



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

NIAGARA COUNTY

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*Produced on Behalf
of*

The New York State Defenders Association

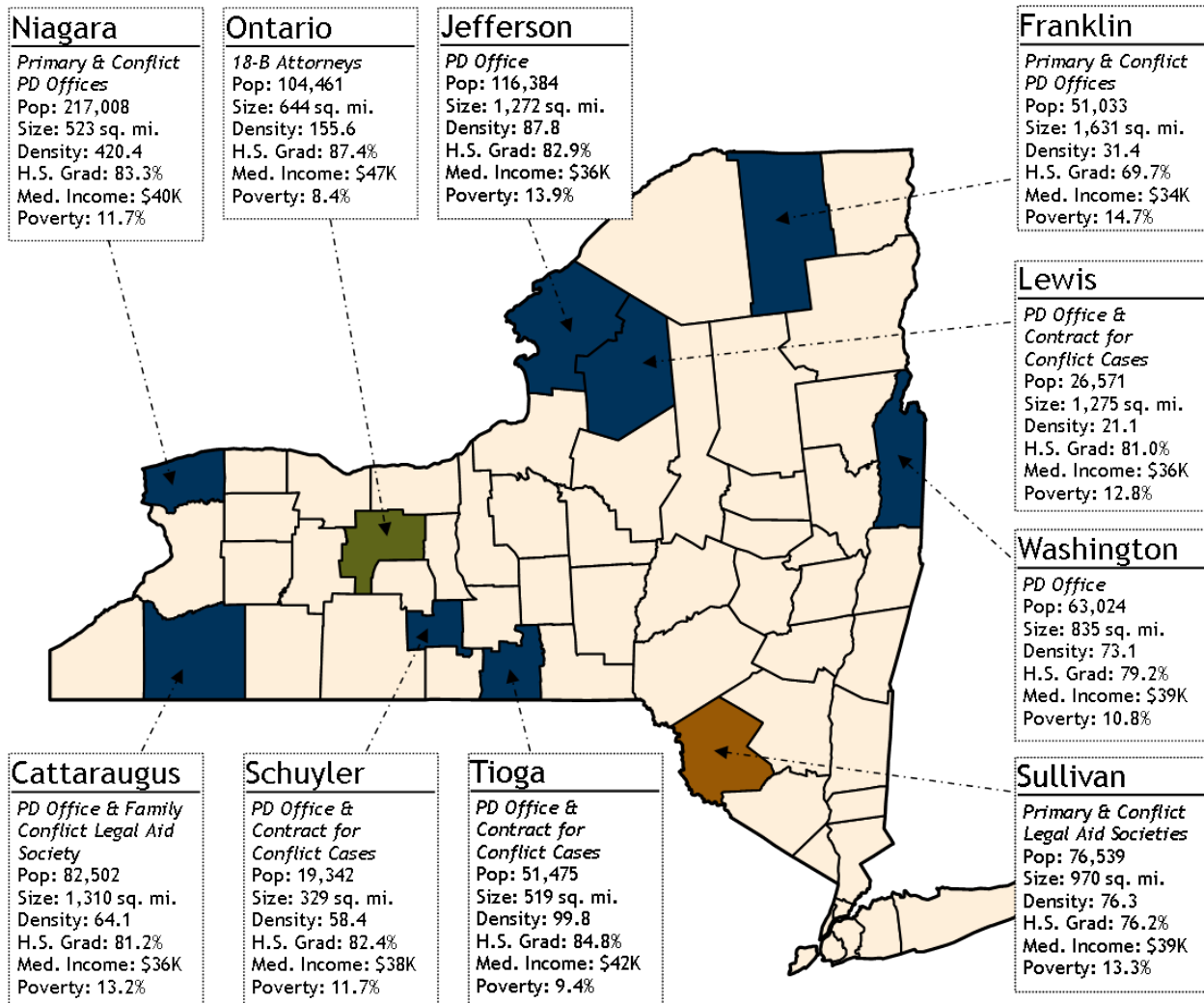
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TEN COUNTY OVERVIEW

Niagara 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 – Niagara 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.

