November 24, 2021

ILS-195 FAQs - Part 2

QUESTIONS ABOUT CLASSIFYING CASES FOR DATA REPORTING PURPOSES

How is a case counted if it is initially charged as a felony and is later reduced to a misdemeanor? Is that case counted as a misdemeanor or a felony?

Cases are counted according to the most serious charge at the outset of the case. In this situation, a case originally charged as a felony would be counted as such, as either a violent or non-violent felony based on the most serious charge at the beginning of the case. This classification would stay with the case even if during the course of the case the top charge was reduced to a misdemeanor.

The only exception to this rule occurs when a case is originally charged as a misdemeanor, but felony charges are subsequently added. In this situation, because the case must always be classified according to the most serious charge, the case changes classification from a misdemeanor to a felony. The full text of ILS' Definition on this matter reads as follows:

> *Trial cases must be categorized according to the top charge at the outset of the case, unless the case begins in local court as a misdemeanor but is subsequently prosecuted in superior court upon a felony indictment or superior court information, in which case it should be classified as a felony.*

This can produce complications where a case begins in one calendar year, but the filing of additional felony charges occurs in the subsequent calendar year. Notably, ILS-195 data are generally due in the April following the calendar year to which the data refer, which allows some time for these reclassifications to occur and cases to be correctly categorized at the time of reporting. Providers are encouraged to supply counts of cases classified into the correct categories that are as up-to-date as possible at the time of filing.

Where a felony complaint is indicted and new charges are included in the indictment, how is this counted?

The addition of new charges to an existing case would not result in the counting of a new case. However, additional charges may result in reclassification of a case into a different, more serious category where the original charges were non-violent felonies and the new charges are violent felonies.

Appeal cases are classified by whether the underlying case was resolved by 'guilty plea' or 'verdict'. Must they also be classified by whether the underlying case was a felony or misdemeanor?

Appeal cases are to be classified and counted by 'guilty plea' or 'verdict' only. The categories 'violent felony', 'other felony', and 'misdemeanor or violation' are only for reporting of trial level criminal representation, and thus, appeals cases should not be counted in these categories.

QUESTIONS ABOUT COUNTING NEW CASES

For questions below, the relevant section of ILS' case definition is as follows:

> *A new trial case is one or more charge(s) against a single individual arising in a single court and contained in a single charging instrument, except where several such instruments refer to a single alleged incident.*

How are cases counted when there are multiple charges? For example, what if a defendant is pulled over for a traffic infraction and drugs are found in the car, resulting in a long list of charges against the defendant? Or what if a rape case alleges a sequence of twelve offenses across a six month period?

Provided all charges against a defendant are on the same charging instrument prosecuted in the same court, they should be counted as one case. Thus, both the above examples would count as one case assuming all the charges are prosecuted in the same court.

But if the charges are prosecuted in separate courts, they should be counted as separate cases. Consider the example of the arrest for a traffic infraction that led to police discovering drugs. Suppose the traffic infraction and drug charges are all charged as violations or misdemeanors in separate accusatory instruments but prosecuted before the same judge in the same court. Because the charges all refer to a single incident and are prosecuted in the same court, this would count as one case. Alternatively, suppose the traffic infraction is charged in a separate charging instrument from the drug case and prosecuted in a different court (i.e., the traffic charge is prosecuted as a violation or a misdemeanor in lower court while the drug charges are prosecuted as felonies in superior court). This would be counted as two cases. This distinction recognizes that having to defend a client on separate charges in separate courts essentially involves the work of two cases.

Does ILS define a single case as a 'criminal transaction'?

As the answer to the question above illustrates, ILS' definition of a case is similar but not identical to the definition of a criminal transaction. If all the charges associated with a criminal transaction are prosecuted in the same court, then the case is defined as one case, even if there are multiple charging instruments. The exception occurs if different charges from the same criminal transaction are prosecuted in different courts. In such circumstances, ILS' case definition deviates from the 'criminal transaction' definition out of recognition that having to defend a client on separate (albeit related) counts in separate courts will likely require the work of two cases.

How is a case counted if a client is returned on a warrant after failing to appear?

The client's return on a warrant is not counted as a new case unless the client is charged with new criminal charges when returned on the warrant. In that situation, because the new charges would be on a new charging instrument, it would meet ILS' definition of a separate case.

