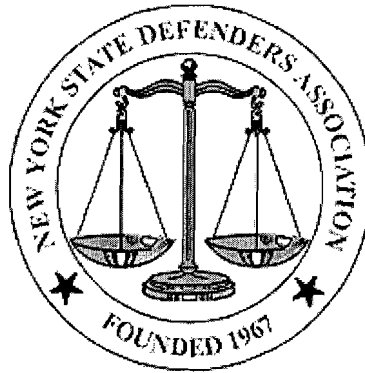


COMMENTS ON THE PROPOSED OFFICE OF INDIGENT DEFENSE SERVICES



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Preface

Governor Spitzer is to be commended for putting forward the proposal for an Office of Indigent Defense Services (OIDS).

We are gratified that the Governor, particularly in this tight budget year, has proposed \$3 million for an office to begin long overdue direct State involvement in the examination and resolution of the public defense crisis. Governor Spitzer's initiative recognizes numerous problems that plague New York's county-based public defense delivery system and, for the first time in more than 40 years, declares a direct role for the State in monitoring quality and examining and solving the problems of public defense. The Governor's proposal underscores the findings of Judge Kaye and the Commission on the Future of Indigent Defense Services which reported that "New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused." We applaud the Governor for his effort to take a first step in the right direction.

Even as we do so however, we are compelled to point out why we believe the present OIDS structure and authority will severely restrict its ability to meaningfully address the crisis in public defense services.¹

Introduction

The Defenders Association was established 40 years ago in the wake of *Gideon v Wainwright* and the passage of County Law Article 18-B to be a resource for the new field of "indigent defense."² In 1981 we began receiving funds from New York State to provide backup services to

¹ Reasonable people functioning in good faith can differ on the ultimate resolution of how to fix this system. The Governor's approach differs from ours in that it is predicated – as ours once was – on the view that the county-based system can be repaired jurisdiction by jurisdiction. Our experience, outlined in this paper, leads us to conclude that this is not the approach New York should take. NYSDA's Board of Directors supports implementation of the recommendations of the Kaye Commission – creation of an Independent Public Defense Commission heading a statewide, fully and adequately state funded public defense system.

² Our first suggestion to the Governor, the Legislature, and the Judiciary is to stop using the word "indigent" and begin using the phrase "public defense." This is so because the word indigent connotes destitution. The United States Supreme Court cases establishing the right to counsel use language that extends beyond the concept of indigence. *See, Powell v. Alabama*, 287 U.S. 45 (1932) at 60 and *Betts v. Brady*, 316 U.S. 455 (1941) at 456-457 ["unable to employ counsel"]; *Gideon v. Wainwright*, 372 U.S. 335 (1963) at 344 ["too poor to hire a lawyer"]; *Argersinger v. Hamlin*, 407 U.S. 25 (1972) at 39 ["unable to retain counsel on his own"]. County Law § 722 utilizes the words "financially unable to obtain counsel" as the standard for court appointment of a lawyer. The statute mirrors the federal statutory scheme contained in 18 U.S.C. 3006a, which requires appointment for those who are "financially unable to obtain adequate representation." Significantly, United States Attorney General Robert Kennedy noted in 1963 regarding S.1057, which implemented 18 U.S.C. 3006a, "S.1057 studiously avoids the term 'indigent'." Hearings on S.63 and S.1057 before the Senate Comm. on the Judiciary, 88th Cong. 1st Sess. 11 (1963). The New York Court of Appeals in *People v. Witek*, 15 NY 2d 392 (1965), the watershed case which gave rise to the establishment of County Law Article 18-B, referred to those who had "no money to pay attorneys." The standard under the New York State Constitution, Article I, section 6, and the United States Constitution, Amendments VI and XIV is "inability to pay." The use of the word "indigent"

counties and public defense attorneys (legal aid society lawyers, public defenders, and assigned counsel).

Our office was given responsibilities quite similar to those the Governor proposes for the Office of Indigent Defense Services, but, like OIDS, we were not given authority to mandate reform. We were asked to train; we did. We were asked to “make a case management system available to counties;” we did. We were asked to review, assess, and analyze the public defense system and make recommendations to the Governor, the Legislature and the Judiciary; we have.

Twenty-seven years later, we have come to the conclusion that the State must take over the funding and administration of public defense services. We did not come to this position lightly nor as perennial advocates for State takeover. Indeed, when we first established the Backup Center in 1978, we neither sought nor wanted “State money.” Our office was first funded through the Unitarian Church; we did not think then that the State should be entwined at all with an office managing and backing up defense services. Only after trying (1978-1980) to carry on our work exclusively with private funds, being turned down by numerous corporations and foundations because they said what we did was the “State’s obligation,” and being inundated with statewide requests for assistance, did we seek State funding of the Backup Center.

Significantly, our pragmatic view for most of the years of our existence was that the State and counties should share joint fiscal liability and administrative responsibility for public defense services. Such an arrangement seemed in the best interests of our clients. Under such an arrangement, *two* responsible parties would be liable for and subject to suit for defective delivery systems. Joint responsibility at least seemed to provide for the possibility of greater assets to fund the public defense system. And for a long time, State takeover appeared to be an impossible political lift.

In the late 1990s our view began to change as the need for a unified public defense system became more and more apparent. By that time we had tried numerous county-by-county fixes. We had studied county public defense systems and provided technical assistance to individual counties.³ We had made available a model voucher to help drive information needs for assigned counsel

therefore undermines appreciation for the broader class of non-indigent persons entitled to counsel. We use here and elsewhere the words *public defense* to cover mandated representation in criminal and family court.