Niagara County's Public Defense System

Niagara County is located on the westernmost side of the state, bordering Canada, and is home to Niagara Falls. With a population of approximately 216,000 sharing only 523 square miles, it is the most densely populated of the ten New York counties studied. Niagara has two county criminal court judges, one county Family Court that operates in three separate locations, three City Courts, and 11 Town and Village Courts.

The county has a public defender office. The Chief Public Defender is appointed by the county legislature for a two-year term and receives an annual salary of approximately \$37,808. Only the chief and the one full-time assistant public defenders have offices and computers at the public defender office facility. The staff attorneys of the public defender office (who technically are also appointed by the county legislature for two-year terms) are initially appointed in both felony and criminal cases and receive salaries ranging from \$34,000 - \$38,000. In 2006, the county spent \$1,653,888 on public defense services (\$7.65 per capita), and received \$426,196 from the state (\$1.97 per capita) in supplemental Indigent Legal Services Fund money.

That same year, the county established a conflict public defender office, which handles all first-level conflicts in both criminal and family court cases. The conflict office administrator is hired by the county legislature, as are the staff conflict attorneys. The building for the conflict public defender office is rarely used, as the six attorneys within the conflict system all work out of their own private offices. The budget for this conflict office covers the salaries of the conflict staff attorneys, at \$40,000 per year each, as well as the fees paid to assigned counsel for second-level criminal and family court conflicts. Assigned counsel are paid according to the state hourly rates, but they must bear the cost of all of their own overhead out of these hourly rates.

There are no stated qualifications for the Chief Public Defender, the assistant public defenders, the conflict office administrator, the conflict assistant public defenders, or the assigned counsel attorneys. In felony cases, the Chief Public Defender makes a conscious effort to assign cases based upon complexity, experience, training, and ability. 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. The county does not provide any funding for CLE or training of any public defense system attorneys. There are no accountability standards in place or method of implementing accountability of the attorneys within the public defense system.

The public defender office is made up of the Chief Public Defender and seventeen assistant public defenders. As noted, all of the public defender office attorneys except one, maintain private offices and private caseloads in addition to their public defense work. The office also employs an administrative assistant and four clerks (two for felony and misdemeanor court, one for Family Court, and one for the Niagara Falls office). The primary criminal and Family Court caseload is divided among the 18 public defender attorneys as follows: two attorneys are responsible for cases out of Lockport Family Court; two attorneys are responsible for cases out of Niagara Falls Family Court; two attorneys are responsible for criminal cases out of Niagara Falls City Court; two attorneys are responsible for appeals, with no trial-level responsibilities; and the remaining ten attorneys are assigned to the Town & Village Courts, the other two City Courts, and the Integrated Domestic Violence Court docket. All felony cases, once set for arraignment in the county court, are assigned by the Chief who attempts to match attorney experience to the seriousness of the case. The office is responsible for determining

financial eligibility for appointment of counsel in all criminal cases, using the eligibility guidelines distributed by NYSDA, and for determining whether there is a conflict.

The conflict public defender office is made up of the conflict office administrator and five staff attorneys. Like the public defenders, all of the conflict defenders maintain private offices and private caseloads in addition to their public defense work. The five staff attorneys are each assigned to particular courts by the conflict office administrator, using a "designated courtroom assignment system." Under this system, two conflict staff attorneys are assigned to each of the busiest courts, while some courts do not have any conflict staff attorney. Each court additionally has a pool of assigned counsel attorneys who are eligible to be appointed. Where a conflict arises and no conflict public defender is assigned to the court, or when additional attorneys are required, the judges directly appoint attorneys from the assigned counsel pool for their court. The conflict office processes the assigned counsel vouchers submitted for payment.

The public defender office has a case management system, which allows them to maintain accurate caseload data. However, the county does not have any caseload or workload standards for any of the public defense system attorneys.

Attorneys are not present at the initial appearance before a magistrate following the arrest of a defendant. Most public defense system attorneys meet their criminal clients, particularly those charged with misdemeanors, for the first time at the courthouse when the client appears for formal arraignment on the charge.

Below, we assess Niagara 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.

