



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

SCHUYLER COUNTY

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of

The New York State Defenders Association

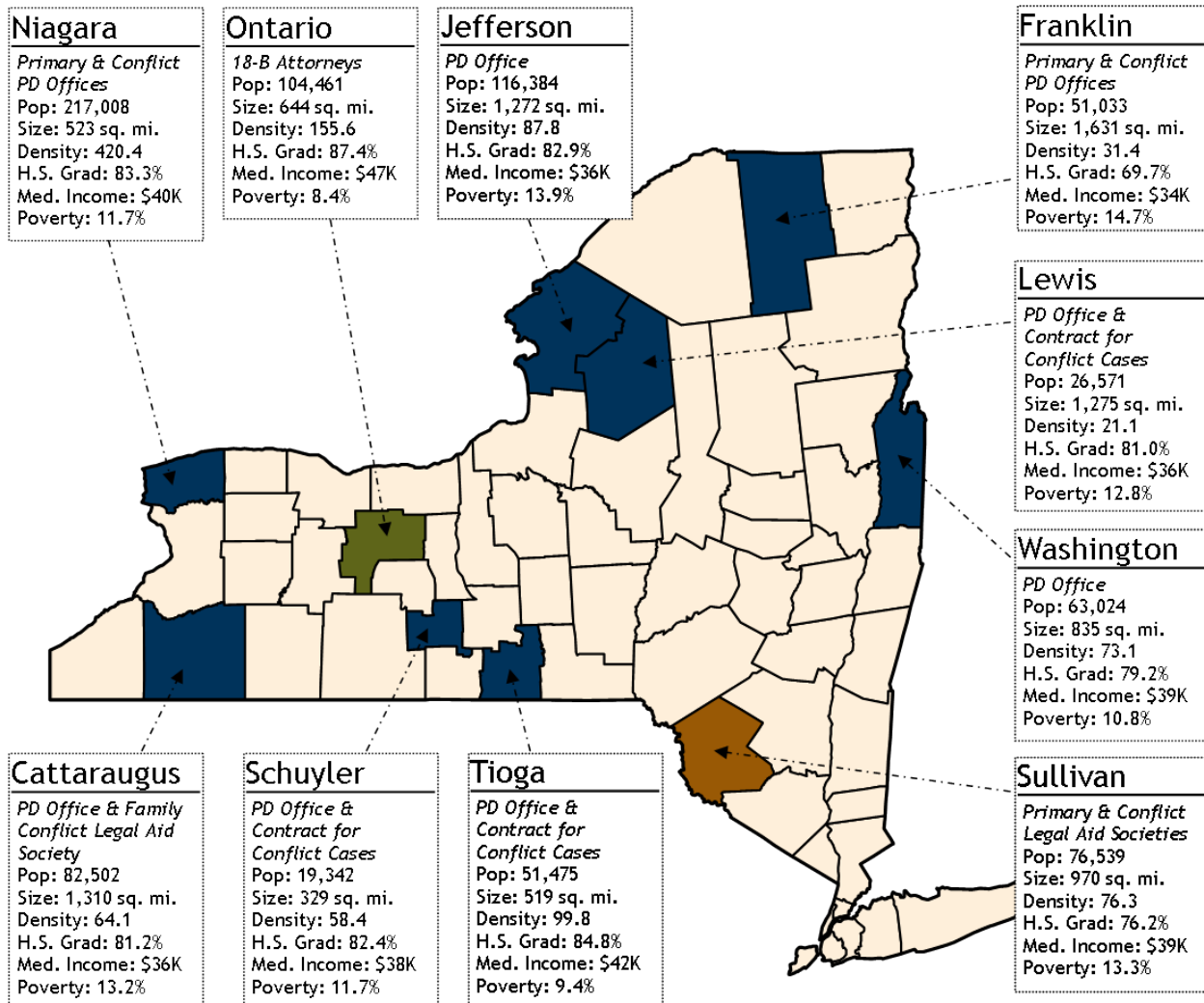
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TEN COUNTY OVERVIEW

Schuyler 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 – Schuyler 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.

