



*Justice Impaired:
The Impact of the
State of New York's Failure to Effectively
Implement the Right to Counsel*

CATTARAUGUS COUNTY

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*Produced on Behalf
of*

The New York State Defenders Association

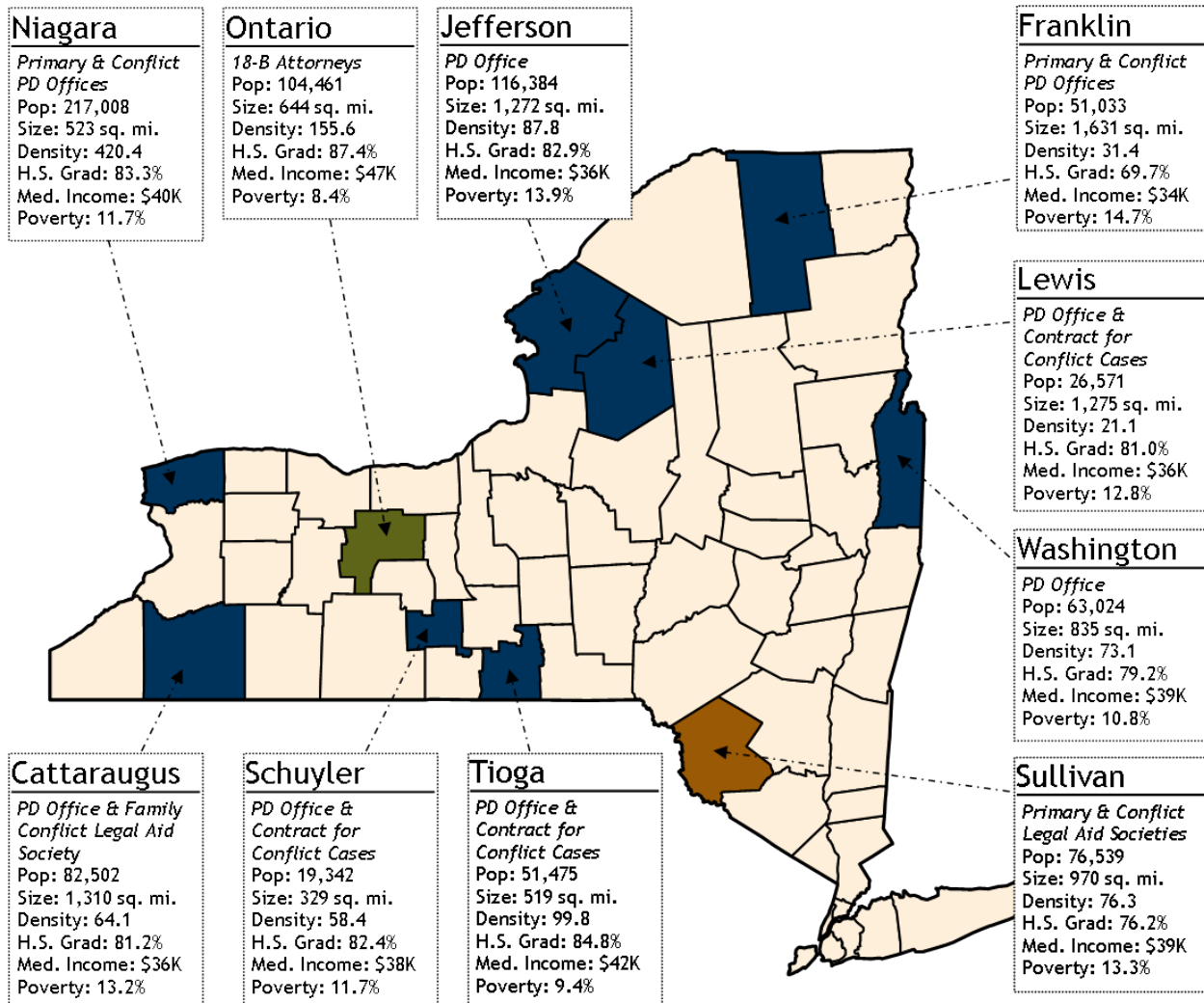
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TEN COUNTY OVERVIEW

Cattaraugus County was one of ten upstate counties chosen for an assessment by NLADA. None of the ten counties were previously studied as part of Chief Judge Kaye's Commission on the Future of Indigent Defense Services, but were instead selected by the New York State Defenders Association as representative of each type of plan under Article 18-B of the County Law and distributed across judicial districts.



Introduction

In the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court concluded that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Declaring it an "obvious truth" that "lawyers in criminal courts are necessities, not luxuries," the Court ruled that states must provide counsel to indigent defendants in felony cases. That mandate has been consistently extended to any case that may result in a potential loss of liberty.¹

Despite the importance of the right to counsel to the justice system's overall health, *Gideon's* "obvious truth" has been obscured or lost at the hands of the State of New York over the past forty-six years. Numerous reports have detailed the failures of the State of New York to adequately fund and effectively implement the constitutional right to counsel in its cities, towns, county and family courts over the years.² Rather than add to the already voluminous materials detailing how the state fails to safeguard the right to counsel, this report reaffirms the existing scholarship that the system is in a "state of crisis"³ and looks instead at the impact the State of New York's abdication of its constitutional duties under *Gideon* and its progeny has on people of insufficient means in one jurisdiction – Cattaraugus County.

The New York State Defenders Association (NYSDA)⁴ retained the services of the National Legal Aid & Defender Association (NLADA) to conduct a study of the public defense

¹ *Gideon* established the right to counsel for felony trials. Subsequent cases extend that right to: direct appeals – *Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation – *Miranda v. Arizona*, 384 U.S. 436 (1966); juvenile proceedings resulting in confinement – *In Re Gault*, 387 U.S. 1 (1967); critical stages of preliminary hearings – *Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment – *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and misdemeanors involving a suspended sentence – *Shelton v. Alabama*, 535 U.S. 654 (2002). Most recently, the Roberts Court found that indigent defendants who plead guilty at the trial-level do not give up their right to counsel on appeal to challenge their sentencing – *Halbert v. Michigan*, 545 U.S. 605 (2005).

² See for example: 1) Commission on the Future of Indigent Defense Services. *Final Report to the Chief Judge of the State of New York*. June 2006; 2) The Spangenberg Group. *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*. June 2006; 3) N.A.A.C.P., Legal Defense Fund, Inc. *The Status of Indigent Defense in Schuyler County*. 2004; 4) Bonstelle, Sheri and Christine Schlessler. *Adjourning Justice: New York State's Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Cases*. Fordham University School of Law, Fordham Urban Law Journal. April 2001; 5) Chester Mirsky. *The Political Economy and Indigent Defense: New York City 1917-1998*. New York University School of Law, Annual Survey of American Law. 1997; 6) The Center for Research in Crime and Justice, American University Criminal Courts Technical Assistance Project. *Review of Existing Case Management Practices and Procedures and Recommendations for Improvement for the Oneida Public Defender Office, Utica New York*. Prepared on behalf of the United States Department of Justice, Bureau of Justice Assistance. CCTAP Technical Assistance Report 98-013. August 1999; 7) The New York Legal Aid Society. *The Defense of Indigents in New York City: The View from the Front Line*. August 1985; 8) New York University School of Law. *Criminal Defense of the Poor in New York City*. Michael McConville and Chester Mirsky. 1985; 9) The New York State Defenders Association. *Assigned Counsel Fees in New York State: Time For a Change*. March 1985; 10) The New York State Defenders Association. *Public Defense Services in Ontario County: A Study of the Assigned Counsel System*. August 1985; 11) The New York State Defenders Association. *Public Defense Services in Schenectady County: An Assessment of the Assigned Counsel Program*. March 1984; 12) The Prison Reform Task Force of the New York Society for Ethical Culture. *Inmate Study of 18-B Indigent Defense Counsel (Court Appointed Counsel)*. Prepared on behalf of the Inmate Committee for Judicial and Legislative Reform. May 1977; and, 13) New York City Board of Corrections. *Legal Representation of Indigent Criminal Defendants in New York City*. March 1973.

³ The Spangenberg Group. *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*. June 2006, p. 155.