Niagara County exhibits the most overtly political undue interference over the public defense function that NLADA has observed in the counties we have studied. The county legislature and the party in control of the legislature control the appointment of the chief Public Defender and the assistant defenders. Clearly, there is full political control over the Conflict Public Defender Office and its administrator as well. In 2005, the Democrats controlled the county legislature, and, as they were leaving office at the end of the year, they pushed to open a conflict public defender office, in part so that they could appoint attorneys from their own party to these positions. That attempt failed by one vote, and the Republicans gained control over the legislature in 2006. The Republicans then engaged the current Conflict Administrator to study the feasibility of opening a conflict office with the goal of saving money given the State-mandated rate increase for assigned counsel attorneys. In Niagara County Justice Courts, the judiciary still exerts substantial control over attorney appointments.

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.

There are three systems for the delivery of adult public defense services in Niagara County. The largest criminal defense organization is the Niagara County Public Defender Office located directly across the street from the courthouse. In September 2006, a Conflict Public Defender Office was started. The last mechanism is the Article 18-B Panel Attorneys, private practitioners, who take appointments in County Court and in the Town/Village/City Courts and whose appointments are controlled by the judges. As is the case with all small, upstate counties the small amount of funding the State of New York provides to offset the cost of public defense is totally 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 defendants from having anyone to advocate on their behalf at the crucial point of having bond set. The public defender office does its own eligibility screening in criminal cases, but it is presumptively appointed in all cases in which the defendant remains in custody following initial justice court appearance immediately following arrest. Based upon information received from the Town/Village/City Courts -- usually by fax -- and through client phone contacts, the office's clerks will prepare preliminary client paperwork and book Tuesday appointments for clients free on bail to come to the office for an eligibility review. The assigned attorney, usually one of the office's new lawyers, will serve as duty attorney for Tuesday, and he or she will interview clients to determine eligibility for public defender services. Another duty attorney is assigned to the jail interviews, and he or she meets with and screens in-custody defendants to determine their eligibility. They follow the eligibility guidelines consistent with the memo sent to their office by the New York State Defenders Association.

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.

As in other counties studied, though attorneys in Niagara County have the confidential space to meet with clients, very few have the time to do so for all non-felony trial cases. For example, there is no meaningful client contact until the actual court hearing date. Although the assigned public defender we observed in Lockport Town Court did as good a job as practical when covering two concurrent dockets, it was impossible for the assigned defender to speak with any clients in depth, to prepare in advance for the court, or to solidly represent two clients who are simultaneously standing before different judges in different courtrooms at the same time. Even if he continued cases for client consultation, there appears to be no real time for case preparation outside the courtroom. It is NLADA's experience that part-time public defense systems generally result in a failure to pay close attention to misdemeanor cases, which "only" carry a penalty of up to one year, despite the collateral consequences of these cases increasing substantially over the years.

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.

Neither the Public Defender nor the Conflict Office has adopted any caseload or workload standards for their practice. Moreover, all attorneys, including the chiefs, in both the primary and conflict offices are part-time and allowed to carry a private caseload including criminal cases. The office does not employ a single investigator, paralegal, or alternative sentencing advocate/social worker. So although felony criminal caseload statistics per attorney do not exceed national standards, the application of those standards in Niagara County is limited at best. Representation in Family Court matters and misdemeanor cases exceed national standards.

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.

In felony cases the Chief Public Defender does make a conscious effort to assign cases based upon considerations of complexity and experience, training, and ability. Less experienced attorneys will start with Justice Court assignments and build to a felony caseload. The Conflict Administrator matches cases and attorneys through his designated courtroom assignment system -- though there is no monitoring by the Conflict Administrator of actual skills and performance levels to know for sure that attorneys are appropriately matched with the level of case assigned.

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.