(Please also see the response to "Should a case be treated as 'closed' after a client fails to appear in court and a warrant has been issued for the client's arrest?" on page 5)

How are charges counted if judge grants a motion to sever?

A motion to sever results in the creation of a second case. The second case would be considered 'opened' when the motion to sever was granted. The initial case would still have the original opening date.

How are charges counted if two or more indictments are joined for trial?

Cases are counted according the number of separate charging instruments at the point the case is assigned. Where a case begins with multiple felony complaints arising from different criminal transactions, the number of cases is equal to the number of complaints, even if they are later joined for trial. This understanding follows the case to its conclusion at the trial level: thus, if a client has two charging instruments filed accusing him or her of separate crimes, it is counted as two newly opened cases; if those charging instruments are prosecuted together in the same court, it is still counted as two open cases; and if those cases are resolved together in a combined deal, it is still counted as two 'closed' cases by ILS.

QUESTIONS ABOUT COUNTING CASES INVOLVING BRIEF INTERACTIONS WITH THE DEFENDANTS OR WHERE REPRESENTATION DOES NOT CONTINUE TO CASE DISPOSITION

For questions below, the relevant section of ILS' case definition is as follows:

> *A case must be counted when an assignment has been made, or when legal advice and/or representation has been provided. A case should not be counted if legal advice and/or representation are not provided, such as when the provider only screens a defendant for eligibility or a conflict of interest. Legal advice and/or representation may be provided in a case, and the case counted, notwithstanding that procedures for eligibility determination, conflict determination, or formal assignment of the case by a court to a provider has not taken place. A case does not necessarily imply the representation of a client from arraignment to disposition. A case may be quite brief if representation is provided but a conflict of interest is discovered, a finding of financial ineligibility is made by the court, or the client opts to retain counsel privately.*

How is a matter counted if the attorney represents the person for arraignment only?

Representation at arraignment is counted as a case for that provider. The ILS case definition defines a case as any situation where a defender has been assigned to represent a person or has provided any legal advice and/or representation to the person. This includes providing representation at arraignment.

If at the time of determining financial eligibility for assigned counsel it becomes apparent that there is a conflict or the person is not financially eligible for assigned counsel, should the interaction with the client to determine eligibility count as a case?

Interaction with a client solely for the purpose of determining financial eligibility for assigned counsel does not count as a case. It will count as a case only if the interaction involves providing the defendant legal advice or ongoing representation.

How is a 'raise the age' case originally arraigned in the criminal court Youth Part and then transferred to Family Court counted?

A case that originates in the criminal court Youth Part (or is arraigned by an accessible magistrate) should be counted as a case and classified according to the highest charge in the charging instrument. If the case is removed (transferred) to Family Court at or after arraignment, the case is considered closed for purposes of representation under County Law 18-B. The representation of juvenile persons in Family Court matters is outside of County Law 18-B, and thus in situations where a defender organization for any reason continues to represent the client after the transfer of a case to Family Court, that post-transfer representation would *not* be counted as a new case on the ILS-195.

How is the delivery of legal advice or other representation of a client prior to arrest or the issuance of charges counted for ILS data reporting purposes?

ILS defines as a case those instances in which legal advice and/or legal representation is provided to a client, even if this occurs prior to arrest or charges being filed. When pre-arrest, pre-charge legal advice or representation, (i.e. appearing with the client to meet with law enforcement authorities or asserting the right to counsel while a client is being interrogated), is provided to a client, information regarding the nature of the representation should be provided to assist ILS in classifying the representation or legal advice given. Of course, if criminal charges are subsequently filed, the matter should be counted as a single case (categorized by the most serious charges). In other words, pre-arrest representation that precedes a charged case to which the provider is assigned will not be counted twice.

QUESTIONS ABOUT COUNTING POST-DISPOSITION CASES

The following is a list of matters that should be counted as post-disposition cases:

- Violations of probation
- Violations of conditional discharge
- Failures to pay a fine
- SORA classification and designation proceedings, whether on release from prison or close in time to sentencing for the initial conviction
- SORA reclassification (modification) proceedings under Corrections Law §168-o
- 440 motions where the attorney is assigned to represent the client

- 440 motions where the attorney files the motion, notwithstanding they are not assigned to represent the client
- Habeas corpus matters where the attorney is assigned to represent the client

How are violation of probation (VOP) proceedings and violation of conditional discharge (VOCD) proceedings counted? Are these new cases?