⁴ The New York State Defenders Association is a not-for-profit, membership organization that provides support to New York's public defense community. Founded in 1967, NYSDA's mission is "to improve the quality and scope of publicly supported legal representation to low income people" in the State of New York NYSDA has a contractual obligation to "review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific

systems in ten New York counties under a generous grant from the Open Society Institute. NLADA is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over ninety years.⁵ NLADA has long played a leadership role in the development of national standards for public defense systems⁶ and processes for evaluating a jurisdiction's compliance with those standards.

Assessing County Defender Systems Against National Public Defense Standards

The concept of using standards to assess uniform quality is not unique to the field of public defense. In fact, the strong pressures on public officials created by favoritism, partisanship, and/or self-interest underscore the need for standards to assure fundamental quality in all facets of government and all components of the justice system. For instance, realizing that standards are necessary to both compare bids equitably and to assure quality products, policy-makers long ago standardized requests for proposals and ceased taking the lowest bid to build a hospital, school or a bridge and required winning contractors to meet minimum quality standards of safety. Ensuring the rights of the individual against the undue taking of his or her liberty by the state merits no less consideration.

The use of national standards of justice in this way also reflects the demands of the United States Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005). In *Wiggins*, the Court recognized that national standards, including those promulgated by the American Bar Association (ABA), should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney practices in an environment that provides her with the time, resources, independence, supervision and training to effectively carry out her charge to adequately represent her clients. *Rompilla* echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."⁷

recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." For more information, see: www.nysda.org.

⁵ NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders. The Defender Division also supports the National Alliance of Sentencing Advocates and Mitigation Specialists which sponsors national trainings and technical assistance services for professionals evaluating and developing appropriate sentencing alternatives for clients of assigned and contract legal counsel as well as public defenders. For more information please see: www.nlada.org.

⁶ *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services, U.S. Department of Justice, 1976); *The Ten Principles of a Public Defense Delivery System* (adopted by the ABA, 2002) *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; adopted as Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ABA, 1989), *Defender Training and Development Standards* (NLADA, 1997); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995); *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985); *Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Evaluation Design for Public Defender Offices* (NLADA, 1977); and *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1994).

⁷ Citation to national public defense standards in court decisions is not limited to capital cases. See for example: 1) *United States v. Russell*, 221 F.3d 615 (4th Cir. 2000) [Defendant was convicted of prisoner possession of heroin; claimed ineffective assistance of counsel; the court relied, in part on the ABA Standards to assess the defendant's claim]; 2) *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1993) [Defendant convicted of being a felon in possession of a weapon; filed appeal arguing, in part, ineffective assistance of counsel Court stated: "In addition, under the *Strickland* test, a court deciding whether an attorney's performance fell below reasonable professional standards can look to the ABA standards for guidance. *Strickland*, 466 U.S. at 688." And, "While

The American Bar Association's *Ten Principles of a Public Defense Delivery System* present the most widely accepted and used version of national standards for public defense. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous ABA standards for public defense systems to their most basic elements, which officials and policymakers can readily review and apply. In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."⁸

Methodology

With these standards, NLADA utilizes a modified version of the Pieczenik Evaluation Design for Public Defender Offices, which has been used since 1976 by leading criminal justice organizations, such as the National Defender Institute and the Criminal Courts Technical Assistance Project of the American University Justice Programs Office. The NLADA protocol combines a review of a jurisdiction's budgetary, caseload and organizational information with site visits to observe courtroom practices and/or to interview defense providers and other key criminal justice policy-makers (e.g., judges, prosecutors, county officials). This methodology ensures that a variety of perspectives is solicited and enables NLADA to form as complete and accurate a picture of an indigent defense system as possible.

NLADA assembled a site-visit team of professional researchers and leading public defense practitioners to conduct in-court observations and interviews with defense providers and other key players in the local criminal justice system. On-site work was conducted on April 10-12, 2007.⁹

Strickland explicitly states that ABA standards "are only guides," *Strickland*, 466 U.S. at 688, the standards support the conclusion that, accepting Blaylock's allegations as true, defense counsel's conduct fell below reasonable standards. Based on both the ABA standards and the law of the other circuits, we hold that an attorney's failure to communicate the government's plea offer to his client constitutes unreasonable conduct under prevailing professional standards."]; 3) *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990) [Defendant pleaded guilty to conspiracy to violate the Arms Control Export Act. The court followed the standard set forth in *Strickland* and looked to the ABA Standards as a guide for evaluating whether defense counsel was ineffective.]

⁸ American Bar Association. *Ten Principles of a Public Defense System*, from the introduction. at: http://72.14.207.104/search?q=cache:li1_aP9C2sJ:www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf+ABA+Ten+Principles&hl=en&gl=us&ct=clnk&cd=1. The *Ten Principles* are attached as Appendix B.

⁹ The New York county site team included members of the American Council of Chief Defenders and NLADA staff. Though not all members visited each site, each reviewed data and compared site notes from each of the other counties in reaching our conclusions. Biographical information for each member of the team is included as Appendix A.

Cattaraugus County's Public Defense System

Cattaraugus County is located in the southwest region of the state and has a population of approximately 85,000 people spread over approximately 1,600 square miles. It has one county court and one family court, two city courts, 32 town courts, and four village courts. The attorneys of the public defense system travel considerable distances to reach these courts, some as far as an hour travel one way. The jail is located in Little Valley.

In 2003, the Cattaraugus County Legislature created a full-time public defender office, located in Olean. In 2006, the county spent \$1,073,229 on public defense services (\$12.78 per capita), and received \$277,213 from the state (\$3.30 per capita) in supplemental Indigent Legal Services Fund money. Through the budget of this office, the county provides all public representation services for both criminal and family cases. The chief public defender is appointed by the county legislature for a four-year term that is coterminous with the electoral terms of the legislators. The staff attorneys of the public defender offices are the first appointed in any case. The salaries for the staff attorneys range from \$40,500 for the newest attorney to \$85,250 for the chief.

Family conflicts are handled first by Legal Aid of Western New York, known as "Southern Tier." Southern Tier is paid a flat annual contract rate, in exchange for which they handle not less than 400 and not more than 500 family court cases. Starting salary for a Southern Tier attorney is \$35,000. Criminal conflicts and secondary family conflicts are handled by assigned counsel. Assigned counsel attorneys in criminal cases are paid at the hourly rate of \$60 per hour for violations and misdemeanors with a cap of \$2,400 per case and at \$75 per hour for felonies (and sex offender registration act and probation and parole violations) with a cap of \$4,800 per case. The cap on fees can be exceeded, but the lawyer must get court approval to exceed the cap. Assigned counsel attorneys are paid \$75 per hour for family court cases, and they must bear the cost of their overhead out of these hourly rates.

There are no stated qualifications for the chief public defender, the staff attorneys of either the public defender office or the conflict non-profit organization, or the assigned counsel attorneys. The county does not require any of the public defense system attorneys to have any on-going training beyond the state-required 12 hours each year of Continuing Legal Education (CLE), and public defense system attorneys are not required to have on-going training in the areas of criminal defense and family law where they are appointed. Both the public defender office and Southern Tier pay the tuition for their staff attorneys to attend CLE in areas related to their jobs. Within the public defender office, newly hired attorneys accompany a more senior attorney during the first month of employment. The county does not provide any funding for CLE or training of assigned counsel. There are no accountability standards in place or method of implementing accountability of the attorneys within the public defender system.

The public defender office is made up of the chief public defender and four assistant public defenders, one of whom is part-time. The office additionally employs one full-time investigator and two full-time secretaries. The primary criminal caseload is divided among the five staff attorneys, with the chief public defender generally representing all felony defendants once their cases are arraigned in county court and staffing one city court, and the five assistants staffing the remaining courts. Three of the staff attorneys handle all of the primary family caseload. The office is also responsible for determining financial eligibility for appointment of counsel in criminal cases, designating whether cases must go to Southern Tier and to assigned counsel. In family court, eligibility for appointment of counsel is determined by the presiding magistrate, based upon a chart that uses a sliding scale based on income.