Representation in felony cases at the preliminary hearing level is horizontal in that representation is provided by the assigned courtroom attorney, not the ultimate felony trial attorney. If the hearing is either waived (hopefully for a concrete benefit to the client) or held for trial following the taking of testimony, the Town/Village/City Court public defender hands the case off for assignment to the felony trial attorney. Before the case may be assigned to the felony trial attorney, it is possible that the district attorney's office will make a felony plea offer. That offer will come to the public defender office and the full time assistant defender is usually responsible for delivering and discussing the offer with the client. If that client is in custody, timely client consultation is not a problem. However, if the client is on bond, the office sends a letter requesting that the client contact the office regarding the plea offer. Given the fluidity of the bail client population, this process for bail defendants is problematic and may result in the client losing a very reasonable plea offer. Misdemeanor representation is accomplished through attorney assignment to one or more of the Town/Village/City courts. While the City Courts may meet on a daily basis, the other courts maintain a rotating schedule with some only open at night. One attorney handles all cases assigned to the public defender office in the particular courtroom. Conflict counsel assigns two "staff" misdemeanor attorneys to the busiest city/justice courts. The other city/justice courts have an assigned counsel pool of attorneys, and the judges assign cases out to those attorneys. Conflict Public Defender office pays the fees for the assigned counsel who handle cases that cannot be handled with only two "staff" attorneys.

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.

Parity is difficult to measure in this county given the differences between an office that is staffed by part-time attorneys and an office staffed by full time prosecutors. Certainly, the salary for the elected District Attorney, established by state legislation, is significantly higher than the Chief Public Defender or the Conflict Administrator; the holders of these positions may ultimately gross a higher yearly income as they maintain a private practice, they therefore cannot be expected to spend the same amount of time on county-paid work as do their counterparts. The defenders did not want to move to a full-time employee situation as that would involve too much loss of income (the Chief Public Defender is paid only approximately \$38,000 per year). The District Attorney's budget is approximately \$1.9 million while the combined public defense budget is only \$1.5 million. Additionally, there are major differences in the office space dedicated to the prosecution and defense function. Located on the third floor of the addition to the courthouse and with full courthouse security, the prosecutors have a very professional

appearing, fully equipped office location with appropriate meeting space, office suites, computers, etc. and with a great view. The Public Defender Office was moved out of the courthouse and into their current location across the street about eighteen months ago. While lessening the identification of a public defense office with other parts of the system is a positive thing, the new office, which might be considered adequate for currently defined operations, lacks the appearance of professionalism that immediately strikes one upon entering the District Attorney's offices.

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.*

The Public Defender Office does not provide any internal formalized training or continuing legal education. Support staff receive from the county no more than orientation to the county's benefits and personnel issues such as sick and annual leave. Attorneys are on their own for any continuing legal education credits, and do not receive funding from the office to support their CLE. There is no office mandate that separately obtained CLE must include a designated number of credits in areas of law related to public defense practice. Compare this to the District Attorney's office which utilizes the NY Prosecutors' Training Institute (the two week beginning prosecutors' school at Syracuse School of Law) and the national prosecutors' school in South Carolina.

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.*

The Chief Public Defender does not provide any direct management or supervisory oversight of his office attorneys. If there is a "problem" that is identified through a complaint, he will address that issue as needed with the attorney and the complaining party. Since the staff attorneys are considered "experienced" litigators, there did not seem to be any perceived need for attorney meetings or case reviews or any other internal quality control mechanisms. No yearly evaluations/performance reviews are conducted for attorneys. It was also expressed that Lockport is a small town, and, if someone is doing a "bad job," everyone in the courthouse will see it, know about it, and the "word" would get out. Lockport is a somewhat closed world in which the system protects itself and deals with its people in its own way. If attorneys perform at "adequate" practice levels, there are also no "incentives" to perform at a higher practice level, or to move up the levels of legal practice expectation. The money and benefits are the same no matter what. Self-motivation is the only incentive to propel performance to a high level.