³ Since 1981, NYSDA has routinely assisted counties upon request in their continuing efforts to examine scores of issues such as the type of system to employ, the effect of procedures designed to cap costs, the indirect consequences of poor quality systems, local application of national standards, problems of early entry, jail overcrowding, comparative caseload and salary information, recruitment and hiring, etc. We have engaged in numerous small technical assistance visits of a day or two and have performed full-blown system studies. *See e.g.*, “Public Defense Services in Schenectady County: An Assessment of the Assigned Counsel Program” (NYSDA 1984); “Public Defense Services in Ontario County: A Study of the Assigned Counsel System” (NYSDA 1985); “Public Defense Services in Clinton County: An Assessment of the Assigned Counsel Program” (NYSDA 1986). County technical assistance requests have had value in sparking some, often ephemeral, local changes and in documenting problems. However we do not believe such efforts should be duplicated. Rather, a broader mandate is needed.

programs.⁴ We had studied eligibility practices and reported on them.⁵ We had weighed in on state budget recommendations,⁶ had reported on and decried prosecution/defense funding disparities,⁷ had made recommendations to the Judiciary on how it could help,⁸ had provided a set of recommendations to the Executive,⁹ and had successfully achieved (at least until the Pataki Administration) the concept of tandem grants to prosecution and defense.¹⁰ We had established a model basic trial skills program¹¹ for entry level defenders and, working closely with defender offices, had developed a Public Defense Case Management System.¹² In sum, we had approached

⁴ See, “Model Assigned Counsel Voucher, Voucher for Compensation and Expenses of Appointed Counsel Pursuant to Section 722-b of the County Law” (NYSDA 1984).

⁵ See, “Determining Eligibility For Appointed Counsel In New York State: A Report From The Public Defense Backup Center” (NYSDA 1994).

⁶ See, Jonathan E. Gradess, “The Crisis in Indigent Defense Funding: Testimony Before the American Bar Association Standing Committee on Legal Aid and Indigent Defendants” (1982); “Correction Law Section 606: The Unfulfilled Promise, A Report by the Public Defense Backup Center on the Legislative History of Correction Law Section 606” (NYSDA 1983); “Assigned Counsel Fees in New York State: Time for a Change” (NYSDA 1985); “Defender Budgetary Request to Reduce Appellate Backlog and Delay” (NYSDA 1988); “Issue Paper: Recommended Enhancements for the Public Defense Backup Center FY 90-91 With Budget Narrative” (NYSDA 1989); “Funding the Defense of the Poor: A Reformulation of the Governor’s Proposal” (NYSDA 1990); “The Deepening Crisis in the Indigent Parolee Representation Program: The Critical Need for Additional Funds” (NYSDA 1990); “Funding Crisis for Poor Defendants in New York State” (NYSDA 1992); “Indigent Parolee Representation: A Mandate Unfulfilled” (NYSDA 1992); “NYSDA Public Defense Backup Center Outline of Proposed Cuts” (NYSDA 1992).

⁷ See, “Prosecution/Defense Funding Disparity Charts” (NYSDA 1985): Brief *Amicus Curiae* in *People v. Lemuel Smith*, 63 NY2d 41 (NYSDA 1984) [“Circumscribing these events is a public defense system which routinely permits, without serious evaluation of its consequences, the inadequate resourcing of the defense, the deprivation of needed expert and other services, and gross fiscal disparity between prosecution and defense.”]; “State Funding of Public Defense Programs: More Than a Decade of Disparity” (NYSDA 1992).

⁸ See, e.g., Memorandum to The Honorable Joseph Bellacosa, Chief Administrative Judge, from Donna Hall, NYSDA Director of Research, re. OCA’s Role in Improving Public Defense Services, April 25, 1986.

⁹ See, Memorandum to Lawrence T. Kurlander, Director of Criminal Justice, and Sherrie McNulty, Counsel, from Jonathan E. Gradess, NYSDA Executive Director, “Recommendations for Policy, Legislative and Administrative Reform Covering Public Defense Services in New York State,” October 28, 1983.

¹⁰ From 1980 to 2001, such tandem funding was New York practice, until Governor Pataki reinstated disparity in the local prosecution and defense aid programs. That disparity, which continues today, funds 62 Aid to Prosecution counties and only 30 Aid to Defense counties. NYSDA’s request for equity (see, Letter to The Honorable George Pataki from Jonathan E. Gradess, February 7, 2001) went unheeded by the State despite our demonstration of tremendous resultant imbalance between prosecution and defense in those newly added jurisdictions. See also, Jonathan E. Gradess, Testimony Before the New York State Division of Criminal Justice Services, February 20, 1980 [“... {W}e want DCJS to take seriously its responsibility to help achieve {} parity as a means of improving the quality of public defense representation for the poor in New York.”]

¹¹ The New York State Judicial Commission on Minorities endorsed NYSDA’s Defender Institute Basic Trial Skills Program for its efforts in “enhancing the competence and racial sensitivity of public defenders [hoping that it would become] a model for similar programs across the state and nation.” (*Report of the New York State Judicial Commission on Minorities*, 1991)

¹² For almost 15 years NYSDA has been implementing and supporting the PDCMS, now in over 30 counties. In 2006, NYSDA’s Project Manager for the Public Defense Case Management System received recognition for award-winning support services from the Center for Digital Government (Best of New York 2006 Leadership Award for Demonstrated Excellence in IT Operations, Support and Service).

the system in the belief that examining and evaluating systems, collecting data and information, and reporting serious recommendations to the State and localities would meaningfully improve quality at the local level. We were wrong in that belief. In spite of the Backup Center's exceptional level of service,¹³ without the authority necessary to mandate the implementation of system-wide reform measures, it has been unable to fundamentally change New York's public defense system.

By the year 2000, we concluded that something more than an entity backing up county systems was required. Public hearings conducted by NYSDA and the League of Women Voters of New York State in 1998 and 1999 in New York City, Rochester, Syracuse, and Albany documented what we had been seeing every day in requests for assistance – there was a need for a unified public defense system in New York.¹⁴ Caseloads were up, salaries were down; turnover was high, morale was low; clients were not being well represented, and the resources for improvement did not appear to be forthcoming as a result of our moral suasion.

At about this time, the State was focused on deflated assigned counsel rates that had not been raised since 1986. At \$25 per hour for out-of-court preparation work, these rates were seen as contributing both to low-quality representation and an absence of a sufficient number of lawyers to handle cases. Even as the State court system urged merely assigned counsel fee reform, we advised it that a more comprehensive solution was necessary.¹⁵

In 2001 we predicted that New York would go down the wrong road if the State raised assigned counsel fees and contributed State money but failed to establish a Commission to guide and drive quality.¹⁶ Importantly, in 2003 the State created the Indigent Legal Services Fund (ILSF). Now some quarter billion dollars later, the State seems concerned that the decision may not have been executed prudently. In our view, it was not. Nor, we fear, will the establishment of OIDS be prudent without substantial reworking.

Structure is important.