The office makes a valiant attempt to keep an accurate count of the cases handled by the public defense system attorneys. An annual report is filed with the court administrative offices at the end of each year. Additionally, the office has been using case tracking software to produce court activity summaries; however, they have had some problems with the consistency of data input. The county does not have any caseload or workload standards for the public defense system attorneys.

Attorneys are not present at the initial appearance before a magistrate following the arrest of a defendant. Public defender staff attorneys and many assigned counsel typically meet their criminal defendant clients for the first time at the courthouse when the client appears for formal arraignment on the charge. Most places of court do not have private confidential meeting places, so the attorneys meet with their clients on the sidewalks and in the hallways. In family matters, the client appears before the court in response to a petition and is asked at that time if they desire counsel, so attorneys are typically not present at this initial family court appearance. And in support order violation cases, the client may be remanded to jail without first being advised by counsel.

Below, we assess Cattaraugus County against the *ABA Ten Principles*. For ease of analyzing the jurisdiction-specific issues, the discussion does proceed in the numeric sequence in which the principles were promulgated. Note: The principles used as headings in the text are taken from the *Ten Principles*, but do not include footnotes from the annotated *Principles* and may not include the full language of a black-letter *Principle*. The full *Ten Principles* are attached as Appendix B.

Independence

ABA Principle 1: The public defense function, including the selection, funding, and payment should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.

There is no independent board or commission that oversees public defense services in Cattaraugus County. The Chief Public Defender is appointed by the County Legislature for a four-year term that is coterminous with the electoral terms of the legislators. Thus, public defense is subject to change with the electoral winds. In the actual representation of clients, the Chief Public Defender operates with some amount of independence, but this ability is largely based on personality and his former tenure as a county Legislator. There is no institutional independence that allows the current or future public defenders the freedom to challenge decisions of the Legislature, and the Legislature regularly engages in micromanagement of staffing and budgetary issues.

For example, in 2007 the office lost two staff attorneys, but the Chief Public Defender was unable to hire replacement attorneys or to set salaries for those attorneys (even at the same level as the exiting attorneys) until the County Legislature met and expressly approved both the person to be hired and the salary for that person. Similarly, the Chief Public Defender must seek approval from the Legislature for payment of invoices from experts, for payment of continuing legal education tuition and travel, and for all other individual expenditures. The lack of

independence makes it difficult to hire and retain staff attorneys, as their employment is not guaranteed beyond the tenure of the chief who hires them.

Delivery Model & Funding

ABA Principle 2: Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.... Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.

In dealing with the caseload, geography, Town & Village court structure (39 courts), and one jail spread over 1,600 square miles, the county makes use of virtually every local lawyer in the provision of public defense--employing a staffed public defender office, a conflicts contract with a non-profit organization, and a rotating assigned counsel list of private attorneys. However, the small attorney population limits the ability of the county in its efforts.

The county provides a significant budget to public defense, but the duties imposed on the public defense system are far greater than the budget can support. As is the case with all small, upstate counties, (and particularly with the vast geography and large number of courts in Cattaraugus County), the small amount of funding the State of New York provides to offset the cost of public defense is insufficient to provide a constitutionally adequate level of representation.

Prompt Appointment of Counsel

ABA Principle 3: Clients are screened for eligibility, and defense counsel is assigned and notified of appointment as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention or request, and usually within 24 hours thereafter.

While New York state law ensures that a defendant is brought immediately before a judge following arrest, there are no attorneys present at these initial appearances, preventing persons eligible for public defense services from having anyone to advocate on their behalf at the crucial point of having bond set. The Chief Public Defender has taken steps to ensure that all judges promptly notify the public defender office following arraignment as to whether a person desires or declines the opportunity to have counsel appointed and the justices appear to promptly do so. Defendants who are unable to make bail generally come to the attention of the public defender fairly quickly, as the office investigator visits the county jail each morning to ensure that defendants are given an application for appointed counsel. Defendants who are released on bail; however, are unlikely to be able to begin the process of applying for appointed counsel until after their first actual court appearance, which could be as much as 30 days after arrest.

The family court has a chart that sets the assessment on a sliding scale based on income. Unfortunately, this scale provides that there will be some assessment even for a client who has no income at all or who lives entirely on federal & state assistance. If there is a failure to pay, then the County is meant to bring an action against the client to attempt to recover the assessment. This of course pits the appointed counsel against their client. In support order violation cases, the Magistrate's practice is to "require an undertaking on the first appearance."

In short, this means that a person has been ordered into court because they are behind on paying their child support. The first time they appear in court, the Magistrate will order them to immediately and on the spot pay some amount of money, say for example \$500. If the person cannot immediately pay this amount of money, they will be incarcerated. The problem is that this first court appearance is also when they are asked whether they need appointed counsel and fill out the financial application requesting appointed counsel. Thus they are not represented at this appearance where they may be sent to jail. And the next hearing in the matter is typically set two months later, so the person may sit in jail the entire time.

The public defender office, rather than an independent administrator, is charged with receiving applications from all potential clients, evaluating their financial eligibility for appointment of counsel, and making the actual determination as to whether and which clients will be represented by the public defender attorneys, the conflict non-profit organization, or assigned counsel. This places the public defender office in a conflict of interest situation. The inability to quickly identify conflicts often results in even further delay in counsel being appointed who will actually represent the defendant through conclusion of the proceedings.

Client Confidentiality

ABA Principle 4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.

The staff public defender attorneys and many assigned counsel virtually never meet with their clients at any time or place other than at the courthouse when the client appears for a court setting. The sheer number of Town, Village & City Courts (39), their broad geographic locations, and the times at which they hold sessions render it almost impossible for staff attorneys to conduct office hours or telephone conferences. Attorneys are relegated to meeting with clients on the sidewalk, in a hallway, or in an empty room. Due to the length of court sessions and number of defendants appearing, each client can typically receive no more than 7 or 8 minutes of his or her attorney's time. While the courts are generous with adjournments, the result is increased costs of both time and money for everyone involved in public defense, most particularly the public defense clients and the taxpayers. A person who is in jail is more apt to have an advance and confidential visit, although one by a non-lawyer agent of counsel, because the staff investigator visits the jail almost every day.

Reasonable Workloads

ABA Principle 5: Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded.

Cattaraugus County does not have any workload standards for public defense attorneys and does not have any method in place to monitor the workloads of the attorneys or to protect them and their clients from excessive workloads. The workload imposed on the staff public defense attorneys ensures that they are not able to do much more than put out the hottest-burning fires and are almost never able to provide considered and prepared quality representation to their clients. Cattaraugus County is fortunate because the staff attorneys, non-profit conflict attorneys, and assigned counsel are all clearly dedicated, hard-working, and concerned lawyers, often working from seven in the morning until eleven at night, who want to provide constitutionally effective representation to their clients, but they are simply unable to do so in the structure and with the resources and funding provided by the county and the state.

The caseload numbers on their face are excessive under national standards. For example, during 2006 the public defense system received approximately 3,494 new family and criminal cases, in addition to those remaining open from prior years. 962 of these cases went to assigned counsel, all of whom maintain private practices and many of whom also serve as assigned counsel to other counties, and Cattaraugus County does not have any method to monitor the workloads of these attorneys. 288 of these cases were closed by private attorneys. By contract, no more than 500 of the family court cases could have gone to the conflict non-profit organization, which attempts to ensure that each of their attorneys do not have more than 100 open files – almost double the number deemed reasonable under prevailing standards. Thus the remaining 1,744 cases -- plus those still open from prior years, including felonies and misdemeanors and family cases -- were handled by the five public defender staff attorneys, for an average of well over 348 cases per attorney. And, this in addition to the spending hours in travel time to the various courts – all well in excess of national caseload standards.

The single staff investigator is only able to provide services for the felony cases that actually go to county court and are handled by the public defender office, leaving the misdemeanor and family cases as well as all cases going to conflict and assigned counsel to be handled generally without benefit of an investigator.

Minimum Qualifications

***ABA Principle 6:** Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.*

The County does not have any minimum qualifications in place for attorneys to be appointed to represent the poor. The County lacks any standards or formalized methods to ensure that counsel have the experience and training necessary to provide ethical and high quality representation appropriate to the complexity of the cases and areas of law to which they are appointed, and there are no criteria by which the County Legislature selects the Chief Public Defender nor for the selection of assistant public defenders, staff of the conflict non-profit organization, or assigned counsel.

