 7

## **VIII. Concluding Remarks**

The Chief Judge thanked everyone for their continued commitment. He then excused himself before the meeting went into Executive Session to be chaired by John Dunne.

**John Dunne moved for the meeting to go into Executive Session; his motion was seconded by Sue Sovie and unanimously approved by the remaining Board members.**

**At the conclusion of the Executive Session, no action was taken.**

The meeting was adjourned at 1:15 PM.



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

To: Indigent Legal Services Board

From: Bill Leahy

Re: Allocation of FY 2014-15 Aid to Localities Appropriation (\$81 million)

Date: September 18, 2014

*Matthew Alpern*  
Director of Quality  
Enhancement,  
Criminal Trials

*Peter W. Avery*  
Manager of  
Information  
Services

*Angela Burton*  
Director of Quality  
Enhancement,  
Parent  
Representation

*Andrew Davies*  
Director of  
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*Tammeka  
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*Risa Gerson*  
Director of Quality  
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Conviction  
Litigation

*Karen Jackuback*  
Grants Manager

*Joanne Macri*  
Director of Regional  
Initiatives

At each of its three previous September meetings, the Board has allocated the entirety of that fiscal year's Aid to Localities appropriation, thereby enabling the Office to 1) develop grants and distributions as authorized by the Board and 2) describe to providers, county and state officials the precise purposes for which the appropriated funds will be expended.

In similar fashion and for the same reasons, I propose that that the FY 2014-2015 Aid to Localities appropriation be allocated for the following purposes:

- 1. Statutory Distribution:** This is the statutory distribution of \$40,000,000 to New York City, as mandated by State Finance Law section 98-b (3) (b). There are no longer any annual statutory distributions to non-NYC counties. The last such distribution was made on March 15, 2014 from FY 2013-2014 funds, in accordance with the phase-out provisions of State Finance Law 98-b (3) (c).
- 2. Quality Improvement Distributions:** These non-competitive distributions totaling \$30,210,924, issued under Executive Law sections 832 (3) (f) and 833 (7) (c) enable all counties and New York City to receive no less state funding than they received in 2010; so long as they consult as required with their providers of mandated representation, and satisfy the Office that their proposed use of the funds will serve to improve the quality of representation. The funds would be allocated as follows:
  - Distribution #3.** \$7,361,326 represents the third year of the three-year distribution authorized by the Board at its September, 2012 meeting.
  - Distribution #4.** \$7,361,326 represents the second year of the three-year distribution authorized by the Board at its September, 2013 meeting.
  - Distribution #5.** \$15,488,228 represents the first year of a new three-year allocation of funds ("Distribution #5"), which is composed of two parts: 1) \$7,361,326 represents the continuation of funding that had been paid to

counties via the statutory payments that were phased out in March, 2014, as explained above; and 2) \$8,126,902 represents the amount allocated to counties and New York City for the three year distribution authorized by the Board at its September, 2011 meeting (Distribution #2). Since the Board has previously allocated funding for each of the three years for distribution #2, a new authorization is required for this component as well.

Therefore, I ask the Board to authorize a new three year funding allocation in the amount of \$15,488,228 in FY 2014-15 (i.e., \$46,464,684 over three years), known as Distribution #5, subject to the same conditions of consultation with providers and approval by the Office as the previous quality improvement distributions. Please note that by combining the two components of this distribution, the funding process for the localities and the Office will be simplified. Also note that New York city would be included in that portion of Distribution #5 funding that extends the funding available via Distribution #2; thereby ensuring that the City, like the counties, can receive the same level of non-competitive funding that it received in 2010.