OIDS is an executive branch office, housed in the Department of State,¹⁷ created to monitor and evaluate the public defense system by, among other things: examining and evaluating defense offices; collecting and analyzing data; developing and making available a case management system;

¹³ The statewide study undertaken for the Kaye Commission notes that: "Throughout this study, one of the most positive themes we heard was the consistent help and encouragement that many of the [public] defense providers have received over the last two decades from NYSDA staff." (*Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services: Final Report* [The Spangenberg Group (TSG) 2006] at 24.)

¹⁴ See, transcripts at http://www.nysda.org/html/fact_finding_hearings.html. Client hearings held thereafter reflect even further public defense system deterioration. See, transcripts at http://www.nysda.org/html/defense_services.html.

¹⁵ See, Memorandum to The Honorable Juanita Bing Newton from Jonathan E. Gradess, November 3, 1999.

¹⁶ See, "Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services" (NYSDA 2001).

¹⁷ Placing OIDS in the Department of State (DOS) is preferable to placing it within the Division of Criminal Justice Services (DCJS) or other line prosecutorial/criminal justice agencies that would present a more immediate and more obvious conflict of interest. However, placement in DOS raises distinctly similar concerns as well as specific ones, including the fact that some past governors have used the DOS as a base for regional political operations.

creating eligibility guidelines; offering training; developing a plan for improvement of public defense; and distributing “excess” ILSF funding pursuant to that plan. OIDS was designed to fix public defense system problems without imposing new mandates on counties.

While the hope is that OIDS would be given significant flexibility, it is not authorized to promulgate and enforce performance standards or eligibility guidelines. Its responsibilities are to study the system, identify problems, make state resources available, and encourage the adoption of its recommendations by counties. The office would be funded by a \$3 million appropriation from the Legal Services Assistance Fund,¹⁸ and additional funds from the ILSF would support initiatives pursuant to its plan for improvement.

Overall, the proposed formation of OIDS delays the implementation of Judge Kaye's recommendation for an independent state entity overseeing defense services. Instead it creates a state office that monitors and attempts to repair the current county-based defense system.

This paper, in commenting on what the proposal's reworking should look like, is not designed to derail the Governors' initiative. Indeed our hope is that the Executive generally and the Division of Budget specifically will continue to look seriously at this issue and to act – with the Judiciary and Legislature – in the best interests of public defense clients to achieve a system that will routinely assure quality representation. We do not think OIDS, as currently designed and structured, is the way to achieve that system. We are also concerned that the momentum created by the strong statewide consensus achieved by Judge Kaye's recommendations and proposal not be lost either as a result of this proposal or from criticism of it.

Clients in New York need immediate relief from a system that deprives them of their rights. The lawyers who represent them need to see light at the end of the tunnel in which they find themselves. Counties need to be removed from the middle of a predicament they cannot resolve. And all New Yorkers need a public defense system that no longer contributes to injustice. This effort, though a first step designed to achieve those ends, cannot, as currently structured, do so. In what follows we will share our view of what can make this idea work.

¹⁸ The Legal Services Assistance Fund (LSAF) was created by § 98-c of the State Finance Law to “assist in the provision of and the reimbursement of expenses incurred by local government agencies and not for profit providers or their employees relating to providing criminal or civil legal services.” §98-c (3). This fund was created in 2003 as a fiscal tributary from the revenue stream created by the imposition of a \$52 fee for OCA criminal history searches. Its genesis lies in the desire and subsequent successful effort of the State Senate to provide loan forgiveness for prosecutors (but not defenders). The fund has resulted in annual “pots” of Assembly and Senate money being made available to each house to expend on chosen projects or budget restorations. By choosing the LSAF as the source of OIDS funding, the Division of Budget may have created a disincentive for its support, as it may be seen as diverting funding from other client services. Advocates seeking the implementation of the Kaye Commission recommendations have alternatively proposed for two years that “startup costs” for the Independent Public Defense Commission – including answering the kind of research questions discussed infra at p. 15 – come instead from an appropriation from the Indigent Legal Services Fund.

Commentary on the OIDS Proposal

A state entity providing oversight of the public defense function must be independent and insulated from the Executive, Judicial, and Legislative branches.

A structural guarantee of professional independence for public defense is the core issue for NYSDA, the defense bar, the client community, and others concerned about justice.¹⁹ NYSDA thus begins its analysis of the OIDS proposal from the standpoint that a state agency managing public defense services must be independent. OIDS, as currently designed, is not.

The need for independence stems from the adversarial nature of our justice system, the commitment to individual clients that professional ethics require, and the unique nature of public defense as a governmental function. Protecting against Executive, Legislative, and Judicial interference paradoxically requires Executive, Legislative, and Judicial approval of the concept of independence and insulation for the defense function.²⁰

Grounded on fundamental legal and professional ethical doctrines,²¹ the principle of public defense independence is widely recognized.²² Its importance as an abstract principle is great, but its

¹⁹ The importance of independence to this constituency has been dramatically illustrated by recent events in Monroe County following the retirement of its long-time public defender, Edward Nowak, who had been selected through a merit process in 1977. When the Monroe County Legislature indicated that a less independent process would be used to select his successor, the Bar and community rallied to demand that merit selection be retained. *See, e.g.*, Stephanie Veale, "Group: No politics in public defender choice," <http://www.democratandchronicle.com/apps/pbcs.dll/article?AID=2008801110378> (1/11/08) ["Rallying cries could be heard Thursday night from inside Aeon Baptist Church on Genesee Street, where more than 100 community members advocated the nonpartisan selection of Monroe County's next public defender."] and "Public defender approved amid controversy," <http://www.whcc.com/article/stories/S344970.shtml?cat=565> (2/13/08).

²⁰ Public defense exemplifies the need for checks and balances among the branches. The Judiciary must act as neutral arbiter in matters between the State and individuals, and so cannot control public defense lawyers who represent individuals against the State in criminal and family court matters. The Executive cannot control the lawyers for individuals whose liberty interests the State seeks to curtail. And the Legislature, which holds the power of the purse as to all three interests (Judiciary, Executive, and public defense) cannot interfere with due process by relegating public defense to a lesser status.

²¹ DR 1-107 A states: "The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it services. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed 'independent professional judgment and undivided loyalty uncompromised by conflicts of interest.' [Footnote omitted.] Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State."