Due to low salaries, unreasonable working hours, and little hope of professional advancement, the public defender office has struggled to hire and retain attorneys, much less to attract experienced counsel to the job. For example, only one of the present staff public defenders has ever conducted a felony trial at any time in his or her career. One of the staff

defenders has been an attorney for only a little over a year and the office lost and had to replace three attorneys in 2006 and 2007. The effort by the Chief Public Defender to handle all of the felony cases in his office to ensure quality representation for felonies has had the corresponding adverse effect of preventing vertical representation, as noted below. The contract conflict office has similar problems with hiring and retention due to low salaries.

While most assigned counsel are serendipitously very experienced and capable, the only requirement to be on this list is a bar card and willingness to do the work at the state established hourly rate. Thus in Cattaraugus County even the most inexperienced attorneys can be appointed to the most complex criminal or family law case.

Continuous Representation

ABA Principle 7: The same attorney continuously represents the client until completion of the case. Often referred to as vertical representation, the same attorney should continuously represent the client from initial assignment through the trial and sentencing.

The many demands placed on the public defender office conspire to routinely prevent vertical representation. The staff office handles all appointments in both criminal and family cases in the first instance. In criminal cases, the staff public defenders are assigned to courts rather than to clients, because it is a practical way that they can cover the large number, location, and times of the various courts. A defendant arrested on a misdemeanor may well receive vertical representation. A defendant arrested on a felony however will be represented by one attorney while the charge is in the Town or Village Court, but then shifted to the Chief Public Defender once the charge is moved to the County Court.

Where the public defender office is conflicted, the defendant will receive assigned counsel who will serve throughout the case, but the office has difficulty in identifying conflicts quickly so they often represent defendants for a good period of time before the client is shifted to assigned counsel. The number of conflict criminal cases and the difficulty in identifying them grows daily as a result of the office handling family representation as well as criminal.

The public defense system attempts to employ vertical representation in the family courts, but this is frequently defeated by the court considering the staff attorneys as fungible and requiring that any attorney present from the public defender office stand-in for any client in court – a burden not imposed on private bar attorneys handling public defense cases. The attorneys involved in the system all recognize the need for vertical representation and desire to achieve it, but insufficient staffing and resources prevent them from doing so.

Resource Parity

ABA Principle 8: There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.

Any consideration of parity must look at not only the District Attorney's office, but also the County Attorney's office and the Department of Social Services at a minimum. While the public defense budget is higher than the District Attorney budget, this is not a correct indication of parity in the county. This is because the public defender system is charged with providing counsel to all people of insufficient means charged with felony and lesser offenses and probation/parole violations, as well as to all eligible adult respondents in child abuse & neglect cases, family offenses, custody & visitation cases, paternity cases, and child support violations. Additionally, in 2006 the public defender office is responsible for determining eligibility for counsel and making appointment of counsel to all parties.

On the criminal court side, the public defender system is working opposite to the District Attorney. On the family court side, the public defense attorney may be working opposite to private attorneys or Department of Social Services attorneys or County Attorneys or other appointed attorneys or any combination of these. Because often all parties to a family court proceeding are similarly eligible for services and therefore represented by public defense attorneys, it is common for the entire cost of representation to be borne by the public defense budget.

The full-time Chief Public Defender is paid \$85,250 per year. By contrast, the full-time District Attorney is paid \$119,800 per year and does not have responsibility for family court, as does the Public Defender. Family court alone fills the daytime work week hours of three of the five staff public defenders. The County Attorney is paid \$101,000 per year and does not have responsibility for criminal court. The full-time assistant staff public defenders are paid a range of \$55,000 to \$40,500 per year, and they are the lowest paid of all of the attorneys employed by the county; the full-time assistant district attorneys are paid a range of \$65,122 to \$54,335, and the social service attorneys are paid a range of \$75,859 to \$65,463. Starting salary for the conflict contract non-profit full-time attorneys is \$35,000 per year, which is the lowest of all of the salaried public defense attorneys. The assigned counsel attorneys are paid at the state established hourly rates, from which they must pay overhead costs, and they also represent private paying clients, setting up a conflict between their duties to their public and private clients and their own financial interests.

Defense investigative costs must come from public defense funds, while the prosecution and the government in family court matters have the support of other local and state agencies. Cattaraugus County cannot hope to resolve the problems in parity without assistance from the State of New York.

Training

ABA Principle 9: Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and

comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

Though the county does not require public defense attorneys to have any training in either criminal defense or family law, both the public defender office and the conflict contract non-profit office pay the cost of continuing legal education for their staff attorneys, so long as it is related to their jobs. The Chief Public Defender tries to ensure that staff attorneys receive CLE in pertinent areas and typically has newly hired attorneys accompanied by a more senior attorney during the first month of employment; there have been struggles in the past with getting the county to approve the cost of CLE for staff attorneys.

There is no requirement that assigned counsel have any on-going training in the areas of law in which they receive appointments, and where they practice in varied areas of law outside of criminal defense and family law there is a built-in conflict for the attorney in choosing the areas of the law where they will spend their time and money to obtain continuing legal education. There should be mandated and funded ongoing systematic training for all public defense attorneys in the specific areas of criminal defense and family law in which they accept appointments to represent parties deemed eligible for public defense services.

Accountability

***ABA Principle 10:** Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.*

There is no supervision or review of the representation provided by public defense attorneys in Cattaraugus County. There is no accountability in the public defense representation system. Despite the best efforts of all attorneys in the public defense system, the structure, and underfunding of the system yields an inability to meet national standards of representation. Because there is no oversight or accountability, everyone within the system is left with anecdotal information that assigned counsel often fail to appear in the Town & Village Courts, the public defender staff are unable to conduct meaningful discussions with clients or to promptly respond to prosecutorial offers to resolve cases, little if any independent investigation is conducted in most cases (particularly in family and misdemeanor cases), and very few evidentiary hearings are ever held. The taxpayers cannot be assured that their dollars are spent effectively and efficiently and in a manner calculated to ensure that justice is served.

NLADA Recommendations for Cattaraugus County

NLADA believes it is unfair for the State of New York to saddle its counties with the responsibility of bringing their public defense standards into constitutional compliance. Indeed, to do the job right would require a significant increase in local funding, which would threaten the overall economic health of the counties. It is best for the State to shoulder this burden and allow counties to invest in social services that may decrease the need for public representation services in the first place. However, we understand that it is important to assess the county's defender system against recognized national standards as a measure of the health and effectiveness of the

defense services. With that in mind, we offer the following recommendations about what is needed locally.

- Provide additional funding sufficient to implement the recommendations made here.
- Establish an independent board to oversee all public representation services, including the hiring of the Chief Public Defender.
- Consider establishing a separate public defender office for the provision of family court representation.
- Increase the salaries of the public defender office attorneys to a level on parity with the salaries of the district attorney and county attorney offices.
- Evaluate the contract rate for Southern Tier to ensure that the contract provides for the salaries of the Southern Tier attorneys to be on a level of parity with the salaries of the District Attorney and County Attorney offices.
- Evaluate the local hourly rates for assigned counsel to ensure that the statutory rates are sufficient to cover overhead costs and provide a reasonable hourly fee.
- Establish hiring criteria and minimum qualifications for the Chief Public Defender and all public defense system attorneys, specifically including assigned counsel.
- Adopt and fully fund a systematic and comprehensive training program for all public representation system attorneys in the areas of law where they are appointed, to include both internal training provided directly by the public representation system and external training that will allow public representation system attorneys to attend statewide and national training.
- Adopt performance standards for all public representation system attorneys.
- Adopt an objective system for the regular supervision, review, and evaluation of all public representation system attorneys, specifically including assigned counsel.
- Hire an administrator to determine eligibility for public counsel, determine conflicts, and make assignments to assigned counsel where necessary.
- Eliminate client payment contributions in family court cases where a client is qualified for public counsel.