### 3. Competitive Grants.

- **Quality Enhancement and Upstate Caseload Reduction:** Grants in the amount of \$4,000,000 to finance the third year of the three-year program to enhance quality and reduce caseloads in counties outside New York City.
- **Counsel at First Appearance:** Grants in the amount of \$4,000,000 to finance the first year of a three-year program to provide counsel at a defendant's first court appearance in upstate counties. The Board has previously allocated three years of funding in this amount for the initial Counsel at First Appearance grant. I now ask the Board to authorize the development of this second Counsel at First Appearance grant, in the amount of \$4 million per year (\$12 million over its three-year period). We will be in discussions with OSC and DOB to determine how best to structure a grant proposal that will continue existing programs, and possibly permit additional counties to participate in this second round of funding.
- **Model Upstate Parental Representation Office:** A grant in the amount of \$900,000 to finance the first year of the three-year program authorized by the Board at its June 13, 2014 meeting. I ask the Board to reduce this authorization of \$900,000 per year to \$870,139 per year (\$2,610,418 over three years) in order to allocate funding for the Steuben County single source contract (see below).
- **Wrongful Conviction Prevention Center:** A grant in the amount of \$900,000 to finance the first year of the three-year program authorized by the Board at its June 13, 2014 meeting. I ask the Board to reduce this authorization of \$900,000 per year to \$870,139 per year (\$2,610,418 over three years) in order to allocate funding for the Steuben County single source contract.

- **Assigned Counsel Infrastructure:** Six grants in the total amount of \$900,000 to finance the first year of the three-year program authorized by the Board at its June 13, 2014 meeting. I ask the Board to reduce this authorization of \$900,000 per year to \$870,139 per year (\$2,610,418 over three years) in order to allocate funding for the Steuben County single source contract.

#### 4. Single Source Contracts.

- **Clinton County:** \$80,000 represents the first year of the three year single source contract authorized by the Board at its June 13, 2014 meeting (\$240,000 over three years). Provision of this funding enables Clinton County to become the 46<sup>th</sup> county to benefit from our Upstate Quality Improvement and Caseload Reduction grant.
- **Steuben County:** \$98,658 represents the first year of a new three year single source contract. I ask the Board to approve an expenditure of \$98,658 (\$295,975 over three years) for this contract, which would make Steuben County the 47<sup>th</sup> county to benefit from our Upstate Quality Improvement and Caseload Reduction grant.



Andrew M. Cuomo  
Governor

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Director

Joseph F. Wierschem  
Counsel

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

To: Indigent Legal Services Board

From: Bill Leahy

Re: FY 2015-2016 Budget Request

Date: September 18, 2014

I ask your approval of a budget request for FY 2015-2016 in the amount of \$117,500,000, which consists of \$112 million in Aid to Localities and \$5.5 million in State Operations. Please see the enclosure, **Office of Indigent Legal Services: FY 2015-2016 Budget Proposal**. As indicated therein, with respect to State Operations, we seek an increase of \$800,000 (from \$1.9 to \$2.7 million) to begin staffing up to our originally intended and much needed level of 20 personnel in the central Albany office; and initial investments of \$2 million for our Regional Support Centers and \$800,000 for our Statewide Appellate Resource Center. The need and justification for these critical pieces of our statewide quality improvement efforts are contained in the enclosed Attachments A (2 pages) and B (5 pages) from last September's Board meeting. The total request for State operations is \$5.5 million, an increase of \$3.6 million over current funding.

We seek an additional \$31 million in Aid to Localities, all for purposes that the Board has previously authorized. The majority of the additional funding, \$20 million, would be devoted to bringing the 72 upstate institutional providers into compliance with national maximum caseload limits and to providing basic support for the 58 upstate assigned counsel programs. This would be the first installment of a five-year funding plan, which is set forth in the enclosure **5 Year Funding Increases Required to Improve Quality of Mandated Representation in New York State**. With respect to upstate quality improvement and caseload reduction, this requested increase is founded upon the data revealed in our *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2013 Update*. This report will be released this week. We seek an additional \$8 million to extend the reach of our Counsel at First Appearance grant program to the remaining upstate counties; and \$1 million each to further fund the three proposals authorized by the Board at its June, 2014 meeting: Assigned Counsel Program grants, a Model Parental Representation Office, and a Wrongful Conviction Prevention Center. The total request for Aid to Localities is \$112 million, an increase of \$31 million over current funding.