Schuyler County's Public Defense System

Schuyler County¹⁰ is located in the Finger Lakes Region of western New York. At approximately 329 square miles in area, it is the geographically smallest of the counties studied, and has a population of slightly more than 19,000. The county has a single judge who presides over both the County and Family Courts, and 12 Town & Village Courts.

The county has a public defender office. Through the budget of this office, the county provides all public defense services for both criminal and family cases. The Chief Public Defender is appointed by the county legislature and receives an annual salary of \$75,000, plus \$2,000 per month for office space rental and operating expenses. Since 2006, the public defender office has contracted with a contract conflict attorney to handle first-level criminal and family conflicts for an annual flat-fee contract of \$30,000 plus mileage costs. Second-level conflicts are handled by private assigned counsel attorneys. 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. In 2006, the county spent \$234,669 on public defense services (\$12.20 per capita) and received \$60,615 from the state (\$3.15 per capita) in supplemental Indigent Legal Services Fund money.

There are no stated qualifications for the Chief Public Defender, assistant public defender, contract conflict attorney, 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. The county does not provide any funding for CLE or training of public defense system attorneys. The Chief Public Defender voluntarily and at her own expense attends training and meetings sponsored by the New York State Defenders Association. The Chief Public Defender knows most of the attorneys in the public defense system, and so she has some capacity to match lawyer experience with case severity in designating counsel in individual cases. 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 one assistant public defender, who both maintain private law offices and represent private retained clients in addition to their public client caseloads. The office also employs a full-time secretary/administrative assistant. At the time of our site visit, the office was located at the private law office of the Chief Public Defender (although the county subsequently moved the public defender office to a location within the courthouse, primarily as a cost-saving measure). The Chief Public Defender generally represents all felony defendants once their cases are arraigned in County Court and handles all family matters other than paternity and child support. The assistant public defender staffs all of the Town & Village Court criminal cases and handles paternity and child support cases in family court. The Chief Public Defender is responsible for determining financial eligibility for appointment of counsel, for determining conflicts and for designating the contract conflict attorney or assigned counsel who will be appointed where necessary. The application for appointment of counsel is lengthy, complex, and requests

¹⁰ The New York Civil Liberties Union and Schulte Roth & Zabel LLP filed a class action lawsuit in November 2007 saying that New York State is failing to uphold its constitutional duty to provide effective counsel in cases where public defense is mandated. In August 2008 the suit withstood a motion to dismiss. Five counties – Onondaga, Ontario, Schuyler, Suffolk, and Washington – were added as defendants at that time.

confidential case-related information. There is one contract conflict attorney who is from a neighboring county, where he also holds a separate public defense contract in addition to maintaining a private practice. Such contracts are not authorized under NYS County Law. The majority of the assigned counsel attorneys are from nearby counties where they maintain their private practices.

The Chief Public Defender maintains accurate caseload data for public representation cases appointed within the county. Schuyler County does not have any standards or mechanism for monitoring the overall caseloads or workloads of the public defense system attorneys, however, because all of the attorneys maintain private retained client caseloads and many accept appointments from other counties.

Attorneys are not present at the initial appearance before a magistrate following the arrest of a defendant. Justices routinely fail to comply with Section 200.26 of the Uniform Rules for Courts Exercising Criminal Jurisdiction and fail to appoint counsel at arraignment for defendants who are financially unable to afford counsel. Defendants who are unable to make bail often remain in jail for significant periods of time without coming to anyone's attention. Most criminal defendant clients meet their attorneys for the first time at the courthouse when they appear for formal arraignment.

Below, we assess Schuyler 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.

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 Schuyler County. The Chief Public Defender is appointed by the County Legislature. Though the chief Public Defender operates with a modicum of independence, her ability to do her job is strictly based on personality and her former tenure as the County District Attorney. There is no institutional independence that allows the current or future public defenders the freedom to challenge decisions of the Legislature and/or the County Administrator. For example, the Chief Public Defender is hard-pressed to urge for necessary budgetary increases at a time when the County is imposing performance-based budget measures in an attempt to decrease costs. Similarly, the County currently has plans to move the public defender office to a location within the courthouse, placing the current Public Defender in the awkward position of balancing her own personal and professional interests against those of the public clients and those of her employer.