Violation of probation and violation of conditional discharge proceedings are counted as new, post-disposition cases. This is because the first case is a full case that was disposed by the court. When the client is alleged to have violated the terms of his or her sentence (VOP or VOCD) a second case, defined as a post-disposition case, begins.

How are 'failure to pay a fine' cases counted?

A failure to pay a fine case is counted as a new, post-disposition case if: 1) a warrant is issued pursuant to CPL § 420.10(3) alleging that the defendant failed to pay; or 2) the defendant seeks to apply to the court pursuant to CPL § 420.10(5) for resentencing on the grounds of inability to pay.

How are SORA classification and designation proceedings counted? Are these proceedings counted as separate cases even if done at sentencing?

For cases requiring a SORA classification and designation proceeding, the SORA proceeding counts as a post-disposition matter separate from the underlying misdemeanor or felony case. SORA classification and designation matters are counted as separate post-disposition cases whether they occur at sentencing (or otherwise close in time to the conviction) pursuant to Correction Law §168-d (2), (3), whether they occur upon release from prison, or whether they are a reclassification (modification) proceeding pursuant to Corrections Law §168-o. This is because SORA proceedings require work separate from and in addition to the defense of the underlying case, notwithstanding the timing of the SORA proceeding.

QUESTIONS ABOUT CLOSING CASES

Should a case be treated as "closed" after a client fails to appear in court and a warrant has been issued for the client's arrest?

For ILS data-reporting purposes, a case is not considered "closed" when a warrant has been issued because the client has failed to appear, and such cases should not be counted a second time if or when the client returns to court. That said, if at the time the client re-appears and the client is charged with new crimes, (i.e., if, for example, the client was arrested as a result of new alleged criminal conduct), then those new charges would be counted as new cases assuming they met ILS's definition of a case.

(See also our response to related question: "How is a case counted if a client is returned on a warrant after failing to appear?" on page 3)

Where a client is sentenced but the court schedules another hearing (such as a restitution hearing) is the case considered closed?

No. The case is only closed when representation terminates, even if this restitution hearing is some time into the future. Of course, depending on the provider's administrative procedures, an attorney might be entitled to bill for his or her time earlier than the final closure of the case to prevent him or her being without payment for a lengthy period. But for ILS-195 reporting purposes, the actual case would not be considered closed.

If a client charged with a felony is found unfit under CPL § 730, is that case ever closed? If so, when?

The ILS-195 instructions and definitions state, "Misdemeanor cases dismissed when the client is found incapacitated under CPL § 730 should be counted as closed. Cases other than misdemeanors where the client is found incapacitated under CPL § 730 should remain open." Thus, the question is, do cases other than misdemeanors (i.e., unindicted or indicted felonies) remain open indefinitely or are they, at some point, closed? If so, what would be the triggering event to their closure?

To answer this, it's useful to understand the process under CPL § 730 as it applies to felony charges, which is differentiated by whether a felony case has been indicted or not. Under CPL § 730, individuals charged with a felony who are found to be incapacitated are committed to the custody of NYS Office of Mental Health to restore them to fitness to stand trial.

If the felony is unindicted, this process occurs when the local criminal court issues a Temporary Orders of Observation under CPL § 730.40, which is valid for 90 days. If the District Attorney does not obtain an indictment against the person within six months of the expiration of the Temporary Order, the charges are dismissed.

If the felony has been indicted, CPL § 730.50 controls the Order of Commitment process. Temporary Orders issued under this section of the law are valid for one year though the NYS Office of Mental Health may continue to retain the client for up to 2/3 of the maximum sentence the client would have received if convicted. Pursuant to CPL §§ 730.50(3) and 730.50(4), the indictment must be dismissed once the commissioner certifies to the Court and District Attorney that the client was in their custody for that time period.

Thus, felony cases where a client is found unfit should be "closed" only when the case is ultimately disposed, either because the client was found fit and the case went to trial or was resolved through a plea, or because the case was dismissed pursuant to CPL § 730.40 or CPL § 730.50.