NLADA Recommendations for Niagara 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 and the chief conflict defender.
- 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, the chief conflict 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, moving these responsibilities away from the public defender office and the conflict defender office.
- Require that attorneys be appointed to clients rather than to courts, thus providing vertical representation in all 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 and the conflict defender office to bring workloads within nationally accepted standards, expressly considering the private client caseloads carried by all public representation system attorneys. 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.
- Eliminate judicial involvement in the appointment of assigned counsel.
- 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.
- 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 Niagara 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>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 nonpartisan board should oversee defender, assigned counsel, or contract systems.</i></p>	<p>Niagara County exhibits the most overtly political undue interference over the public defense function that NLADA has observed in the seven counties we have studied thus far. The county legislature and the party in control of the legislature control the appointment of the chief Public Defender and the assistant defenders. Clearly, there is full political control over the Conflict Public Defender Office and its Administrator as well. In 2005, the Democrats controlled the county legislature, and, as they were leaving office at the end of the year, they pushed to open a conflict public defender office, in part so that they could appoint attorneys from their own party to these positions. That attempt failed by one vote, and the Republicans gained control over the legislature in 2006. The Republicans then engaged the current Conflict Administrator to study the feasibility of opening a conflict office with the goal of saving money given the State-mandated rate increase for assigned counsel attorneys. In Niagara County Justice Courts, the judiciary still exerts substantial control over attorney appointments.</p>	<p>F</p>
<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>There are three systems for the delivery of adult public defense services in Niagara County. The largest criminal defense organization is the Niagara County Public Defender Office located directly across the street from the courthouse. In September 2006, a Conflict Public Defender Office was started. The last mechanism is the Article 18-B Panel Attorneys, private practitioners, who take appointments in County Court and in the Town/Village/City Courts and whose appointments are controlled by the judges. As is the case with all small, upstate counties the small amount of funding the State of New York provides to offset the cost of public defense is totally insufficient to provide a constitutionally adequate level of representation.</p>	<p>D</p>
<p>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 defendants from having anyone to advocate on their behalf at the crucial point of having bond set. The public defender office does its own eligibility screening in criminal cases, but it is presumptively appointed in all cases in which the defendant remains in custody following initial justice court appearance immediately following arrest. Based upon information received from the Town/ Village/City Courts -- usually by fax -- and through client phone contacts, the office's clerks will prepare preliminary client paper work and book Tuesday appointments for clients free on bail to come to the office for an eligibility review. The assigned attorney, usually one of the office's new lawyers, will serve as duty attorney for Tuesday, and he or she will interview clients to determine eligibility for public defender services. Another duty attorney is assigned to the jail interviews, and he or she meets with and screens in-custody defendants to determine their eligibility. They follow the eligibility guidelines consistent with the memo sent to their office by the New York State Defenders Association.</p>	<p>C</p>



Public Defense Report Card

Niagara County



<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>As in other counties studied, though attorneys in Niagara county have the confidential space to meet with clients, very few have the time to do so for all non-felony trial cases. For example, there is no meaningful client contact until the actual court hearing date. Although the assigned public defender we observed in Lockport Town Court did as good a job as practical when covering two concurrent dockets, it was impossible for the assigned defender to speak with any clients in depth, to prepare in advance for the court, or to solidly represent two clients who are simultaneously standing before different judges in different courtrooms at the same time. Even if he continued cases for client consultation, there appears to be no real time for case preparation outside the courtroom. It is NLADA's experience that part-time public defense systems generally result in a failure to pay close attention to misdemeanor cases, which "only" carry a penalty of up to one year, despite the collateral consequences of these cases increasing substantially over the years.</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>Neither the Public Defender nor the Conflict Office has adopted any caseload or workload standards for their practice. Moreover, all attorneys, including the chiefs, in both the primary and conflict offices are part-time and allowed to carry a private caseload including criminal cases. The office does not employ a single investigator, paralegal, or alternative sentencing advocate/social worker. So although felony criminal caseload statistics per attorney do not exceed national standards, the application of those standards in Niagara County is limited at best. Representation in Family Court matters and misdemeanor cases exceed national standards.</p>	<p>F</p>
<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>In felony cases the chief Public Defender does make a conscious effort to assign cases based upon considerations of complexity and experience, training, and ability. Less experienced attorneys will start with Justice Court assignments and build to a felony caseload. The Conflict Administrator matches cases and attorneys through his designated courtroom assignment system -- though there is no monitoring by the Conflict Administrator of actual skills and performance levels to know for sure that attorneys are appropriately matched with the level of case assigned.</p>	<p>C</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>Representation in felony cases at the preliminary hearing level is horizontal in that representation is provided by the assigned courtroom attorney, not the ultimate felony trial attorney. If the hearing is either waived (hopefully for a concrete benefit to the client) or held for trial following the taking of testimony, the /Town/Village/City Court public defender hands the case off for assignment to the felony trial attorney. Before the case may be assigned to the felony trial attorney, it is possible that the district attorney's office will make a felony plea offer. That offer will come to the public defender office and the full time assistant defender is usually responsible for delivering and discussing the offer with the client. If that client is in custody, timely client consultation is not a problem. However, if the client is on bond, the office sends a letter requesting that the client contact the office regarding the plea offer. Given the fluidity of the bail client population, this process for bail defendants is problematic and may result in the client losing a very reasonable plea offer. Misdemeanor representation is accomplished through attorney assignment to one or more of the Town/Village/City courts. While the City Courts may meet on a daily basis, the other courts maintain a rotating schedule with some only open at night. One attorney handles all cases assigned to the public defender office in the particular courtroom. Conflict counsel assigns two "staff" misdemeanor attorneys to the busiest city/justice courts. The other city/justice courts have an assigned counsel pool of attorneys, and the judges assign cases out to those attorneys. Conflict PD office pays the fees for the assign counsel who handle cases that cannot be handled with only two "staff" attorneys.</p>	<p>D-</p>