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*Karen Jackuback*  
Grants Manager

*Joanne Macri*  
Director of Regional  
Initiatives

(9/18/14)

**OFFICE OF INDIGENT LEGAL SERVICES**

**5 Year Funding Increases Required to Improve Quality of Mandated Representation in New York State**

**Increase Over FY 2014-2015 Funding**

	<b><u>FY 2015-16</u></b>	<b><u>2016-17</u></b>	<b><u>2017-18</u></b>	<b><u>2018-19</u></b>	<b><u>2019-20</u></b>
<b><u>State Operations</u></b>					
ILS Staffing	\$0.8M	\$1.4M	\$1.6M	\$1.8M	\$2M
Regional Support Centers	\$2M	\$6M	\$8M	\$9M	\$9M
Statewide Appellate Center	\$0.8M	\$1.5M	\$1.5M	\$1.5M	\$1.5M
<b>Total State Ops. Increase</b>	<b>\$3.6M</b>	<b>\$8.9M</b>	<b>\$11.1M</b>	<b>\$12.3M</b>	<b>\$12.5M</b>
<b><u>Aid to Localities</u></b>					
Upstate Caseload	\$20M	\$40M	\$60M	\$80M	\$100M
Counsel at First Appearance	\$8M	\$8M	\$8M	\$8M	\$8M
ACP Improvement	\$1M	\$1.5M	\$1.5M	\$1.5M	\$1.5M
Parent Rep. Offices	\$1M	\$2M	\$3M	\$3M	\$3M
WC Prevention Offices	\$1M	\$2M	\$3M	\$3M	\$3M
<b>Total Aid to Localities Increase</b>	<b>\$31M</b>	<b>\$53.5M</b>	<b>\$75.5M</b>	<b>\$95.5M</b>	<b>\$115.5M</b>
<b>Total Increase</b>	<b>\$34.6M</b>	<b>\$62.4M</b>	<b>\$86.6M</b>	<b>\$107.8M</b>	<b>\$128M</b>
<b>Total Annual Budget</b>	<b>\$117.5M</b>	<b>\$145.3M</b>	<b>\$169.5M</b>	<b>\$190.7M</b>	<b>\$210.9M</b>

## Attachment A

### Proposal for Regional Support Centers

After two and one-half years of observing, inquiring, reading, listening, consulting, funding and assessing the quality of the representation provided under New York's delivery of legally mandated representation to people who cannot afford to retain counsel, we have determined that the creation of Regional Support Centers throughout the state is an extremely important initiative that should be implemented now to improve both the quality and the uniformity of representation throughout the State of New York.

The First Annual Report of the Indigent Legal Services Board advocated for the establishment of state-funded Regional Resource Centers to help all localities improve the quality of indigent defense and parent representation, and to provide mandate relief to the counties:

The current county-based system cannot long survive if it is not supplemented by Regional Resource Centers, operating as integral parts of the Office, to assist counties in each region. These resources can include not only the already-planned Immigration Consequences Resource Centers, but also such areas as investigation, social services, litigation training, forensic assistance, appellate representation, certification of counsel, and others: many of which have been identified in the 2012 *Report on Sharing Resources* of the New York State Bar Association Committee to Ensure the Quality of Mandated Representation.

ILSB First Annual Report at 13-14 (November, 2012).

The failure of New York's primarily county-funded system to provide uniformly competent representation has been repeatedly documented both in state reports ("The current indigent defense 'system' is a haphazard, patchwork composite of multiple plans that provides inequitable services across the state to persons who are unable to afford counsel." *Status of Indigent Defense in New York* [Final Report, The Spangenberg Group, (2006) at 155]); ("The current method of providing indigent

defense services in New York imposes a large unfunded mandate by the state upon its counties [and] results in a very uneven distribution of services[.]” Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York*, [2006] at 20-21; and in every recent national assessment, including *Gideon’s Broken Promise* (ABA, 2004), *Justice Denied* (The Constitution Project, 2009) and *Securing Reasonable Caseloads* (ABA, 2011).