²² In the very year that the Legislature first funded NYSDA's Public Defense Backup Center, the United States Supreme Court recognized that "a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing the 'undivided interests of his client.'" *Polk County v. Dodson*, 454 U.S. 312, 318-319 (1981). *See*, American Bar Association (ABA), *Standards for Criminal Justice, Providing Defense Services* (3rd Ed. 1992), Standard 5-1.3 Professional Independence; ABA, *The Ten Principles of a Public Defense Delivery System* (2002), Principle 1; National Legal Aid and Defender Association (NLADA), *Standards for the Administration of Assigned Counsel Systems* (1989), Standard 2.2 Independence from Judiciary and Funding Source; National Advisory Commission on Criminal Justice Standards and Goals (NAC), *Task Force on Courts, "The Defense"* (1973), Standard 13.8 ["The method employed to select public defenders should insure that the public defender is as independent as any private counsel who undertakes the defense of

importance amid the gritty realities of courtrooms, jail cells, political campaigns, and financial inequalities is immeasurable.

A client's lawyer must be free from direct interference in the attorney-client relationship by an adversary, the State, or any third party. Yet *indirect* interference often goes unrecognized, or worse, ignored. Public defense attorneys told by the officials who vote their budgets and salaries that the representation they provide is “too good” are placed in conflict with their clients. Staff lawyers working under excessive workloads – told to accept the workload or leave the job – are also placed in conflict with their clients. And these conflicts are neither hypothetical nor apocryphal. Chief Defenders at the county level engaging in necessary motion practice have been threatened with removal because they were deemed “too aggressive” in representing their clients. They have been told to reduce their own budget requests to meet political objectives, and they have had resources withdrawn from their offices for political – as opposed to budgetary – reasons.

In years hence, we don't want to see the same thing repeated on the state level. While OIDS, as currently envisioned, is not a provider of direct legal services,²³ it is intended to directly affect public defense services. It should therefore be independent of political or other improper influence.

The management of public defense services cannot be housed in the Executive branch of government.

The administration of public defense services must be conflict free and able to give voice to the needs of public defense clients. The Executive, like the Judicial and Legislative branches, will be reticent to aggressively champion the clients to be served by the public defense system or, worse, through its supervision of the State Police, DCJS, Parole, and DOCS, and its proactive legislative initiatives, be in direct conflict with the interests of those clients. Only at a distance from day-to-day management can the Executive demonstrate fidelity to public defense. The Governor can demonstrate fidelity by publicly leading on this issue, assuring fair procedures, securing a place at the decision-making table for the defense, and through *meaningful* budgeting.

But no Governor can at 10:00 a.m. meet with the State Police to plan and supervise a new statewide arrest program and at 11:00 a.m. meet with the defense director to sensibly solve the adverse fiscal impact of the morning's previous decision. A Governor cannot meaningfully follow the recommendations of the administration's defense advocate on legislation and still ask DCJS's counsel to draft an initiative that restricts the rights of defendants. A Governor cannot tout the efficacy of intelligence-based drug arrest policies and simultaneously curtail their adverse 4th amendment implications. There is a conflict with the Executive administering and managing any aspect of public defense services.

Moreover, it is impossible to conceive of even a good faith effort working well. If this Governor tries to administer public defense services and champions the cause of clients as he

a fee-paying criminally accused person. . . .”]; New York State Bar Association (NYSBA), *Standards For Providing Mandated Representation* (2005), Standard A-1; NYSDA, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (2004), Standard II. Independence.

²³ The bill memorandum suggests, however, that the office might be staffed “with defenders to provide representation in certain cases....”

should, he will be roundly criticized by the law enforcement agencies he supervises as biased in favor of defendants. Yet if the Governor takes on the management role of administering public defense services and does not loudly voice that cause, he will also be roundly criticized for that failure.

Defenders and their clients need an independent yet fully accountable entity that can be relied on to be committed to the representation of public defense clients in foul weather or fair. Many Executive initiatives, past and present, such as restrictions on access to post conviction relief, cameras in court, sex offender punishments, civil commitment, and the death penalty, are in direct tension with the needs of public defense clients.

Much of the work of the proposed OIDS office is intimately connected to assessing the current system for providing public defense services. This is significant, because the assessment of the adequacy of a public defense system includes the extent to which individual litigators stand up to executive branch officials, document prosecutorial misconduct and state agency abuses, vigorously preserve prosecutorial error, and maintain the dignity of clients in the face of insensitive public officials. An executive office would not easily be able to assess this particular competence. The evaluator of a defender office or public defense system needs to be able to see, hear, and review information that should not be made available to the Executive. As an adjunct of measuring defender performance, such an evaluator must be able to freely hear from public defense providers and clients about problems with their representation, police, law enforcement, prosecution, and state public safety agencies. The evaluation entity must not only be conflict-free and client-centered, but must also be able to inspire confidence in its own independence in the evaluation process. What clients need is the administration of a public defense system that is exclusively focused on assessing, providing, and insisting upon committed and competent representation. A defender administrator must be free to advocate for the rights of clients even to the disadvantage of court apparatus, prosecutors, or government treasuries. Structurally and legally, an uninsulated office answering directly to the Governor and housed in the Department of State cannot do this.²⁴

A public defense oversight entity must possess the statutory authority to set standards and mandate reform.

The absence of standard-setting authority in the proposal reflects the State's concern not to burden counties with additional unfunded mandates. However, this lack of authority to enforce standards or implement reform measures will affect every aspect of the work of any oversight entity and undermine meaningful reform efforts.