QUESTIONS SPECIFIC TO ASSIGNED COUNSEL PROGRAMS

Should Assigned Counsel Panel attorneys bill separately for each case or may they consolidate several cases into one voucher?

ILS does not establish procedures for voucher billing, and providers may establish whatever procedures they wish to manage attorney billing. However, it is essential that the provider report to ILS its caseloads in keeping with ILS definitions. One way to accomplish this is to reconcile billing procedures with ILS' case definitions so that at the end of a year a provider may simply count how many bills were received and know that this number must be equal to the number of cases in which representation was provided. If a provider does allow attorneys to bill multiple cases on one voucher (or the opposite – to bill a single case across several vouchers, a process sometimes called 'interim vouchering') the provider must also ensure that it has some way of tracking the number of cases separate to the number of vouchers processed. We encourage providers to work with their case management system vendors to ensure case counting is accurate in these situations.

When requesting information pertaining to time dedicated on a case, is travel time included in the time devoted to providing representation?

Information requested pertaining to the time involved in providing representation by assigned counsel should include all time dedicated to the case, including that time spent for necessary travel.

Should hours devoted to a case only be reported for those cases that are closed during the reported data period?

The total number of hours devoted to a case that is reported on the ILS-195 pertains only to those cases that are closed at any time during the reported calendar year, regardless of when the case was originally opened. Therefore, the total should represent the number of hours dedicated to representation for all cases closed at any time during the reporting period, regardless of when they were opened.

Are providers responsible for reporting on those cases in which notification of assignment of cases are made by a judge and are not reported to the provider?

ILS recognizes that assignment of cases issued by certain judges might not be shared with the provider until a voucher is submitted for payment, and that providers are unable to report on those cases that they are unaware of having been opened during the reported calendar year. However, the provider will be responsible for reporting on the status of cases closed during the reported data period. ILS will continue to work with each provider, the county and each county's Data Officer to ensure that assignments of cases are available as early in the case as practicable.

QUESTIONS ABOUT THE COUNTING OF CERTAIN TYPES OF CASES

How are drug court cases counted?

Drug cases are counted in accordance with the most serious charge in the charging instrument (i.e., a misdemeanor if that is the most serious charge or a felony if that is the most serious charge). A new case is not created simply because the case is transferred to drug court.

How are cases transferred to IDV court counted?

As with Drug Court cases (see question above), a new case is not created or counted differently because a matter is transferred to Integrated Domestic Violence Court (IDV court). Thus, if a client is arrested for a domestic related criminal case, the case is classified in accordance with the most serious charge in the charging instrument, and this classification continues if the case is transferred to IDV court. If the client has a related matter that originated in Family Court that is transferred to the IDV court with the criminal matter, that Family Court matter also counts on the ILS-195.

How is a case counted that resulted in an adjournment in contemplation of dismissal (ACD), but then was restored to the calendar for prosecution?

This is counted as one case and classified based on the most serious charge in the charging instrument. It is not counted as a new, separate case simply because the case that resulted in the ACD is reinstated to the court calendar, (i.e., because the person was rearrested within six months, for example).

Are administrative appeals of parole release denials reportable on the ILS-195? Are other administrative matters reportable on the ILS-195?

Administrative appeals of parole release denials do not fall within County Law 18-B, and therefore do not count as a case. Where the ILS-195 asks providers to report the number of 'parole violation' cases, it is not intended that those numbers include administrative appeals of parole decisions, but rather representation in cases where the client is accused of violating the terms and conditions of his or her parole.

Note however, that Part 2 of the ILS-195 has the following question: "Please note any types of any other cases in which the provider supplied representation which are not included in the counts reported above…" Administrative appeals for parole release decisions can be reported here, as well as other matters not otherwise listed in the ILS-195, which may include, but are not limited to, the following:

- Fugitive from justice (extradition) proceedings
- Administrative matters that may be related to the criminal proceeding but for which a person is not entitled to assigned counsel under County Law 18-B. These include drivers license suspension hearings, public housing termination hearings, surety hearings, and school suspension hearings.

- Representation of subpoenaed witnesses
- Appeals of denial of a CPL 440 motion

Occasionally, as part of their counsel at arraignment programs, providers represent people who are arraigned on a warrant issued by Family Court. Do these cases count on the ILS-195?