Every locality is in need of access to state-funded and locally accessible expertise, training, consultation and support. Once established, these Centers will help to assure that the quality of justice one obtains in New York does not fluctuate and often fall, depending solely on the happenstance of where one’s case arises, or which provider assumes responsibility for one’s representation. The State of New York cannot and must not tolerate the continuation of such inequity in the provision of counsel; a right that is “fundamental and essential to fair trials[.]” *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

We therefore propose the creation of state-funded Regional Support Centers that will assist local providers of indigent defense and parent representation by providing them with assistance in the following areas: 1) criminal defense and mandated family court representation expertise, 2) legal research and advice, 3) appellate and post-conviction advice and assistance, 4) locally-based litigation and supervisory training; and 5) development of and access to investigative, forensic and other litigation support services.

We envision a total of nine Centers: one in each of the upstate Judicial Districts 3 through 9, one on Long Island (JD 10), and one in New York City. Each Center would be staffed by a training director, a criminal defense attorney, a family court representation attorney, an appellate and post-conviction attorney, an investigative and forensic support resource person, and an office manager/paralegal. Ultimately, we estimate the annual cost of operating each of these Centers to be in the vicinity of \$800,000 – one million dollars annually, or a total annual expenditure of approximately \$8 million. Given the pace at which it is feasible to inhabit space and employ Executive Branch employees, however, we believe it is realistic to request a limited appropriation of one million dollars in the startup year FY 2014-2015.

## Attachment B

### New York State Appellate Resource Center: A Proposal

Mandated appellate representation is fragmented in New York State. In New York City, institutional defenders represent most indigent defendants, while in upstate New York, there are three institutional providers that represent only a small fraction of the criminal defendants in the remaining 57 counties. This proposal, to create a state-wide appellate resource center in Albany, the State capital, would save the State and counties money by diverting the complex cases to an institutional defender office, staffed by highly-qualified experienced attorneys, and assisted by support staff including a paralegal, investigator, and a social worker, who would provide reentry assistance and mitigation support. Because of economies of scale, this state-funded office would be more cost-effective than individual panel attorneys who are assigned to these cases now. And, because of the office's ability to engage in collateral litigation at the earliest opportunity, wrongful convictions may be overturned years earlier than is the case now, where an attorney is obligated to litigate the issues in the Appellate Division before going back to the trial court on a motion to vacate the conviction.

In New York City, The Legal Aid Society Criminal Appeals Bureau represents clients in all five counties in the city of New York (Kings, Queens, New York, Bronx; and Richmond). There are three additional institutional providers: two in the First Department (comprising the Bronx and Manhattan); and one in the Second Department, which includes Kings (Brooklyn), Queens, and Richmond (Staten Island). The Office of the Appellate Defender and the Center for Appellate Litigation represent clients in the First Department. Appellate Advocates represents clients in the three New York City counties encompassed in the Second Department. All of the institutional defenders in New York City have experienced attorney staffs, social work programs, and the flexibility to engage in collateral litigation prior to filing the direct appeal if the attorney deems it in the best interest of his or her client.

In addition to the three New York City counties, the Second Department comprises seven additional counties: Nassau, Suffolk, Westchester, Orange, Dutchess, Putnam, and Rockland. The suburban counties, Nassau, Suffolk, and Westchester, all have legal aid societies with appeals units; two of the remaining counties, Dutchess and Rockland, have public defenders offices in which a single appellate attorney handles appeals. Neither Putnam County nor Orange County Legal Aid Societies handle appeals.

The Third and Fourth Departments comprise the remaining 50 counties in the state. The Third Department is comprised of 28 counties; the Fourth Department is comprised of 22 counties. In the Third Department, while a handful of the public defender offices have a single appellate attorney,<sup>1</sup> there is no public defender office or legal aid society with an appeals unit. The Fourth Department has three

<sup>1</sup> The Albany County Public Defender office has one attorney who handles appeals full time, and a second attorney who devote half of his time to trial work and the other half to appeals. Columbia and Ulster counties each have a single appellate attorney.