For example, subdivision 4 of the proposed bill directs the office to develop uniform eligibility determination standards and practices to "guide courts." Absent statutory authority to

²⁴ As currently envisioned, OIDS would be headed by an executive director whose appointment and salary are controlled by the Governor. OIDS is not currently envisioned as a temporary agency and has no sunset date. Any comfort to be had from knowing that the initial executive director would be appointed by a governor who supports public defense reform could disappear in the future. A governor lacking appreciation for the checks and balances of our adversary system could appoint an executive director who eroded rather than improved public defense services. As there is no tenure provision, such a governor could fire (or force out) an executive director who pushed for zealous representation of public defense clients. The statute lacks any specified qualifications for the executive director. There is no requirement that the director be a lawyer or possess the background and practical experience necessary to respond meaningfully to the constitutional mandate underlying the office's function. No ban exists to prevent the appointment of a judge or prosecutor to the position and no insulating board is suggested.

enforce eligibility standards, courts, particularly town and village courts, will disregard the proposed guidelines. One illustration of this is the recent effort by the Office of Court Administration. Nearly two years after the Chief Administrative Judge enacted a 2005 court rule “to provide guidance to and procedural support for Justice Courts adjudicating criminal actions against indigent defendants,” it was acknowledged that many justice courts had failed to comply. (*Action Plan for the Justice Courts* [Unified Court System 2006] at 30.) If justice courts will not follow a court rule on appointment practices, how can it be expected that they will be “guided” by OIDS recommendations on eligibility? **Unless a public defense oversight entity has the authority to enforce these standards, there will be no compliance.**

Section 160-qq (1) of the proposed bill requires OIDS to examine and evaluate existing public defense services. An oversight entity cannot evaluate and improve existing public defense services unless it can apply standards and provide guidance on how to meet them. Evaluations carried out by a sufficiently insulated oversight entity should (at least preliminarily) use the “Standards for Providing Mandated Representation,” adopted by the New York State Bar Association’s House of Delegates on April 2, 2005, and the “Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State,” adopted by the New York State Defenders Association’s Board of Directors on July 25, 2004. They already have professional support and were envisioned as the baseline evaluation in the Lentol/Volker Public Defense Act (A.9087-A/S.4311-A).

On data collection efforts

OIDS is given statutory responsibility to collect public defense data, including caseload, salary and budgets, eligibility practices, and prosecution and defense funding disparity. The proposal recognizes that some counties do not have a case management system sufficient to facilitate data collection. However, it fails to appreciate the many issues associated with the lack of uniform, reliable data or a county’s ability or commitment to collect relevant data.

The enabling statute for a public defense oversight entity must mandate that localities record and provide data on their public defense systems.

Counties, even those with case management systems, collect minimal data. Some, without repercussion, fail even to do that. Since its enactment in 1965, County Law § 722-f has required counties to file with the Office of Court Administration an annual report. Most counties ignored this statutory obligation until recently, when compliance became tied to their ILSF distribution. Yet some counties continue to fail to file or they regularly omit significant information on their statutorily mandated UCS-195 reports.²⁵

²⁵ When the New York State Comptroller’s office began to administer the ILSF, the UCS-195 report was “deemed to be an integral part” of the ILSF annual report. However, the 2007 ILSF annual report eliminates the UCS-195 filing requirement. Moreover, other required information on the ILSF annual report is missing or omitted by counties without consequence.

More troubling, there continue to be significant assigned counsel expenditures without data being collected and reported by counties.²⁶ For example, in Dutchess County, where there is a Public Defender Office, court appointed lawyers handle conflict cases and adult representation in Family Court. Although Dutchess County expended \$2.2 million in assigned counsel representation in 2006 and received over \$1 million of ILSF funding from the State, there have been no UCS-195 filings reflecting this representation in recent years because there is no assigned counsel plan and no data gathered on caseload or defense expenditures. **An oversight entity must have the authority to mandate that public defense caseload and expenditure data be made available to it.**²⁷

A public defense oversight entity must have the authority to establish data definitions and enforce data collection practices.

The quality and reliability of public defense data collection efforts depend on consistent and uniform record keeping by public defense programs. The State's Division of Criminal Justice Services recognized this critical need and created a standardized data dictionary for law enforcement agencies. No entity has the authority to direct county public defense programs to establish data collection standards. Consequently, defense offices report on cases without any uniformity, and data collection procedures have developed based on local needs.²⁸

The proposed OIDS obligation to collect the average number of attorney hours for a particular case type will also be impossible to satisfy when no public defense program, other than assigned counsel, maintains or can afford to maintain hourly time records. **Until the underlying chaos in data recording is fixed, the data collected will be of little value to policy makers in developing recommendations for public defense reform.**

²⁶ Proposed § 160-qq (7) permits OIDS "To review payment vouchers submitted under article eighteen-B of the county law and the approval process for those vouchers." This apparently assumes the easy availability of the vouchers themselves. In many places, this will not be the case. In the absence of an assigned counsel administrator, judges frequently authorize payment. Counties subsequently pay the vouchers and then file the paid vouchers with the vouchers of all other county vendors. We also assume this section is not meant to empower pre-payment voucher review by OIDS, but its wording is unclear and should be rewritten.

²⁷ For the reasons set out earlier, such a mandate should only be given to an independent entity; empowering a prosecutorial/adversarial entity to collect data about legal services providers whose clients it pursues is improper.

²⁸ From NYSDA's work, we know counties count cases differently. For example, some offices close Adjournment in Contemplation of Dismissal (ACD) dispositions upon entry, others leave them open until six months have passed. Some offices will count a criminal charge and probation violation as one case, others as two separate cases. Offices vary on how they record case activity in cases where defendants are determined ineligible, or whose representation ended due to a conflict of interest, or in cases involving multiple incidents of the same criminal act such as passing bad checks. Some defender offices will immediately close a bench warrant case; others keep it open until the client is re-arrested. These differing recording practices impact monthly and annual caseload reports. Case counting can also vary widely depending on the type of public defense system. In counties where one defender program provides misdemeanor representation and another office handles felony representation, cases can be counted twice, once by each program.

A public defense oversight entity must have the authority to collect data on all types of representation provided pursuant to County Law Article 18-B.

The statewide picture of public defense services will be incomplete without comprehensive caseload data from public defense offices responsible for not only representation in criminal matters but also designated Family Court proceedings and parole and probation violations. At a minimum, an oversight entity must gather this information to accurately analyze budgetary data for criminal and Family Court representation.²⁹

Representation provided pursuant to County Law Article 18-B includes adult representation in Family Court, parole representation, and local violation cases. Public defense caseload in Family Court increased tremendously as a result of the new permanency legislation that took effect in December 2005 and the sharp increase in abuse and neglect case filings after the Nixzmary Brown case. This caseload burden on Family Court defense counsel is reflected in last year's legislative mandate to direct OCA to recommend prescribed workload standards for law guardians. (L. 2007, c. 626.)

Additionally, some offices handle significant numbers of parole revocations and parole appeals. These cases are not prosecuted by the district attorney but by parole officers and, in the case of most Family Courts, the County Attorney or Department of Social Services counsel.