- Require that attorneys be appointed to clients rather than to courts, thus providing vertical representation in all cases.
- Ensure that family court representation counsel are not treated by the courts as fungible, thus providing vertical representation – one lawyer to one client – in all family court cases.
- Adopt mandatory caseload/workload standards for all public representation system attorneys, specifically including assigned counsel, and establish a county-wide criminal justice system mechanism for the public representation system to cease taking new cases when maximum caseloads/workloads are reached.
- Hire a sufficient number of attorneys, investigators, and social workers in the public defender office to bring workloads within nationally accepted standards, expressly considering the time and distance required to travel to all sessions of Town & Village Courts. There should be one investigator and one social worker for every four attorneys required by the system workload, including provision of investigators and social workers to assigned counsel for their appointed cases.
- Provide counsel at all initial appearances before a magistrate following arrest, where a detainee is indigent and requests counsel, prior to conducting any proceedings related to probable cause or bond setting.
- Provide counsel at all first appearances in child support violation cases, where a respondent is indigent and requests counsel, prior to conducting any proceedings on the merits of the allegations.
- Create an adequate number of private attorney-client meeting rooms in all places where court is held and the jail.
- Provide for non-toll telephone access in a private area by all detained clients to the office or designated telephone number of their public representation system attorney, specifically including assigned counsel.

Appendix A

Mary Broderick served as team leader for the NLADA evaluations of the Cook County (IL) Public Defender and the San Bernardino County (CA) Public Defender and developed a Projected Indigent Defense System Budget for San Diego (CA). She was also a team member for the NLADA evaluations of the Public Defender Service of the District of Columbia, Montana indigent defense system and the Riverside County (CA) Public Defender. As executive director of California Attorneys for Criminal Justice (CACJ), the largest statewide association of criminal defense lawyers and allied professionals, Broderick was responsible for policy development; supervision of the legislative, professional education and publications programs; public education and media relations; liaison with other organizations; technical assistance; and administration. She led the CACJ legislative effort that preserved unanimous jury verdicts in California. Broderick was also director of NLADA's Defender Division, where she conceived and edited NLADA's *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* and its *Standards for the Administration of Assigned Counsel Systems* and supervised development of NLADA's *Performance Guidelines for Criminal Defense Representation; Indigent Defense Caseloads and Common Sense: An Update; The Lay of the Land: Statewide Defender Programs; FINAL REPORT: Indigent Defense and the FY 91 BJA Formula Grant Program; and the National Directory of Death Penalty Mitigation Specialists*. She designed and launched NLADA's *Life in the Balance* death penalty defense training, and NLADA's *Defender Management Training*, and supervised its *Appellate Defender Training*. She also led NLADA's effort in Congress to preserve *habeas corpus*.

David Carroll is the director of research for the National Legal Aid & Defender Association (NLADA). Carroll has conducted assessments of the right to counsel in Montana, Idaho, New York, the District of Columbia, Clark County (Las Vegas) Nevada, Santa Clara County (San Jose) California, and Venango County Pennsylvania. Carroll has consulted with numerous public defender organizations and state Supreme Courts, and he co-authored a report for the U.S. Department of Justice on the Implementation and Impact of Indigent Defense Standards.

In 2004, NLADA released *In Defense of Public Access to Justice*, a comprehensive report detailing the impact Louisiana's systemic deficiencies had on one judicial district – Avoyelles Parish. A legislative Task Force on Indigent Defense subsequently retained Carroll to advise them on different models for delivering indigent defense services. The Louisiana State Bar retained NLADA to document issues in post-Katrina New Orleans and to create a road map for a legislative fix to the state's systemic deficiencies. The report, primarily authored by Carroll and released in September 2006, was the starting point for a legislative advisory group put together by the Chair of the House Criminal Justice Committee that eventually led to the passage of the Louisiana Public Defender Act of 2007.

For five and a half years, Carroll worked as a senior research associate & business manager for the Spangenberg Group (TSG). TSG is a national and international research and consulting firm specializing in criminal justice reform. Since 1985, TSG has been the research arm of the American Bar Association on indigent defense issues. Carroll directed numerous projects on behalf of TSG, including: a jail-planning study for Pierce County (Tacoma) Washington; a study of indigent defense cost recovery efforts in Jefferson and Fayette Counties (Louisville and Lexington), Kentucky; a statewide assessment of West Virginia's Public Defender Services; and principal analysis on a statewide public defender, court, and prosecutor

case-weighting study in Tennessee. He provided analysis and re-design of the New York Legal Aid Society's Criminal Defense Division and Criminal Appeals Bureau's case management information systems. Carroll also was chosen to provide on-site technical assistance to statewide Task Forces in Illinois, Nevada, Alabama, and Vermont under the auspices of the American Bar Association and the U.S. Department of Justice, Bureau of Justice Assistance.

William J. (Bill) Leahy grew up in Boston, graduated from the University of Notre Dame in 1968 and Harvard Law School in 1974. Between college and law school, he taught elementary school students at P.S. 20 in Hunts Point, the Bronx. His legal career has been dedicated to the representation of indigent persons, first as a trial and appellate defender with the Massachusetts Defenders Committee for 10 years, then as the first leader of the Public Defender Division of the Committee for Public Counsel Services (CPCS) from 1984 to 1991, and since 1991 in his current position as CPCS chief counsel.

Leahy was a member from 1991 to 2005 of the Massachusetts Supreme Judicial Court Standing Advisory Committee on the Rules of Criminal Procedure and was a member of the Boston Bar Association Executive Council from 2003 to 2006. He has been an adviser to the American Law Institute's Model Penal Code sentencing project since 2001. He has served on the Boston Bar Association/Crime and Justice Foundation Task Force on Justice, the Superior Court Criminal Justice Study Committee, the Criminal History Systems Board, and the executive board of the Massachusetts Association of Criminal Defense Lawyers. He is an active member of the National Legal Aid & Defender Association and is currently a member of the executive committee of the American Council of Chief Defenders. In April 2007, Leahy was appointed to serve on Gov. Deval Patrick's Anti-Crime Council.

In September 2005, he received the *Award for Legal Excellence* from the New England Bar Association, and the *Outstanding Professional Achievement Award* in June 2005, from the Boston Inn of Court. In June, 2004, he received the *Clarence Earl Gideon Award* from the Massachusetts Association of Criminal Defense Lawyers, and in October 2004, he received the Juvenile Bar Association's *Judge Leo Lydon Award*. Leahy was lead counsel in the landmark right-to-counsel case of *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004).

Phyllis Mann is the director of the National Defender Leadership Institute, within the National Legal Aid & Defender Association. Prior to joining NLADA, she was a consultant in criminal defense, providing expert testimony in both state and federal courts in capital defense, research and writing in systemic areas of criminal defense, and serving as the curriculum coordinator for NLADA's *Life in the Balance* capital defense training. Before returning to her home state of Texas, where she resides, Mann practiced exclusively criminal defense – trial and appeal, state and federal – in Louisiana. At various times in her career she served as a public defender for Rapides Parish, as an appellate public defender for the Louisiana Appellate Project, as a court appointed capital defender certified by the Louisiana Indigent Defender Assistance Board, and as a court appointed CJA attorney for the Western and Middle Districts of Louisiana. In 2005, she secured the unanimous opinion from the Louisiana Supreme Court in *State v. Citizen & Tonguis*, establishing the authority for trial court judges to halt capital prosecutions in Louisiana where there is no funding for the defense of the accused. Following Hurricane Katrina, she established and led an *ad hoc* group of criminal defense attorneys in their *pro bono* efforts to interview, counsel and document the approximately 8,500 prisoners and detainees evacuated from south-

eastern Louisiana jails and to represent them where appropriate in *habeas corpus* and bond proceedings. She received the 2006 *Arthur von Briesen Award* from NLADA for her contributions as a private attorney to indigent defense in Louisiana. Phyllis is a past president of the Louisiana Association of Criminal Defense Lawyers and was the recipient of LACDL's 2005 *Justice Albert Tate Jr. Award* for lifetime achievement in criminal defense.