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.

Schuyler County has in place a plan for provision of public defense representation that makes use of a part-time staffed office and contracts with the private bar. However, the small attorney population limits the ability of the county to find qualified counsel willing to serve. One contract conflict attorney comes from a neighboring county where until recently he held a separate public defense contract. No one performs oversight of workload in either county, let alone monitoring the combined workload from both counties. All conflicts are identified and assigned by the primary Public Defender. 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. There is no compliance in Schuyler County with Section 200.26 of the Uniform Rules for Courts Exercising Criminal Jurisdiction, which requires justices to assign counsel at arraignment for defendants who are unable to retain their own attorney. Defendants who are unable to make bail often languish in jail without counsel for extended periods of time without coming to anyone's attention. The Chief Public Defender and the jail staff attempt to monitor arrests to the extent possible in order to prevent this occurring, and the County Judge takes action immediately to appoint counsel when a felony defendant comes to his attention, but standards should be implemented and followed immediately to provide for prompt appointment of counsel following arrest. Defendants who are released on bail are basically left to find their own way to the public defender office in order to apply for appointed counsel. While the public defender office has a system in place for processing applications, determining eligibility, and promptly notifying clients as to whether they will receive appointed counsel, it is often a month or more after arrest before a potential client can overcome the obstacles imposed by lack of information and poverty to reach the office to begin the process. The application form presently in use is lengthy, complex, and requests confidential case-related information unnecessary to the eligibility determination. The sheer number of Town and Village courts (12 in all), their dispersed locations, and the number of separate court sessions preclude defense counsel from being present to provide representation to defendants at all court sessions. Most defendants will meet their

attorney for the first time (and in the case of misdemeanors typically the only time) when they arrive at the courthouse for a hearing in their case.

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 contract conflict attorney and most of the assigned counsel attorneys maintain their offices in other counties, so it is extremely difficult for publicly-appointed clients to travel to their offices to meet with them. The result is that attorneys are most likely to meet with their clients at the courthouses. The attorney will typically meet the client, discuss the case with the prosecutor and the client, reach a plea agreement, and the defendant will enter a guilty plea and be sentenced, all in the same court appearance and with all attorney-client discussions occurring at the courthouse. The Chief Public Defender and the assistant defender both have private offices located within the county, where they are able to keep their offices open after business hours to better serve the needs of their clients, to affirm the public defenders' separate role from law enforcement and the courts, and to preserve full confidentiality and safety when clients meet with their attorneys. While places exist where attorneys can conduct confidential conversations with some of their clients, the structure of the Town and Village court system combined with the delay in appointment of counsel frequently prevents the attorneys from meeting with their clients sufficiently in advance of court proceedings to provide constitutionally adequate representation. The Schuyler County jail allows virtually unfettered access to incarcerated defendants by their attorneys, who can visit them at any time of the day or night, and this level of cooperation by jail staff with defense attorneys is laudable. Additionally, the jail has put in place a direct phone line to the public defender office, although not in a confidential area, which male defendants can and do use to call the public defender office. Female defendants are not so fortunate because they are held in various surrounding county jails. Similarly, there is no direct phone line to the assistant public defender, the contract conflict attorney, or the assigned counsel attorneys.

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.*

Schuyler 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. And though the number of cases handled by the public defenders, contract conflict attorney, and assigned counsel all appear reasonable and manageable upon initial statistical review, all attorneys handle

private cases in addition to their public work – work that is not reported or monitored by any person or agency with supervisory authority of the attorneys. At the time of NLADA’s study, one attorney was handling public defense cases in at least two counties, neither of which can account for his exact workload. In addition, the number of courts in which they must appear, the frequency of court sessions, and the geographic location of these courts impedes the ability of the attorneys to appear in court with their clients in order to provide quality representation at every stage of the proceeding and often to provide any representation whatsoever at some stages. This suggests that the workload is excessive. Moreover, the lack of a staff investigator or paralegal means that attorneys must do all of the work on their cases without support.