Institutional defender offices with appeals units: the Legal Aid Bureau of Buffalo, the Appeals Unit of the Monroe County Public Defender, and the Hiscock Legal Aid Society Appeals Unit (Syracuse, Onondaga County), and seven other offices that handle appeals. The following chart shows the breakdown of the number of appeals handled by Institutional defenders and by assigned counsel in the Third and Fourth Departments:

Third Department Assignments, 2012

Assigned Counsel, 18-8	Assigned Public Defender*
441	70

\*Public Defender Assignments By County; TOTAL: 70

Albany	Broome	Chenango	Columbia	Essex	Madison	Rensselaer	Ulster	Warren
27	6	8	4	2	2	15	3	3

4<sup>th</sup> Department Assignments, 2012

Legal Aid Buffalo	Monroe County Public Defender	Hiscock Legal Aid Society	Conflict/Other PD*	Assigned counsel
141	119	76	104	221

\*Conflict/Other PD: Breakdown of the 104 appeals:

Monroe Conflict	Niagara PD	Niagara Conflict	Oneida PD	Ontario PD	Wayne PD	Wyoming PD
35	9	7	19	19	6	8

The total number of criminal appellate assignments in 2013 in the Third Department was 511; the total number of criminal appellate assignments in the Fourth Department in 2013 was 680; the total for the 50 upstate counties was 1191. The state-wide appellate center would accept approximately ten percent of the assignments in these 50 counties, plus an additional 15-20 cases from the Second Department, totaling approximately 135 cases each year.

The State of New York would be well-served by creating an appellate resource center to handle complex criminal appeals. The staff attorneys at the resource center would be available to litigate the most serious cases, such as those where the defendant has been sentenced to life without parole, or a life sentence, or cases that raise particularly complex facts and legal issues, as well as litigate appeals of civil commitment pursuant to Article 10. Currently—outside of New York City—the task of filing appeals in these cases primarily falls upon individual solo practitioners on the assigned counsel plan. The hours

needed to litigate these complex cases often result in costs that exceed the statutory cap of \$4,400.<sup>2</sup> Staffing the office with at least one attorney with expertise in Article 10 commitment proceedings is critical, because very few criminal appellate attorneys have experience and expertise in Article 10 appeals.

If the most complex and serious cases were diverted to a state-funded appellate office, staff attorneys with experience in litigating complex criminal appeals would save the counties money by being able to collaborate, share their research and expertise,<sup>3</sup> and create statewide resources including a brief bank that would collect briefs by subject matter that could be made available to any attorney representing an indigent defendant on appeal. The creation of such an office would not obviate the need for panel attorneys, as those attorneys would be necessary to be assigned to conflict cases of codefendants, and to handle the majority of appeals that would not be diverted to the resource center.<sup>4</sup> Nor would the creation of an appellate resource center diminish the need for the existing institutional upstate defenders: Monroe County Public Defender's Appeals Unit, The Hiscock Legal Aid Society in Syracuse, or the Buffalo Legal Aid Bureau, all of which handle a substantial number of appeals in a competent and professional manner. The attorneys at the resource center would, however, be available to any public defender, legal aid society attorney, or panel member, who needed research assistance, including access to the appellate resource center's brief bank, motion support practice, and mitigation reports by a certified social worker.

The staff attorneys at the appellate resource center would also be available to engage in collateral motions that challenge the validity of the conviction based on evidence outside the appellate record in the 57 counties. The most common such challenges are ineffective assistance of counsel claims and Brady claims (claims that exculpatory evidence has been withheld by the prosecution). In addition to collateral litigation, the staff attorneys at the resource center would be available to consult with trial attorneys at legal aid societies and public defender offices that do not have appeals attorneys on staff by providing pre-trial and trial litigation support (e.g., legal research and motion writing for issues that arise prior to and during trial). Further, through this litigation, challenges to wrongfully convicted defendants

<sup>2</sup> In a meeting with Justice Peters and the staff at the New York State Supreme Court, Appellate Division, Third Department on February 26, 2013, Angela Burton and I were told that in 2012, of 520 payment orders, 65 exceeded the statutory cap.

<sup>3</sup> At a meeting on May 13, 2013, with the Frances Cafarelli, Esq., Clerk of the Appellate Division, Fourth Department, Ms. Cafarelli noted that the more experienced attorneys on the panel were more efficient, and that they submitted vouchers for less money than less experienced attorneys on comparable cases. She believes that is because more experienced attorneys are more efficient at reading the record, spotting issues, researching issues, and writing, than those with less experience.