Jon Mosher is research associate for the Research & Evaluations division of the National Legal Aid & Defender Association. He assists in the direction of NLADA's numerous standards-based assessments of indigent defense systems, including: an evaluation of trial-level public defender services in the state of Michigan; a study of public defense in Orleans Parish (New Orleans) Louisiana; an evaluation of public defense in Hamilton County, Ohio (Cincinnati); a statewide study of the right to counsel in Idaho's trial-level adult criminal and juvenile delinquency systems; and an evaluation of the Idaho State Appellate Defender's Office. He joined NLADA in 2003 as resource coordinator with Defender Legal Services, serving as primary staff liaison to the American Council of Chief Defenders. He is a graduate of George Washington University.

Gerard A. Smyth is the former chief public defender for the state of Connecticut and served as co-chair of the American Council of Chief Defenders (ACCD) from 2004-06. He had a 30-year career as a public defender in Connecticut, including misdemeanor representation, felony trials and supervision of the Capital Defense & Trial Services Unit of the CT Division of Public Defender Services. He served as chief public defender from 1994 until 2006. He is also the founder of the CT Innocence Project and has served on numerous criminal justice advisory boards and commissions. He currently is affiliated with the Institute for the Study of Crime & Justice at Central Connecticut State University and is an adjunct professor in the Department of Criminology & Criminal Justice. He has served as a consultant to the National Legal Aid & Defender Association and has been involved in indigent defense evaluations in several jurisdictions throughout the United States.

Phyllis Subin completed two gubernatorial appointment terms as the chief public defender for the state of New Mexico in 2003. In that capacity, she was the leader of New Mexico's largest statewide law firm, the New Mexico Public Defender Department, which had a budget of more than \$30 million and employed 320 staff members (160 attorneys) with more than 100 contract attorneys. At the time of her first appointment, Subin was an assistant professor at the University of New Mexico School of Law and the director of the Criminal Defense Clinic. She has a long history in the teaching and training of law students and public defender attorneys. Following years as a trial and appellate public defender, Subin was the first director of training and recruitment at the Defender Association of Philadelphia (PA), a large county public defender system, where she developed and taught a nationally recognized training program for lawyers and law interns.

Subin served as chair of NLADA's Defender Trainer's Section, was instrumental in writing and developing NLADA's national training and development standards and assisted in the creation of NLADA's *Defender Advocacy Institute*. Subin has consulted privately for a number of indigent defense programs, including the Kentucky Department of Advocacy.

Appendix B

"Ten Principles of a Public Defense Delivery System"

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1. ***The public defense function, including the selection, funding, and payment of defense counsel,¹⁰ is independent.*** *The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.¹¹ To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.¹² Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.¹³ The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.¹⁴*

2. ***Where the caseload is sufficiently high,¹⁵ the public defense delivery system consists of both a defender office¹⁶ and the active participation of the private bar.*** *The private bar participation*

¹⁰ "Counsel" as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney or an attorney in private practice accepting appointments. "Defense" as used herein relates to both the juvenile and adult public defense systems.

¹¹ National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter "NAC"], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter "NSC"], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter "ABA"], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter "Assigned Counsel"], Standard 2.2; *NLADA Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter "Contracting"], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter "Model Act"], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter "ABA Counsel for Private Parties"], Standard 2.1 (D).

¹² NSC, *supra* note 12, Guidelines 2.10-2.13; ABA, *supra* note 12, Standard 5-1.3(b); Assigned Counsel, *supra* note 12, Standards 3.2.1, 2; Contracting, *supra* note 12, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter "ABA Monitoring"], Standard 3.2.

¹³ Judicial independence is "the most essential character of a free society" (American Bar Association Standing Committee on Judicial Independence, 1997).

¹⁴ ABA, *supra* note 12, Standard 5-4.1

¹⁵ "Sufficiently high" is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase can generally be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases is enough to support meaningful involvement of the private bar.

¹⁶ NAC, *supra* note 12, Standard 13.5; ABA, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 12, Standard 2.2. "Defender office" means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

may include part time defenders, a controlled assigned counsel plan, or contracts for services.¹⁷ The appointment process should never be ad hoc,¹⁸ but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.¹⁹ Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.²⁰

3. **Clients are screened for eligibility,²¹ and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention or request,²² and usually within 24 hours thereafter.²³**
4. **Defense counsel is provided sufficient time and a confidential space with which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.²⁴ Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client.²⁵ To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.²⁶**
5. **Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations,**

¹⁷ ABA, *supra note 12*, Standard 5-1.2(a) and (b); NSC, *supra note 12*, Guideline 2.3; ABA, *supra note 12*, Standard 5-2.1.

¹⁸ NSC, *supra note 12*, Guideline 2.3; ABA, *supra note 12*, Standard 5-2.1.

¹⁹ ABA, *supra note 12*, Standard 5-2.1 and commentary; Assigned Counsel, *supra note 12*, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

²⁰ NSC, *supra note 12*, Guideline 2.4; Model Act, *supra note 12*, § 10; ABA, *supra note 12*, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

²¹ For screening approaches, see NSC, *supra note 12*, Guideline 1.6 and ABA, *supra note 12*, Standard 5-7.3.

²² NAC, *supra note 12*, Standard 13.3; ABA, *supra note 12*, Standard 5-6.1; Model Act, *supra note 12*, § 3; NSC, *supra note 12*, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra note 12*, Standard 2.4 (A).

²³ NSC, *supra note 12*, Guideline 1.3.

²⁴ American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter "ABA Defense Function"], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter "Performance Guidelines"], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra note 12*, Standard 4.2.

²⁵ NSC, *supra note 12*, Guideline 5.10; ABA Defense Function, *supra note 12*, Standards 4-2.3, 4-3.1, 4-3.2; Performance Guidelines, *supra note 113*, Guideline 2.2.

²⁶ ABA Defense Function, *supra note 12*, Standard 4-3.1.

and counsel is obligated to decline appointments above such levels.²⁷ National caseload standards should in no event be exceeded,²⁸ but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.²⁹

6. **Defense counsel's ability, training, and experience match the complexity of the case.** Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.³⁰
7. **The same attorney continuously represents the client until completion of the case.** Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.³¹ The attorney assigned for the direct appeal should represent the client throughout the direct appeal.
8. **There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.** There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.³² Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.³³ Contracts with private attorneys for public defense services

²⁷ NSC, *supra* note 12, Guideline 5.1, 5.3; ABA, *supra* note 12, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 12, Standard 13.12; Contracting, *supra* note 12, Guidelines III-6, III-12; Assigned Counsel, *supra* note 12, Standards 4.1.4.1.2; ABA Counsel for Private Parties, *supra* note 12, Standard 2.2 (B) (iv).

²⁸ Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should "reflect" (NSC Guideline 5.1) or "under no circumstances exceed" (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). See also *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989) [hereinafter "Death Penalty"].

²⁹ ABA, *supra* note 12, Standard 5-5.3; NSC, *supra* note 12, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980), Standard 1-F.

³⁰ Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 117, Guideline 5.1.

³¹ NSC, *supra* note 12, Guidelines 5.11, 5.12; ABA, *supra* note 12, Standard 5-6.2; NAC, *supra* note 12, Standard 13.1; Assigned Counsel, *supra* note 12, Standard 2.6; Contracting, *supra* note 12, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 12, Standard 2.4 (B) (i).

³² NSC, *supra* note 12, Guideline 3.4; ABA, *supra* note 12, Standards 5-4.1, 5-4.3; Contracting, *supra* note 12, Guideline III-10; Assigned Counsel, *supra* note 12, Standard 4.7.1; Appellate, *supra* note 120, ABA Counsel for Private Parties, *supra* note 12, Standard 2.1 (B) (iv). See NSC, Guideline 4.1 (includes numerical staffing ratios, e.g., there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). Cf. NAC, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

³³ ABA, *supra* note 12, Standard 5-2.4; Assigned Counsel, *supra* note 12, Standard 4.7.3.

should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases,³⁴ and separately fund expert, investigative and other litigation support services.³⁵ No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.³⁶ This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

- 9. Defense counsel is provided with and required to attend continuing legal education.** *Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.³⁷*
- 10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.** *The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.³⁸*

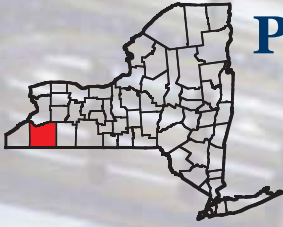
³⁴ NSC, *supra note 12*, Guideline 2.6; ABA, *supra note 12*, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra note 12*, Guidelines III-6, III-12, and *passim*.