Family Court return-on-warrant arraignment representation does not count as a separate case on the ILS-195. This type of representation can be described in the question on Part 2 of the ILS-195 that asks: "Please note any types of any other cases in which the provider supplied representation which are not included in the counts reported above…"

As part of counsel at arraignment representation, what if a provider represents at arraignment a person who is returned on a warrant but is currently represented by another provider. Should this case count for the provider that provided the representation on the warrant arraignment?

ILS recognizes that in some counties, specific providers are responsible for staffing arraignment parts, and during these arraignment parts represent defendants who are returned on a warrant. At times, these defendants are currently represented by another provider on the case for which a warrant was issued. This return-on-a-warrant arraignment representation does not count as an additional case, even if the defendant enters a plea to the underlying case. However, ILS encourages arraignment providers to describe this kind of representation on the Part 2 ILS-195 question that asks: "Please note any types of any other cases in which the provider supplied representation which are not included in the counts reported above…"

How is a case counted that ends in a hung jury, and then instead of being retried is resolved by a plea?

The relevant ILS case definition states as follows: 'A new case must be counted if an existing client is to be retried.' Thus, when a case results in a hung jury (or a decision is made for whatever reason that the case must be retried, such as the granting or a motion for a retrial), then a new case is opened and is counted as an additional case no matter the outcome.

If a provider files a writ to get bail reduced or a person released, does that count as another case? Similarly, if a provider files a motion for bail pending appeal but does not do the actual appeal, is that countable as a case?

No. These activities are case-related and case-specific activities that a part of quality client representation.

How are appeals of SORA risk-level designation proceedings and modification proceedings counted?

Appeals of SORA proceedings (classification and designation proceedings and modification proceedings) should be counted as appeals of a guilty plea.

How should we count CPL § 440 cases that have been granted leave to appeal under CPL § 460.15 by the Appellate Division? Sometimes these appeals become consolidated with a pending direct appeal; other times, they are standalone appeals.

We have not yet weighted appeals of CPL § 440 denials, but as part of efforts to further refine our data collection efforts, we are interested in this information. If your case management system records this information, we ask you include theses case, when standalone, as "other cases" in Question 15.

Note: while the ILS Definitions for Reporting Counts of Criminal Cases indicate that a new case should be counted "whenever leave is granted to appeal to a higher court," this section does not apply where a CPL Article 440 motion was denied and permission to appeal to an intermediate appellate court was granted. Instead, that section applies where a direct appeal from a judgment of conviction to a mid-level appellate court was unsuccessful and leave was granted to appeal to the Court of Appeals.

Where an appeal from a denial of a 440 motion is consolidated with a direct appeal, does that count as separate appeals for reporting purposes, even if only one brief is filed?

No. While the ILS Definitions for Reporting Counts of Criminal Cases states that an "appellate case is defined as a single appeal in a single appellate court," appeals of CPL 440 denials are not currently weighted and therefore should not be counted as an additional case in this scenario. If you track this information, please include it in Question 15 which captures work performed but not currently weighted.

How should interlocutory appeals be counted?

Interlocutory appeals that take place while the case is still pending are case-related and case-specific activities that are part of quality client representation thus should not be counted separately as a new case.

How is the delivery of legal advice or other representation of a client prior to arrest or the issuance of charges, or even without a subsequent arrest or issuance of charges, counted for ILS data reporting purposes?

ILS defines as a case those instances in which legal advice and/or legal representation is provided to a client, even if this occurs prior to arrest or charges being filed. When pre-arrest, pre-charge legal advice or representation, (i.e. appearing with the client to meet with law enforcement authorities or asserting the right to counsel while a client is being interrogated), is provided to a client, information regarding the nature of the representation should be provided to assist ILS in classifying the representation or legal advice given.

If criminal charges are filed in a legal advice and/or legal representation situation, , the matter should be counted as a single case (categorized by the most serious charge). In other words, pre-arrest representation that precedes a charged case to which the provider is assigned will not be counted twice.

If criminal charges are not filed in a legal advice and/or legal representation situation, , the matter should be counted as an "other case" as defined in ILS "instructions and definitions" and reported in Question 15 which indicates: "Please note the types of any other cases in which this provider supplied representation which are not included in the counts reported above, and where possible note the numbers of those cases."

When an 18b attorney is assigned to represent a testifying witness, how would that work be counted?