<sup>4</sup> The creation of an appellate resource center as proposed would handle less than 10% of the appeals state-wide. While some states that have created a state-wide appellate defender office handle virtually all of the indigent criminal appeals, e.g., Illinois, other states that have created state-wide appellate offices typically handle only a small percentage of the appeals throughout the state. For example, the State Appellate Defender Office in Michigan represented only 17% of indigent criminal defendants pursuing an appeal in 2011; the remaining 83% were represented by private assigned counsel.

would be filed at the earliest possible moment, thereby saving the State money in continued incarceration and in lessening the amount of civil damage awards. According to the National Registry of Exonerations, a joint project of University of Michigan Law School and Northwestern Law School, there have been 115 exonerations in the state of New York from 1983 through May 13, 2013.<sup>5</sup>

The first line of defense against wrongful convictions is a post-conviction litigation by appellate attorneys. In New York, each of the institutional appellate providers in the City of New York has a unit that litigates wrongful convictions.<sup>6</sup> Yet none of the upstate institutional providers have such a unit, and some institutional providers are barred from engaging in post-conviction litigation outside of the direct appeal. Thus, for example, when Nathaniel Johnson was convicted of a robbery in the City of Buffalo, his case was assigned to the Appeals Unit of the Legal Aid Bureau of Buffalo. In his appeal, his attorney asserted, among other issues, that the verdict was against the weight of the evidence and that exculpatory evidence was withheld until after the trial had commenced (i.e. that there was a Brady violation). The Appellate Division rejected the weight of the evidence claim and rejected the Brady claim on the basis that it concerned matters outside the record and could be raised only by filing a motion pursuant to N.Y. Crim. Proc. Law §440.10. See *People v. Johnson*, 88 A.D.3d 1293, 1294 (4<sup>th</sup> Dep't 2011). Although the appellate attorney continued to investigate the case, a motion to vacate the conviction pursuant to N.Y. CPL §440.10 could not be filed until an attorney was assigned through the Erie County Assigned Counsel Plan on the trial attorney panel. This did not occur until two years after the original appellate attorney was assigned. See "Freed From Prison After Wrongful Conviction, Man Now 'Just Enjoying Life'" *The Buffalo News*, May 11, 2013, by Jay Tokász, available at: <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20130511/CITYANDREGION/130519804/1109>

Had there been an appellate resource center, the motion to vacate the conviction could have been filed prior to the direct appeal, and Mr. Johnson could have been released from incarceration two years earlier. In the past few years, there have been significant judgments and settlements by the State, counties and New York City, to wrongfully convicted people. Those wrongfully convicted in New York State may sue for redress under the Unjust Conviction and Imprisonment Act, Court of Claims Act §8-b (McKinney), in addition to pursuing other litigation remedies such as federal claims for violation of civil rights.

<sup>5</sup> The registry is available at: <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>

<sup>6</sup> In the First Department, the Center for Appellate Litigation, the Office of the Appellate Defender have dedicated staff that pursue litigation for their wrongfully convicted clients, as does Appellate Advocates in the Second Department. The Legal Aid Society, which handles indigent criminal appeals in both the First and Second Departments does not have a formal wrongful conviction review unit, but does pursue direct appeals as well as collateral litigation for wrongfully convicted clients.

Since 2011, the State of New York, or the counties have settled, or been ordered to pay, more than twenty million dollars on wrongful conviction claims:

L. Dejac <sup>7</sup>	J. Deskovich <sup>8</sup>	S. Fapplano <sup>9</sup>	M. Clancy <sup>10</sup>	D. Gristwood <sup>11</sup>	A. Baba-Ali <sup>12</sup>
Federal civil rights lawsuit	Federal civil rights lawsuit	Court of Claims Wrongful Conviction	Court of Claims Wrongful Conviction	Court of Claims Wrongful Conviction	Court of Claims Wrongful Conviction
2.7 million settlement against NY State, 11/2012	6.5 million against Westchester County 4/2011	2 million settlement against NY State 5/2013	2 million settlement against NY State 9/2012	5.5 million verdict 5/2013 against NY State	1.350 million (verdict that was modified downward on appeal - 6/2012)
murder	Rape/murder	Sexual assault	murder	att. murder	Child sexual assault
Erle County	Westchester County	Kings County	Bronx County	Onondaga County	Queens County