Measuring an office's criminal caseload alone is misleading without accounting for these other types of representation, particularly since offices cannot easily separate their budgets for each type of case handled. **In addition to collecting "parity" data from district attorney offices, any oversight entity must gather and analyze data from these other prosecuting agencies.**

²⁹ County Law § 722 requires representation by public defense providers of adult respondents in Family Court matters. Judge Kaye's Commission commented on the integrated nature of these services delivered by 30 institutional and 20 assigned counsel providers as follows:

"... the criminal defense programs studied by TSG were, in many instances, inseparable from the programs providing Family Court representation. As TSG observed, '[f]amily court matters are an integral part of New York's [public]defense system and cannot be completely removed from an overall consideration of the current system.' (SR at 158) Indeed, these programs are frequently jointly administered and completely interdependent and reported county level fiscal data is usually merged into one amount covering both programs. *Ibid.* These factors suggest that the [Public] Defense Commission that we propose also oversee services providing for Family Court representation. However, given the limitations of the Commission's mandate, we are hesitant to make this a specific recommendation." Footnote 33 at page 20.

Hesitant though the Commission may have been due to its charge, we and many others concerned with public defense reform are convinced that Family Court representation should be included in the work of any oversight entity. Absent recognition of the intimate connection between appointed Family Court representation and criminal defense representation, data collection efforts, workload assessments, caseload caps, standards development, and performance monitoring will all be genuinely impossible. Indeed the language of the OIDS bill makes this clear. Section 160-qq (2) (c) of the proposed bill requires collecting data on "*the actual yearly caseloads of attorneys providing services to indigent criminal defendants...*" It will be impossible for any oversight entity to collect caseload data from such public defense providers without collecting Family Court data, as their "actual yearly caseloads" include those cases.

Absent uniform, standardized, county-based data, the proposed data collection responsibilities are monumental.

The Backup Center has conducted numerous surveys of counties to collect public defense data and has witnessed the Division of Criminal Justice Services and Judiciary undertake similar data collection efforts with marginal success. The collection responsibilities outlined in the OIDS bill in and of themselves are daunting and extremely labor-intensive if done properly. Detailing the effort to collect data on expert and auxiliary services (i.e., County Law § 722-c applications) and eligibility determination practices can provide a picture of the work involved under proposed § 160-qq (2) (h).

To begin, any defense oversight entity looking at the questions posed will have to contact the approximately 120 defense programs and all county fiscal offices to review expert vouchers, and this information will only reflect those applications that have been granted. In addition, oversight staff would have to survey the over 2000 justices in the 1,277 town and village courts in the 57 counties outside New York City to determine if applications for expert services have been made and denied.

Similarly, when conducting research into eligibility determination practices, it is a mistake to believe that each county will have defined standards and practices. We have found that even within the same county, different courts will employ different methods. A thorough investigation of actual eligibility practices will again require surveying the courts, including the over 2000 town and village justices.

Mandating public defense data definitions and data collection practices in counties is more important than making available to defender offices an additional case management system.

OIDS is statutorily directed to develop and make available a case management system with the ostensible purpose of aiding county data collection efforts. As mentioned above, NYSDA's Backup Center has developed and successfully supports its Public Defense Case Management System (PDCMS) in over 30 counties. We have been supporting the application with a 95 percent user approval rate. However, despite the PDCMS's substantial functionality, we know many defense offices utilize only a portion of the application.

Like OIDS, NYSDA lacks the authority to require offices to implement uniform data collection standards. NYSDA's PDCMS was built with sufficient flexibility to satisfy the many varied and disparate data collection practices of county defender offices. While the application successfully meets the information needs of individual offices, PDCMS data cannot be compiled to provide a statewide picture of defender caseload until counties are required to follow consistent, uniform data collection practices. This will be true for any other case management system placed in use.

It is not the lack of availability of a case management system that impedes statewide public defense data collection efforts, but the failure of counties to abide by uniform, standardized data collection practices. **Without uniform data collection standards, an oversight entity cannot provide accurate, reliable comparative data analyses of the State's public defense system.**

The effectiveness of OIDS training will be affected adversely by its status as an Executive branch agency.

Increased training is an important ingredient in improving the public defense system. Cross training among prosecution, defense, and the Judiciary can also have a value in improving system-wide practices. But effective public defense training must be focused on advocating on behalf of a client against the State. In other words, OIDS would be in the questionable position of training lawyers whose role is to challenge policies and practices of the State regardless of the interests of state and county governments. OIDS' lack of independence will directly conflict with its training duties.

There are a multitude of customary training topics connected to preparing effective public defense advocates. Following are a few which will demonstrate the conflict generated by housing training in an Executive branch office:

- challenging the validity of the state's SORA risk assessment instrument;
- preparing expert witnesses to defend against a DSS permanent neglect petition;
- explaining the obligation of county public defenders not to accept more case assignments than they can ethically handle;
- challenging evidence-handling practices of the New York State Police;
- formulating and advancing claims of judicial or prosecutorial misconduct;
- advising accused sex offender clients whether or not to participate in DOCS sex offender treatment programs;
- aggressively pursuing applications for expert and auxiliary services under 722-c when such services would clearly add to a locality's expenditures.

It is unlikely that OIDS would provide effective training on these or similar topics (or that public defense attorneys would attend and trust such training), and it is likely that the office would or might choose not to present such training to avoid conflicts.

An additional problem associated with the bill's proposed training on "video or computer" is its failure to satisfy CLE requirements. The provision of training through anything other than live presentation is deemed by the New York State MCLE Board as a non-traditional format. According to current MCLE regulations, this training is unsuitable for entry-level attorneys, which represent a large portion of public defense practitioners.

The training part of the bill requires further consideration. Also, any oversight entity needs to assure training for all the staff of defender offices and programs, not just line attorneys: paralegals, secretaries and other support staff, social workers, investigators, and attorney managers.

Our experience has shown that the impact of high quality training programs is limited unless accompanied by a mandate. As a result, large segments of the defender community who live in remote areas or have tight court schedules or lack staff or support staff are not being trained. **Training programs carried out through a public defense oversight entity need to be not only free or subsidized, but also mandated.**

Assistance from other agencies and confidentiality

The proposed bill recognizes the need to enable a public defense oversight entity to receive the assistance of other State agencies and political subdivisions. The language of the bill however is ambiguous on whether those subject to an OIDS' inquiry are bound to comply. In stating that the office has the power to "request and receive" assistance, information, and data, the bill lacks a provision requiring compliance from those asked for information and assistance.