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 current Chief Public Defender and assistant defender are both extremely experienced attorneys, and the County is fortunate in this regard. But the County lacks any standards or formalized methods to ensure that counsel provided to poor people have the experience and training necessary to provide ethical and high quality representation. There are no criteria by which the County Legislature selects the Chief Public Defender, and there are no criteria for the selection of assistant public defenders or conflict counsel. There are no criteria for the attorneys who serve as assigned counsel in the county; rather these attorneys are chosen based only on their willingness to do the work at the state-established hourly rates, so that any willing attorney, no matter how inexperienced, can be appointed to the most complex criminal or Family Court case. Because the Chief Public Defender knows most of the attorneys, she has some capacity to match lawyer experience and credentials with case severity, and she and the County Judge informally monitor assigned counsel courtroom performance.

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.

Though the primary public defender office tries to adhere to vertical representation, the court structure prevents it. The staff public defenders are initially assigned to courts rather than to defendants, because it is a practical way that the two of them can cover all of the sessions of court held in all of the various courts. A defendant arrested on a felony charge will therefore be represented by the assistant public defender while the charge is in the Town or Village Court, but will then be represented by the Chief Public Defender if a preliminary hearing is actually held and once the charge is moved to the County Court.

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.*

Schuyler County is simply financially unable to provide parity between the public defense attorneys and the prosecuting agencies. The public defender office is charged with providing counsel to all eligible persons charged with felonies or lesser offenses and probation/parole violations, as well as to all eligible 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 to all eligible parties. On the criminal court side, the Public Defender is appointed in the vast majority of cases and is working opposite the District Attorney. On the family court side, the Public Defender may be working opposite private attorneys or Department of Social Services attorneys or County Attorneys or other appointed attorneys or any combination of these; and Family Court cases make up a larger portion of the public defender work than do criminal cases.

Thus any consideration of true parity would have to look at not only the District Attorney office, but also the County Attorney office and the Department of Social Services. The full-time chief Public Defender is paid \$75,000 per year by the County. This is the same salary paid to the part-time County Attorney. The full-time elected District Attorney, however, is paid \$119,800 per year, of which \$63,214 is paid by the county and \$56,586 is paid by the state. The failure of the State to augment public defender salaries in the same way as district attorney salaries directly impacts the quality of the representation. Qualified attorneys may not accept the job due to the low pay or (as in Schuyler County) qualified attorneys – including the "full time" Chief Public Defender – must work a separate private practice to subsidize their public defense income. This impacts the amount of time that can be spent with public defense clients and sets up conflicts between attorneys' duties to public and private clients. The move to an ostensibly full-time Public Defender came only in 2004, as the NAACP Legal Defense and Educational Fund concluded a study describing the need for a full-time program.

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.*

Schuyler County public defense attorneys are not provided with nor required to have any training in either criminal defense or family law. Neither the County nor the State has specific dedicated funding for continuing legal education of public defense attorneys. Because all of the public defense attorneys in Schuyler County must also maintain private law practices to make ends meet, where they practice in varied areas of the 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. It is commendable that the Chief Public Defender voluntarily avails herself of trainings and meetings sponsored by the New

York State Defenders Association, however 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 are appointed to represent people of insufficient means.

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 Schuyler County. The best example of where this leads to failure can be seen in the lack of use of an investigator by any public defense counsel. There is an affirmative duty on the part of defense counsel to conduct an investigation that is independent of that undertaken by law enforcement or the prosecution. Facts need to be tested and their accuracy determined; known and newly discovered witnesses must be interviewed or located and their stories compared and analyzed; information that mitigates the severity of the crime or punishment must be discovered; the crime scene should be viewed and explored; and physical evidence must be examined and independently tested as necessary. Very little, if any, independent defense investigation is undertaken in any criminal or Family Court case. Yet no one is charged with supervising the public defense attorneys. There is no accountability in Schuyler County's public defense representation system. 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 Schuyler 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.
- Locate the public defender office in a place outside of the county courthouse, so that clients may meet with their attorney during non-business hours and without fear of encountering law enforcement, prosecutors, alleged victims, witnesses, and judges.