Finally, creation of a state-wide appellate office would serve the interests of justice by creating parity between the defense and the prosecution. As it stands now, a prosecution office that does not have the resources or ability to represent the People on appeal can refer its appeals to the New York Prosecutors Training Institute (NYPTI), and a staff attorney there handles the appeal on behalf of the People of the State of New York. NYPTI also has the resources to send its attorneys to any prosecutor's office in the state to assist prosecutors at trial. Although the New York State Defenders Association is available as a resource center for defense counsel, NYSDA is limited to providing training and research assistance to attorneys representing indigent clients; it does not engage in direct representation, nor does it have the resources to send attorneys to consult during trial.

<sup>7</sup> See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3169>; <http://bigstory.ap.org/article/ny-woman-set-27m-wrongful-conviction>

<sup>8</sup> See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3173>

<sup>9</sup> See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3211>

<sup>10</sup> See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3105>

<sup>11</sup> See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3266>

<sup>12</sup> See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3171>; Baba-Ali v. State, 19 N.Y.3d 627 (2012)



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

To: Indigent Legal Services Board  
From: Bill Leahy  
Re: State-Funded Upstate Caseload Limits  
Date: September 25, 2014

**Matthew Alpern**  
Director of Quality  
Enhancement,  
Criminal Trials

**Peter W. Avery**  
Manager of  
Information  
Services

**Angela Burton**  
Director of Quality  
Enhancement,  
Parent  
Representation

**Andrew Davies**  
Director of  
Research

**Tammeka  
Freeman**  
Executive Assistant

**Risa Gerson**  
Director of Quality  
Enhancement,  
Appellate and Post-  
Conviction  
Litigation

**Karen Jackuback**  
Grants Manager

**Joanne Macri**  
Director of Regional  
Initiatives

Our **Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2013 Update**, released yesterday, draws a direct parallel between the state's success in reducing the weighted criminal caseloads of New York City institutional defenders from almost 600 in 2009 to under 400 today, via the infusion of annual state appropriations; and the challenge of reducing upstate providers' caseloads from over 700 in 2012 (and 680 in 2013) to a similar level. Critical to the success of the City's progress was the institution of caseload limits, set in 2010 but not to take effect until April 1, 2014, by which time state funding support was expected to, and did, suffice to support the reduced caseload levels.

Our data shows that, in 2013, available funding fell \$105.2 million short of the amount that would have permitted upstate providers to be in compliance with national maximum caseload limits. (As explained in last year's Cost Estimate, we have tentatively set the weighted caseload limit for institutional providers at 367, to account for supervision as the national standards require, but do not quantify). There can be little question that setting a caseload limit for upstate institutional providers, *contingent on state funding directed for that purpose, and effective only when such funding shall have been appropriated*, would provide powerful backing for our funding advocacy.

Therefore, I ask the Board to establish a limit of 367 weighted new case assignments in any calendar year in institutional provider offices in the 57 upstate counties, such cases to be weighted in accordance with the analysis found in our 2012 Upstate Cost Estimate at pages 3-5 (i.e., 367 misdemeanors or 138 felonies or parental representation cases). This caseload limit is contingent upon the appropriation of sufficient state funds to fully support it; and it is to become effective only when the Office of Indigent Legal Services has certified that sufficient state funds have been appropriated. These limits are to apply as an average per staff attorney within an organization, so that the leadership of the organization may assign individual staff attorneys so as to promote the most effective representation of clients.

In order to estimate the amount of additional state funding needed for upstate providers to be in compliance with national maximum caseload limits, the Director shall annually, at the time of the preparation and submission of the Office's Executive Budget Request, review the workload of upstate providers and present the Board with an updated Cost Estimate. In undertaking such review, the Director may consider differences among categories of cases that comprise the workload of the provider; the level of activity required at different phases of the proceeding; local court practice, including the duration of a case; and other factor the Director deems relevant.

These limits may be adjusted upon written request by the Director of the Office and with the approval of the Indigent Legal Services Board.