Similarly, while the effort at protecting confidential information is well-intentioned and particularly important in this area, the confidentiality language raises a number of unanswered questions. For example, while the language concerning "secrets and confidences" of clients seems helpful, the bill is silent concerning what remedy exists for breach. This is particularly significant since in its current form the office in the Governor's bill is not a law firm, has no clients, may have no lawyers, and neither office nor personnel in that circumstance will be bound by the Code of Professional Responsibility. In other words, the teeth provided by the Code of Professional Responsibility need to be supplied by statute, since they don't as yet independently exist.

Another aspect of the subsection warranting concern is the breadth of its provision. It is not limited to protecting the "confidences and secrets of criminal defendants." It requires OIDS to protect "any confidential information received from any source." Lacking is any definition of "confidential information," any indication of who designates information as "confidential," and, for that matter, any definition of what is meant by "protect."

Provisions concerning the Indigent Legal Services Fund need further examination.

Our work with counties during the 27 years of State-funded Backup Center technical assistance and our 40 year affiliation with the New York State Association of Counties lead us to conclude several things about the nature of the county-based public defense system. Counties struggle with their public defense obligations and have few financing options and little State guidance as to how to meet this delegated State responsibility. We do not believe that counties are capable of maintaining, by themselves, a legally-adequate system of public defense services and are at sea as to how best to implement, respect, and insulate the public defense function.

We were thus pleased that the ILSF came into existence in 2003, but warned the Comptroller's office of our concerns that, without proper monitoring, State funding might not achieve its proper purpose of assuring quality.³⁰ The ILSF budget initiative did not staff the Comptroller's office in any way to monitor performance, nor did it provide a Board, as with the IOLA Fund, to oversee distribution of ILSF funds. Rather ILSF is formula-driven and permits, in its current form, any county which spends one dollar more in a subsequent year than in the preceding year to circumvent State scrutiny as to whether or not quality has been improved. Yet a fair reading of 98-b of the State Finance Law makes plain that "all...state funds received by a county or city shall be used to improve the quality of services provided pursuant to article eighteen-b of the county law."

³⁰ See, Letter to Assistant Comptrollers Christine Rutigliano and John Clarkson, from Jonathan E. Gradess, January 27, 2004.

In 2007, when ten counties were notified that their ILSF filings failed to demonstrate compliance with the maintenance-of-effort provisions of the law, we urged the State Comptroller to give those counties an opportunity to supplement their filings to demonstrate that they had used ILSF funds to improve quality. But we urged also an important caveat: “If, of course, they are unable to make the requisite showing as required by statute, they should not receive ILSF funding.”³¹ When the final decision to cut funding to three counties was made, Legislative intervention supplied alternative revenue converting the State’s approach from an enforcer of quality to an aid program.

The OIDS bill alters the maintenance-of-effort provisions of the 2003 legislation in two respects. It provides an additional way (averaging the past three years’ expenditures) of determining whether the maintenance-of-effort provisions have been met, making it less likely that a locality will be subject to State scrutiny for quality assurance. If a county *is* subject to maintenance-of-effort analysis, it establishes a new process for what happens when a locality uses less than all of the ILSF funds received in a given year to assure improvement in the quality of public defense services. Instead of being denied all ILSF money as a result of its failure to meet maintenance-of-effort, a locality loses only an amount proportional to the amount of State funds that were not used to improve the quality of public defense services. The revised formula substantially reduces the impact of the maintenance-of-effort provisions while enhancing the State aid capacity of the formula, and underscores an inherent tension.

Both needs – State aid to localities and assuring quality – are legitimate goals, but we are concerned that since 2003 these goals have become blurred. Both needs must be served as long as the county-based system functions as the surrogate for a State-administered system of public defense services. If the current statute is to be amended to make aid to localities more accessible under the formula-driven program, it should not be done at the expense of assuring that State funds are being used to improve quality.

Legitimate and compelling questions need to be answered by any state oversight entity.

Until January 23, 2008, NYSDA believed it shared a common vision about state takeover with both Judge Kaye and Governor Spitzer. We knew there were lingering questions that an Independent Commission needed to answer in cooperation with the Division of Budget, the Legislature, and counties. We assumed that the Public Defense Backup Center’s work and the work of many others over the last 30 years – and the conclusions drawn from that work – were shared assumptions. It has now become clear that there are very important questions – as yet unanswered – that could retard reform if not laid to rest by a consensual process of data collection and dialogue. It is quite puzzling then that these questions only peer shyly from beneath the language of the bill rather than being placed front and center as an obligation of OIDS. These questions include the following:

- What is the cost of the current public defense system, which by definition includes Family Court?

³¹ See, Letter to Comptroller Thomas DiNapoli, from Jonathan E. Gradess, March 16, 2007.

- What will it cost to bring New York State into compliance with national, ethical, and state professional standards?
- What will it cost to maintain a quality public defense system?
- Will this cost differ if the State maintains a bifurcated system of county and State delivery? Will State costs be less if a new State-level design replaces the current county model? Are there competing economies of scale under either model or is it a reasonable assumption that only a State system provides economy of scale savings? If so, what are the projected savings?
- In retrofitting a 40-year-old system, what will it cost to incorporate current best practices absent from most New York representation: immigration and related civil law representation; social work and community social service assistance; paralegal deployment; client satisfaction feedback mechanisms; reentry and collateral consequence advocacy; etc.?
- How can we assure a sufficient revenue stream to provide the needed level of resources for either system?
- Should a general fund obligation be supplemented by special revenue streams?
- Is it reasonable to assume that creative revenue streams and appropriate private/public partnerships can be established to support and adequately fund a county-based system? What are those revenue streams? Can they assure New York City and other interested municipalities that State takeover will not reduce the resource or service level now provided in their jurisdictions?
- Can the business community, now directly harmed by crime and a failed criminal justice system, be recruited to creatively broaden the economic base for a new public defense system? Are there other methods to broaden the financing base of a model public defense system? Can an endowment used in conjunction with the suggested public benefit corporation housing a Commission be one model for assuring adequate financing? Is it more likely that a State assumption of costs and administration will provide for creativity to truly drive forward a better model of service?
- Without collaterally harming clients, could current criminal penalties be converted to civil penalties in appropriate cases, thereby reducing the cost of a reformed public defense system?
- Is the current Indigent Legal Services Fund an appropriate response to the problems of county-based public defense services? Can it be increased? If not, what is a better or supplementary approach? Under ILSF, has there been local supplanting? Has there been State funding supplementation of local defense expenditures? Has quality been improved? If so, how? Is the ILSF formula fair to clients? Is it fair to counties and the city of New York? Does it drive quality representation in all counties, in some, or in none? In changing the maintenance of effort provisions as envisioned by the bill, will services to clients improve or will counties simply get a pass to be less vigorous?