Public Defense Report Card

Niagara County



<p>Resource Parity</p>	<p><i>There is parity between the 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>Parity is difficult to measure in this county given the differences between an office that is staffed by part-time attorneys and an office staffed by full time prosecutors. Certainly, the salary for the elected District Attorney, established by state legislation, is significantly higher than the Public Defender or the Conflict Administrator; the holders of these positions may ultimately gross a higher yearly income as they maintain a private practice, they therefore cannot be expected to spend the same amount of time on county-paid work as to their counterparts. The defenders did not want to move to a full time employee situation as that would involve too much loss of income (the Chief Public Defender is paid only approximately \$38K per year). The District Attorney's budget is approximately \$1.9 million while the combined public defense budget is only \$1.5 million. Additionally, there are major differences in the office space dedicated to the prosecution and defense function. Located on the third floor of the addition to the courthouse and with full courthouse security, the prosecutors have a very professional appearing, fully equipped office location with appropriate meeting space, office suites, computers, etc. and with a great view. The Public Defender Office was moved out of the courthouse and into their current location across the street about eighteen months ago. While lessening the identification of a public defense office with other parts of the system is a positive thing, the new office which might be considered adequate for currently defined operations, lacks the appearance of professionalism that immediately strikes one upon entering the District Attorney's offices.</p>	<p>F</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>The Public Defender Office does not provide any internal formalized training or continuing legal education. Support staff receive from the county no more than orientation to the county's benefits and personnel issues such as sick and annual leave. Attorneys are on their own for any continuing legal education credits, and do not receive funding from the office to support their CLE. There is no office mandate that separately obtained CLE must include a designated number of credits in areas of law related to public defense practice. Compare this to the District Attorney's office which utilizes the NY Prosecutors' Training Institute (the two week beginning prosecutors' school at Syracuse School of Law) and the national prosecutors' school in South Carolina.</p>	<p>F</p>
<p>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>The chief Public Defender does not provide any direct management or supervisory oversight of his office attorneys. If there is a "problem" that is identified through a complaint, he will address that issue as needed with the attorney and the complaining party. Since the staff attorneys are considered "experienced" litigators, there did not seem to be any perceived need for attorney meetings or case reviews or any other internal quality control mechanisms. No yearly evaluations/performance reviews are conducted for attorneys. It was also expressed that Lockport is a small town, and, if someone is doing a "bad job," everyone in the courthouse will see it, know about it, and the "word" would get out. Lockport is a somewhat closed world in which the system protects itself and deals with its people in its own way. If attorneys perform at "adequate" practice levels, there are also no "incentives" to perform at a higher practice level, or to move up the levels of legal practice expectation. The money and benefits are the same no matter what. Self-motivation is the only incentive to propel performance to a high level.</p>	<p>F</p>