³⁵ ABA, *supra note 12*, Standard 5-3.3(b)(x); Contracting, *supra note 12*, Guidelines III-8, III-9.

³⁶ ABA Defense Function, *supra note 15*, Standard 4-1.2(d).

³⁷ NAC, *supra note 12*, Standards 13.15, 13.16; NSC, *supra note 12*, Guidelines 2.4(4), 5.6-5.8; ABA, *supra note 12*, Standards 5-1.5; Model Act, § 10(e); Contracting, *supra note 12*, Guideline III-17; Assigned Counsel, *supra note 12*, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra note 12*, Standard 2.1 (A).

³⁸ NSC, *supra note 12*, Guidelines 5.4, 5.5; Contracting, *supra note 12*, Guidelines III-16; Assigned Counsel, *supra note 12*, Standard 4.4; ABA Counsel for Private Parties, *supra note 12*, Standards 2.1 (A), 2.2; ABA Monitoring, *supra note 3*, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

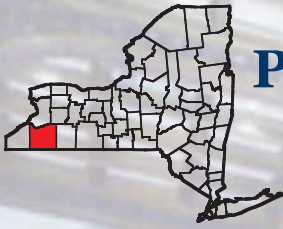


Public Defense Report Card Cattaraugus County



The American Bar Association's *Ten Principles of a Public Defense Delivery System*: The fundamental criteria necessary for a system to provide "effective, efficient, high quality, ethical, conflict-free legal representation"

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Independence</p>	<p><i>The public defense function, including the selection, funding, and payment should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a non-partisan board should oversee defender, assigned counsel, or contract systems.</i></p>	<p>There is no independent board or commission that oversees public defense services in Cattaraugus County. The Chief Public Defender is appointed by the County Legislature for a four-year term that is coterminous with the electoral terms of the legislators. Thus, public defense is subject to change with the electoral winds. In the actual representation of clients, the Chief Public Defender operates with some amount of independence, but this ability is largely based on personality and his former tenure as a county Legislator. There is no institutional independence that allows the current or future public defenders the freedom to challenge decisions of the Legislature, and the Legislature regularly engages in micromanagement of staffing and budgetary issues. For example, in 2007 the office lost two staff attorneys, but the chief Public Defender was unable to hire replacement attorneys or to set salaries for those attorneys (even at the same level as the exiting attorneys) until the County Legislature met and expressly approved both the person to be hired and the salary for that person. Similarly, the chief Public Defender must seek approval from the Legislature for payment of invoices from experts, for payment of continuing legal education tuition and travel, and for all other individual expenditures. The lack of independence makes it difficult to hire and retain staff attorneys, as their employment is not guaranteed beyond the tenure of the chief who hires them.</p>	<p style="font-size: 2em; text-align: center;">D-</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Prompt Appointment of Counsel</p>	<p><i>Clients are screened for eligibility, and defense counsel is assigned and notified of appointment as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention or request, and usually within 24 hours thereafter.</i></p>	<p>While New York state law ensures that a defendant is brought immediately before a judge following arrest, there are no attorneys present at these initial appearances, preventing persons eligible for public defense services from having anyone to advocate on their behalf at the crucial point of having bond set. The chief Public Defender has taken steps to ensure that all judges promptly notify the public defender office following arraignment as to whether a person desires or declines the opportunity to have counsel appointed and the justices appear to promptly do so. Defendants who are unable to make bail generally come to the attention of the public defender fairly quickly, as the office investigator visits the county jail each morning to ensure that defendants are given an application for appointed counsel. Defendants who are released on bail, however, are unlikely to be able to begin the process of applying for appointed counsel until after their first actual court appearance, which could be as much as 30 days after arrest. The Family Court has a chart that sets the assessment on a sliding scale based on income. Unfortunately this scale provides that there will be some assessment even for a client who has no income at all or who lives entirely on federal & state assistance. If there is a failure to pay, then the County is meant to bring an action against the client to attempt to recover the assessment. This of course pits the appointed counsel against their client. In support order violation cases, the Magistrate's practice is to "require an undertaking on the first appearance." In short, this means that a person has been ordered into court because they are behind on paying their child support. The first time they appear in court, the Magistrate will order them to immediately and on the spot pay some amount of money, say for example \$500. If the person cannot immediately pay this amount of money, they will be incarcerated. The problem is that this first court appearance is also when they are asked whether they need appointed counsel and fill out the financial application requesting appointed counsel. Thus they are not represented at this appearance where they may well be sent to jail. And the next hearing in the matter is typically set two months later, so the person may sit in jail for two months. The public defender office, rather than an independent administrator, is charged with receiving applications from all potential clients, evaluating their financial eligibility for appointment of counsel, and making the actual determination as to whether and which clients will be represented by the public defender attorneys, the conflict non-profit organization, or assigned counsel. This places the public defender office in a conflict of interest situation. The inability to quickly identify conflicts often results in even further delay in counsel being appointed who will actually represent the defendant through conclusion of the proceedings.</p>	<p style="font-size: 2em; text-align: center;">F</p>

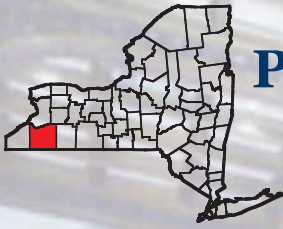


Public Defense Report Card

Cattaraugus County



<p>Delivery Model & Funding</p>	<p><i>Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. ... Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.</i></p>	<p>In dealing with the caseload, geography, and Town & Village court structure of this large rural county with 39 courts and one jail spread over 1,600 square miles, the county makes use of virtually every local lawyer in the provision of public defense, employing a staffed public defender office, a conflicts contract with a non-profit organization, and a rotating assigned counsel list of private attorneys. However, the small attorney population limits the ability of the county in its efforts. The county provides a significant budget to public defense, but the duties imposed on the public defense system are far greater than the budget can support. As is the case with all small, upstate counties, (and particularly with the vast geography and large number of courts in Cattaraugus County), the small amount of funding the State of New York provides to offset the cost of public defense is insufficient to provide a constitutionally adequate level of representation</p>	<p>D</p>
<p>Client Confidentiality</p>	<p><i>Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.</i></p>	<p>The staff public defender attorneys and many assigned counsel virtually never meet with their clients at any time or place other than at the courthouse when the client appears for a court setting. The sheer number of Town, Village & City Courts (39), their broad geographic locations, and the times at which they hold sessions render it almost impossible for staff attorneys to conduct office hours or telephone conferences. Attorneys are relegated to meeting with clients on the sidewalk, in a hallway, or in an empty room. Due to the length of court sessions and number of defendants appearing, each client can typically receive no more than 7 or 8 minutes of his or her attorney's time. While the courts are generous with adjournments, the result is increased costs of both time and money for everyone involved in public defense, most particularly the public defense clients and the taxpayers. A person who is in jail is more apt to have an advance and confidential visit, although one by a non-lawyer agent of counsel, because the staff investigator visits the jail almost every day.</p>	<p>D-</p>
<p>Reasonable Workloads</p>	<p><i>Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded....</i></p>	<p>Cattaraugus County does not have any workload standards for public defense attorneys and does not have any method in place to monitor the workloads of the attorneys or to protect them and their clients from excessive workloads. The workload imposed on the staff public defense attorneys ensures that they are not able to do much more than put out the hottest-burning fires and are almost never able to provide considered and prepared quality representation to their clients. Cattaraugus County is fortunate because the staff attorneys, non-profit conflict attorneys, and assigned counsel are all clearly dedicated, hard-working, and concerned lawyers, often working from seven in the morning until eleven at night, who want to provide constitutionally effective representation to their clients, but they are simply unable to do so in the structure and with the resources and funding provided by the county and the state. The caseload numbers on their face are excessive under national standards. For example, during 2006 the public defense system received approximately 3,494 new family and criminal cases, in addition to those remaining open from prior years. 962 of these cases went to assigned counsel, all of whom maintain private practices and many of whom also serve as assigned counsel to other counties, and Cattaraugus County does not have any method to monitor the workloads of these attorneys. 288 of these cases were closed by private attorneys. By contract, no more than 500 of the family court cases could have gone to the conflict non-profit organization, which attempts to ensure that each of their attorneys do not have more than 100 open files – almost double the number deemed reasonable under prevailing standards. Thus the remaining 1,744 cases -- plus those still open from prior years, including felonies and misdemeanors and family cases -- were handled by the five public defender staff attorneys, for an average of well over 348 cases per attorney. And, this in addition to the spending hours in travel time to the various courts – all well in excess of national caseload standards. The single staff investigator is only able to provide services for the felony cases that actually go to county court and are handled by the public defender office, leaving the misdemeanor and family cases as well as all cases going to conflict and assigned counsel to be handled generally without benefit of an investigator.</p>	<p>F</p>