- Set the salaries of the public defender office attorneys to a level on parity with the salaries of the district attorney and county attorney offices.
- Eliminate the flat-fee contract with the conflict attorney and replace it with a payment mechanism, whether salary or contract or hourly rate, that complies with national standards.
- 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 in which 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.
- Adopt a simplified application for appointment of counsel that requests only that financial information necessary to determine eligibility for appointment of counsel, and specifically eliminating any request for case related information.
- 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 taking into consideration the private client caseloads carried by all public representation system attorneys, 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 investigators and social workers in the public 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.

- Ensure that all courts comply with Section 200.26 of the Uniform Rules for Courts Exercising Criminal Jurisdiction to provide prompt appointment of 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,¹¹ 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.¹² To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.¹³ Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.¹⁴ 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.¹⁵*
- 2. Where the caseload is sufficiently high,¹⁶ the public defense delivery system consists of both a defender office¹⁷ and the active participation of the private bar.** *The private bar participation*

¹¹ "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.

¹² 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).

¹³ 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.

¹⁴ Judicial independence is "the most essential character of a free society" (American Bar Association Standing Committee on Judicial Independence, 1997).

¹⁵ ABA, *supra* note 12, Standard 5-4.1

¹⁶ "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.

¹⁷ 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.¹⁸ The appointment process should never be ad hoc,¹⁹ 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.²⁰ 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.²¹

3. **Clients are screened for eligibility,²² 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,²³ and usually within 24 hours thereafter.²⁴**

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.²⁵ Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client.²⁶ To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.²⁷**

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,**

¹⁸ 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.

¹⁹ NSC, *supra note 12*, Guideline 2.3; ABA, *supra note 12*, Standard 5-2.1.

²⁰ 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).

²¹ 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).

²² For screening approaches, see NSC, *supra note 12*, Guideline 1.6 and ABA, *supra note 12*, Standard 5-7.3.

²³ 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).

²⁴ NSC, *supra note 12*, Guideline 1.3.

²⁵ 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.

²⁶ 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.

²⁷ ABA Defense Function, *supra note 12*, Standard 4-3.1.

and counsel is obligated to decline appointments above such levels.²⁸ National caseload standards should in no event be exceeded,²⁹ 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.³⁰

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.³¹
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.³² 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.³³ Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.³⁴ Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements

²⁸ 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).

²⁹ 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"].

³⁰ 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.

³¹ Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 117, Guideline 5.1.

³² 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).

³³ 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).

³⁴ ABA, *supra* note 12, Standard 5-2.4; Assigned Counsel, *supra* note 12, Standard 4.7.3.

and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases,³⁵ and separately fund expert, investigative and other litigation support services.³⁶ 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.³⁷ 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.³⁸*

- 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.³⁹*

³⁵ 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*.

³⁶ ABA, *supra note 12*, Standard 5-3.3(b)(x); Contracting, *supra note 12*, Guidelines III-8, III-9.

³⁷ ABA Defense Function, *supra note 15*, Standard 4-1.2(d).

³⁸ 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).