If the testifying witness is not criminally charged, then this representation should be counted as an "other case" and reported in Question 15. However, if the witness subsequently faces criminal charges related to his or her status as a witness, the case should be counted as a single case, categorized by the most serious charge in accordance with ILS Caseload Standards.

QUESTIONS ABOUT FILING THE ILS-195

Is each individual provider in a county required to file an ILS-195? Similarly, is the provider required to submit two separate ILS-195 forms for each program if that provider manages more than one program within the county, (i.e., conflict defender managing the assigned counsel program)?

The ILS-195 requires that a separate ILS 195-form be submitted for each individual program within each county and New York City. Similarly, a separate ILS-195 form for each program will be required by the same provider who is managing more than one program. The applicable ILS-195 instruction is as follows:

> *Every provider of representation must file a separate submission. A 'provider' of representation is a public defender office, conflict defender office, legal aid society, assigned counsel program, or any other office, firm, individual, or entity that provides representation to persons financially unable to afford counsel in criminal or Family Court cases as defined in NY County Law 18-b. We consider assigned counsel 'providers' to exist in counties even where no formal administration exists and judges assign counsel ad hoc. Except in New York City, we consider providers to be specific to a county. Where a single organization supplies representation in multiple counties (sometimes called a 'regional' program), separate forms must be submitted for services provided by that*

organization in each county respectively. Where one person or entity oversees two or more providers according to this definition (as, for example, where public defender offices oversee assigned counsel systems) separate reports must be submitted for each provider.

Does ILS have plans to provide APIs to allow CMS systems to file the ILS-195 automatically?

The ILS-195 form is expected to be submitted via a website link which requests the information to be transferred manually onto the form available on the website.

***Has ILS collaborated with NYSDA or any other case management system (CMS) software producers so that the case management systems will be designed to mirror the new ILS data collection* needs?**

It is the responsibility of each provider and of each county and New York City to ensure that their CMS's are up-to-date and available to provide them with the requested data that is in accordance with ILS data reporting requirements. To assist in this matter, ILS has made the ILS data reporting requirements and training videos available to all providers, counties and New York City officials and CMS providers available at https://www.ils.ny.gov/content/annual-data-reporting. ILS will continue to be available to answer any questions from providers, Data Officers, county and New York City officials and CMS providers regarding ILS data requirements.

QUESTIONS ABOUT ILS CASELOAD STANDARDS

How are Family Court cases counted with respect to caseload standards in an office where some attorneys handle both kinds of cases?

Part 1 of the ILS-195 addresses the issue of mixed caseloads by requesting information on the amount of time that each attorney spends on both criminal and family court representation, respectively. By reporting on the time allotted for criminal court representation versus family court representation, ILS is able to calculate the dedicated resources to each type of 18-B representation by program. For instance, if a program reports that there are three attorneys who are providing criminal court representation on a full-time basis and one attorney providing only 50% of their time to criminal court representation while another 50% of their time is devoted to family court representation, ILS will interpret this information to conclude that the program has 3.5 FTE attorneys providing criminal defense representation.

Has ILS considered giving greater weight to trials (commenced or to verdict) than cases resolved other ways?

At present, ILS caseload standards address weighting cases at the time of assignment. For this reason, cases are not distinguished by type of disposition or how the disposition was reached. This allows cases to be classified as they are originally identified at the time

of assignment and does not take into consideration the varying outcomes that may impact the resolution of a case. However, Part 3 of the ILS-195 does request information regarding those cases that are resolved following trial. Information reported to ILS on this section will continue to be reviewed and taken into consideration by ILS with respect to its caseload standards.

Has ILS considered distinguishing between misdemeanor violations of probation and felony violations of probation?

Although ILS recognizes that there is a distinction between the complexity of varying types of cases, we had to balance the need for nuance in our caseload standards against the burden that they impose on providers to collect and report case-related data. It is true that more categories of cases, such as distinguishing misdemeanor and felony VOP cases, would allow for a more refined weighting system. But we are also aware that adding too many categories of cases would impose significant data-collection and reporting requirements on providers. To strike a balance between nuanced information and the data providers reasonably can be expected to track and report, ILS has limited the case types to seven categories but structured the ILS-195 form to encourage providers to note any additional information they believe ILS should have to more fully explain the data provided.