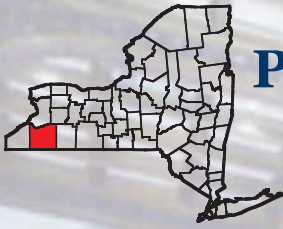


Public Defense Report Card

Cattaraugus County



<p>Minimum Qualifications</p>	<p><i>Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.</i></p>	<p>The County does not have any minimum qualifications in place for attorneys to be appointed to represent the poor. The County lacks any standards or formalized methods to ensure that counsel have the experience and training necessary to provide ethical and high quality representation appropriate to the complexity of the cases and areas of law to which they are appointed, and there are no criteria by which the County Legislature selects the chief Public Defender nor for the selection of assistant public defenders, staff of the conflict non-profit organization, or assigned counsel. Due to low salaries, unreasonable working hours, and little hope of professional advancement, the public defender office has struggled to hire and retain attorneys, much less to attract experienced counsel to the job. For example, only one of the present staff public defenders has ever conducted a felony trial at any time in their career. One of the staff defenders has been an attorney for only a little over a year and the office lost and had to replace three attorneys in 2006 and 2007. The effort by the chief Public Defender to handle all of the felony cases in his office to ensure quality representation for felonies has had the corresponding adverse effect of preventing vertical representation, as noted below. The contract conflict office has similar problems with hiring and retention due to low salaries. While most assigned counsel are serendipitously very experienced and capable, the only requirement to be on this list is a bar card and willingness to do the work at the state established hourly rate. Thus in Cattaraugus County even the most inexperienced attorneys can be appointed to the most complex criminal or family law case.</p>	<p>F</p>
<p>Continuous Representation</p>	<p><i>The same attorney continuously represents the client until completion of the case. Often referred to as vertical representation, the same attorney should continuously represent the client from initial assignment through the trial and sentencing.</i></p>	<p>The many demands placed on the public defender office conspire to routinely prevent vertical representation. The staff office handles all appointments in both criminal and family cases in the first instance. In criminal cases, the staff public defenders are assigned to courts rather than to clients, because it is a practical way that they can cover the large number, location, and times of the various courts. A defendant arrested on a misdemeanor may well receive vertical representation. A defendant arrested on a felony however will be represented by one attorney while the charge is in the Town or Village Court, but then shifted to the chief Public Defender once the charge is moved to the County Court. Where the public defender office is conflicted, the defendant will receive assigned counsel who will serve throughout the case, but the office has difficulty in identifying conflicts quickly so they often represent defendants for a goodly period of time before the client is shifted to assigned counsel. The number of conflict criminal cases and the difficulty in identifying them grows daily as a result of the office handling family representation as well as criminal. The public defense system attempts to employ vertical representation in the family courts, but this is frequently defeated by the court considering the staff attorneys as fungible and requiring that any attorney present from the Public Defender Office stand-in for any client in court – a burden not imposed on private bar attorneys handling public defense cases. The attorneys involved in the system all recognize the need for vertical representation and desire to achieve it, but insufficient staffing and resources prevent them from doing so.</p>	<p>D-</p>
<p>Training</p>	<p><i>Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.</i></p>	<p>Though the county does not require public defense attorneys to have any training in either criminal defense or family law, both the public defender office and the conflict contract non-profit office pay the cost of continuing legal education for their staff attorneys, so long as it is related to their jobs. The Chief Public Defender tries to ensure that staff attorneys receive CLE in pertinent areas and typically has newly hired attorneys accompanied by a more senior attorney during the first month of employment; there have been struggles in the past with getting the county to approve the cost of CLE for staff attorneys. There is no requirement that assigned counsel have any on-going training in the areas of law in which they receive appointments, and where they practice in varied areas of law outside of criminal defense and family law there is a built-in conflict for the attorney in choosing the areas of the law where they will spend their time and money to obtain continuing legal education. There should be mandated and funded ongoing systematic training for all public defense attorneys in the specific areas of criminal defense and family law in which they accept appointments to represent parties deemed eligible for public defense services.</p>	<p>D+</p>



Public Defense Report Card

Cattaraugus County



<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Resource Parity</p>	<p><i>There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.</i></p>	<p>Any consideration of parity must look at not only the District Attorney office, but also the County Attorney office and the Department of Social Services at a minimum; thus the first glance notice that the public defense budget is higher than the District Attorney budget is not a correct indication of parity in the county. This is because the public defender system is charged with providing counsel to all people of insufficient means charged with felony and lesser offenses and probation/parole violations, as well as to all eligible adult respondents in child abuse & neglect cases, family offenses, custody & visitation cases, paternity cases, and child support violations. Additionally, the public defender office is responsible for determining eligibility for counsel and making appointment of counsel to all parties. On the criminal court side, the public defender system is working opposite the District Attorney. On the family court side, the public defense attorney may be working opposite private attorneys or Department of Social Services attorneys or County Attorneys or other appointed attorneys or any combination of these. Because often all parties to a family court proceeding are similarly eligible for services and therefore represented by public defense attorneys, it is common for the entire cost of representation to be borne by the public defense budget. The full-time chief Public Defender is paid \$85,250 per year. By contrast, the full-time District Attorney is paid \$119,800 per year and does not have responsibility for family court, as does the Public Defender. Family court alone fills the daytime workweek hours of three of the five staff public defenders. The County Attorney is paid \$101,000 per year and does not have responsibility for criminal court. The full-time assistant staff public defenders are paid a range of \$55,000 to \$40,500 per year, and they are the lowest paid of all of the attorneys employed by the county; the full-time assistant district attorneys are paid a range of \$65,122 to \$54,335, and the social service attorneys are paid a range of \$75,859 to \$65,463. Starting salary for the conflict contract non-profit full-time attorneys is \$35,000 per year, which is the lowest of all of the salaried public defense attorneys. The assigned counsel attorneys are paid at the state established hourly rates, from which they must pay overhead costs and they also represent private paying clients, setting up a conflict between their duties to their public and private clients and their own financial interests. Defense investigative costs must come from public defense funds, while the prosecution and the government in family court matters have the support of other local and state agencies. Cattaraugus County cannot hope to resolve the problems in parity without assistance from the State of New York.</p>	<p style="font-size: 48pt; text-align: center;">D</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Accountability</p>	<p><i>Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.</i></p>	<p>There is no supervision or review of the representation provided by public defense attorneys in Cattaraugus County. There is no accountability in the public defense representation system. Despite the best efforts of all attorneys in the public defense system, the structure, and underfunding of the system yields an inability to meet national standards of representation. Because there is no oversight or accountability, everyone within the system is left with anecdotal information that assigned counsel often fail to appear in the Town & Village Courts, the public defender staff are unable to conduct meaningful discussions with clients or to promptly respond to prosecutorial offers to resolve cases, little if any independent investigation is conducted in most cases (particularly in family and misdemeanor cases), and very few evidentiary hearings are ever held. The taxpayers cannot be assured that their dollars are spent effectively and efficiently and in a manner calculated to ensure that justice is served.</p>	<p style="font-size: 48pt; text-align: center;">F</p>