³⁹ 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 Schuylker 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>There is no independent board or commission that oversees public defense services in Schuylker County. The Chief Public Defender is appointed by the County Legislature. Though the chief Public Defender operates with a modicum of independence, her ability is strictly based on personality and her former tenure as the county District Attorney. There is no institutional independence that allows the current or future public defenders the freedom to challenge decisions of the Legislature and/or the County Administrator. For example, the chief Public Defender is hard-pressed to urge for necessary budgetary increases at a time when the County is imposing performance-based budget measures in an attempt to decrease costs. Similarly, the County currently has plans to move the public defender office to a location within the courthouse, placing the current Public Defender in the awkward position of balancing her own personal and professional interests against those of the public clients and those of her employer.</p>	<p>D</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>Schuylker County has in place a plan for provision of public defense representation that makes use of a part-time staffed office and contracts with the private bar. However, the small attorney population limits the ability of the county to find qualified counsel willing to serve. One contract conflict attorney comes from a neighboring county where until recently he held a separate public defense contract. No one performs oversight of workload in either county, let alone monitoring the combined workload from both counties. All conflicts are identified and assigned by the primary Public Defender. 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. There is no compliance in Schuylker County with Section 200.26 of the Uniform Rules for Courts Exercising Criminal Jurisdiction, which requires justices to assign counsel at arraignment for defendants who are unable to retain their own attorney. Defendants who are unable to make bail often languish in jail without counsel for extended periods of time without coming to anyone's attention. The Chief Public Defender and the jail staff attempt to monitor arrests to the extent possible in order to prevent this occurring, and the County Judge takes action immediately to appoint counsel when a felony defendant comes to his attention, but standards should be implemented and followed immediately to provide for prompt appointment of counsel following arrest. Defendants who are released on bail are basically left to find their own way to the public defender office in order to apply for appointed counsel. While the public defender office has a system in place for processing applications, determining eligibility, and promptly notifying clients as to whether they will receive appointed counsel, it is often a month or more after arrest before a potential client can overcome the obstacles imposed by lack of information and poverty to reach the office to begin the process. The application form presently in use is lengthy, complex, and requests confidential case-related information unnecessary to the eligibility determination. The sheer number of Town and Village courts (12 in all), their dispersed locations, and the number of separate court sessions preclude defense counsel from being present to provide representation to defendants at all court sessions. Most defendants will meet their attorney for the first time (and in the case of misdemeanors typically the only time) when they arrive at the courthouse for a hearing in their case.</p>	<p>F</p>



Public Defense Report Card

Schuylers 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>The contract conflict attorney and most of the assigned counsel attorneys maintain their offices in other counties, so it is extremely difficult for publicly-appointed clients to travel to their offices to meet with them. The result is that attorneys are most likely to meet with their clients at the courthouses. The attorney will typically meet the client, discuss the case with the prosecutor and the client, reach a plea agreement, and the defendant will enter a guilty plea and be sentenced, all in the same court appearance and with all attorney-client discussions occurring at the courthouse. The chief Public Defender and the assistant defender both have private offices located within the county, where they are able to keep their offices open after business hours to better serve the needs of their clients, to affirm the public defenders' separate role from law enforcement and the courts, and to preserve full confidentiality and safety when clients meet with their attorneys. While places exist where attorneys can conduct confidential conversations with some of their clients, the structure of the Town and Village court system combined with the delay in appointment of counsel frequently prevents the attorneys from meeting with their clients sufficiently in advance of court proceedings to provide constitutionally adequate representation. The Schuylers County jail allows virtually unfettered access to incarcerated defendants by their attorneys, who can visit them at any time of the day or night, and this level of cooperation by jail staff with defense attorneys is laudable. Additionally, the jail has put in place a direct phone line to the public defender office, although not in a confidential area, which male defendants can and do use to call the public defender office. Female defendants are not so fortunate because they are held in various surrounding county jails. Similarly, there is no direct phone line to the assistant public defender, the contract conflict attorney, or the assigned counsel attorneys.</p>	<p>C-</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>Schuylers 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. And though the number of cases handled by the public defenders, contract conflict attorney, and assigned counsel all appear reasonable and manageable upon initial statistical review, all attorneys handle private cases in addition to their public work – work that is not reported or monitored by any person or agency with supervisory authority of the attorneys. At the time of NLADA's study, one attorney was handling public defense cases in at least two counties, neither of which can account for his exact workload. In addition, the number of courts in which they must appear, the frequency of court sessions, and the geographic location of these courts impedes the ability of the attorneys to appear in court with their clients in order to provide quality representation at every stage of the proceeding and often to provide any representation whatsoever at some stages. This suggests that the workload is excessive. Moreover, the lack of a staff investigator or paralegal means that attorneys must do all of the work on their cases without support.</p>	<p>D-</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>The current chief Public Defender and assistant defender are both extremely experienced attorneys, and the County is fortunate in this regard. But the County lacks any standards or formalized methods to ensure that counsel provided to poor people have the experience and training necessary to provide ethical and high quality representation. There are no criteria by which the County Legislature selects the chief Public Defender, and there are no criteria for the selection of assistant public defenders or conflict counsel. There are no criteria for the attorneys who serve as assigned counsel in the county; rather these attorneys are chosen based only on their willingness to do the work at the state-established hourly rates, so that any willing attorney, no matter how inexperienced, can be appointed to the most complex criminal or family law case. Because the chief Public Defender knows most of the attorneys, she has some capacity to match lawyer experience and credentials with case severity, and she and the County Judge informally monitor assigned counsel courtroom performance.</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>Though the primary public defender office tries to adhere to vertical representation, the court structure prevents it. The staff public defenders are initially assigned to courts rather than to defendants, because it is a practical way that the two of them can cover all of the sessions of court held in all of the various courts. A defendant arrested on a felony charge will therefore be represented by the assistant public defender while the charge is in the town or village court, but will then be represented by the chief Public Defender if a preliminary hearing is actually held and once the charge is moved to the County Court.</p>	<p>F</p>



Public Defense Report Card

Schuyler 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>Schuyler County is simply financially unable to provide parity between the public defense attorneys and the prosecuting agencies. The public defender office is charged with providing counsel to all eligible persons charged with felonies or lesser offenses and probation/parole violations, as well as to all eligible 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 to all eligible parties. On the criminal court side, the Public Defender is appointed in the vast majority of cases and is working opposite the District Attorney. On the family court side, the Public Defender may be working opposite private attorneys or Department of Social Services attorneys or County Attorneys or other appointed attorneys or any combination of these; and family court cases make up a larger portion of the public defender work than do criminal cases. Thus any consideration of true parity would have to look at not only the District Attorney office, but also the County Attorney office and the Department of Social Services. The full-time chief Public Defender is paid \$75,000 per year by the County. This is the same salary paid to the part-time County Attorney. The full-time elected District Attorney, however, is paid \$119,800 per year, of which \$63,214 is paid by the county and \$56,586 is paid by the state. The failure of the State to augment public defender salaries in the same way as district attorney salaries directly impacts the quality of the representation. Qualified attorneys may not accept the job due to the low pay or (as in Schuyler County) qualified attorneys – including the "full time" chief Public Defender – must work a separate private practice to subsidize their public defense income. This impacts the amount of time that can be spent with public defense clients and sets up conflicts between attorneys' duties to public and private clients. The move to an ostensibly full time Public Defender came only in 2004, as the NAACP Legal Defense and Educational Fund concluded a study describing the need for a full-time program.</p>	<p style="font-size: 2em; text-align: center;">F</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">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>Schuyler County public defense attorneys are not provided with nor required to have any training in either criminal defense or family law. Neither the County nor the State has specific dedicated funding for continuing legal education of public defense attorneys. Because all of the public defense attorneys in Schuyler County must also maintain private law practices to make ends meet, where they practice in varied areas of the 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. It is commendable that the Chief Public Defender voluntarily avails herself of trainings and meetings sponsored by the New York State Defenders Association, however 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 are appointed to represent people of insufficient means.</p>	<p style="font-size: 2em; text-align: center;">F</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 Schuyler County. The best example of where this leads to failure can be seen in the lack of use of an investigator by any public defense counsel. There is an affirmative duty on the part of defense counsel to conduct an investigation that is independent of that undertaken by law enforcement or the prosecution. Facts need to be tested and their accuracy determined; known and newly discovered witnesses must be interviewed or located and their stories compared and analyzed; information that mitigates the severity of the crime or punishment must be discovered; the crime scene should be viewed and explored; and physical evidence must be examined and independently tested as necessary. Very little, if any, independent defense investigation is undertaken in any criminal or family case. Yet no one is charged with supervising the public defense attorneys. There is no accountability in Schuyler County's public defense representation system. 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: 2em; text-align: center;">F</p>