- Is there disparity between the financing of prosecution (district attorneys, county attorneys, DSS attorneys, parole revocation specialists [and their attendant available resources]) and public defense attorneys (legal aid societies, public defender offices, assigned counsel [and their attendant available resources])?

Conclusion

This year's proposed bill is a bright star in the otherwise historically dark sky of Executive action. Although our comments reflect differences with the approach of the OIDS initiative, they do not represent differences with the Governor regarding the ultimate objective represented by that bill.

Public defense reform in New York has moved at a glacial pace. Our hopes for increasing its speed remain strong. Our comments are offered with that goal in mind.

We are grateful for the Governor's commitment on this issue and thankful for the involvement of the Legislature and the Judiciary in ongoing efforts to move public defense reform forward.

The critical flaw with the OIDS bill is its lack of independence for the public defense function. Its great value is its existence as the starting point for meaningful, ongoing three-way discussions on public defense reform.

Albany, NY
February 28, 2008

31

PART C

32 Section 1. The executive law is amended by adding a new article 6-G to
33 read as follows:

34 ARTICLE 6-G

35 OFFICE OF INDIGENT DEFENSE SERVICES

36 Section 160-pp. Office of indigent defense services; creation; executive
37 director; employees.

38 160-qq. Functions, powers and duties of the office.

39 § 160-pp. Office of indigent defense services; creation; executive
40 director; employees. There is hereby created in the department of state
41 an office of indigent defense services. The office shall be headed by an
42 executive director, who shall be appointed by the governor and shall
43 receive an annual salary to be fixed by the governor. The executive
44 director may, within the amounts available by appropriation, appoint
45 such deputies, directors and others within the office as he or she may
46 deem necessary to the proper implementation of this article, prescribe
47 their duties, fix their compensation and provide for reimbursement of
48 their actual and necessary expenses.

49 § 160-qq. Functions, powers and duties of the office. The office of
50 indigent defense services shall be responsible for monitoring and
51 improving the quality of public defense services provided to criminal
52 defendants throughout the state. In order to fulfill these responsibil-
53 ities, the office of indigent defense services shall have the following
54 duties and powers:

- 1 1. To examine and evaluate the existing public defense services
2 provided to indigent criminal defendants in each county.
- 3 2. To collect information and data on, among other things: (a) the
4 types and combinations of defender systems now being utilized in each
5 county; (b) the existing public defender salary scale statewide; (c) the
6 actual yearly caseloads of attorneys providing services to indigent
7 criminal defendants as public defenders, legal aid attorneys or pursuant
8 to any other city or county plan for representation placed in operation
9 pursuant to article eighteen-B of the county law; (d) how the yearly
10 caseloads of public defense counsel compare with the yearly caseloads of
11 prosecutors in each county; (e) disposition rates, including whether by
12 dismissal of charges, plea or trial, of public defense attorneys acting
13 under each type of indigent defense system; (f) the average number of
14 attorney hours currently being spent in each county to defend against
15 different types of criminal charges; (g) actual expenditures currently
16 being made in each county on criminal defense and prosecution services;
17 (h) the funds currently being spent on criminal defense and prosecution
18 services, and the amount being spent on ancillary services, such as
19 investigators, support staff, social workers, and expert witnesses; (i)
20 the standards and criteria used in each county to determine whether a
21 criminal defendant is eligible to receive public defense services; and
22 (j) the standards and criteria used in each county to determine whether
23 an attorney is qualified to provide services as a public defender, a
24 legal aid attorney or pursuant to any other city or county plan for
25 representation placed in operation pursuant to article eighteen-B of the
26 county law, including as assigned counsel on a case by case basis.
- 27 3. To develop and make available to counties a case management system
28 to facilitate the collection and reporting of data on the county's indi-
29 gent defense system.
- 30 4. To analyze and evaluate the collected data, and undertake any
31 necessary research and studies, in order to consider and recommend meas-
32 ures to enhance the provision of defense services to indigent defendants
33 and to ensure that indigent criminal defendants are provided with
34 constitutionally effective representation in a manner that is fiscally
35 responsible for counties and the state, which may include but not be
36 limited to: establishing a definition of indigency and uniform standards
37 and procedures to guide courts in determining whether a defendant is
38 eligible for public defense services; and establishing standards, crite-
39 ria and a process for qualifying attorneys to provide defense services
40 to indigent criminal defendants.
- 41 5. To develop a plan to improve the delivery of defense services
42 statewide in a manner that is consistent with the needs of the counties,
43 the efficiency and adequacy of the public defense system operated in the
44 counties and the quality of representation offered, which may include
45 the distribution of grants pursuant to specified criteria.
- 46 6. To distribute any available state funding for indigent defense
47 services pursuant to such a plan.
- 48 7. To review payment vouchers submitted under article eighteen-B of
49 the county law and the approval process for those vouchers.
- 50 8. To plan, coordinate and provide free or low-cost practice training
51 to public defense attorneys. Such training may be made available by
52 video or computer to the extent possible.
- 53 9. To make an annual report to the governor, legislature and chief
54 judge summarizing the activities of the office, analyzing the status of
55 existing public defense services provided to indigent criminal defend-



1 ants in the state and making recommendations for improving such
2 services.

3 10. To request and receive from any department, division, board,
4 bureau, commission or other agency of the state or any political subdi-
5 vision thereof or any public authority such assistance, information and
6 data as will enable the office properly to carry out its functions,
7 powers and duties. The office shall protect any confidential information
8 received from any source, including confidences and secrets of criminal
9 defendants, and no record received by the office shall be deemed defi-
10 cient because of the omission of confidential or privileged information.

11 For the purposes of this section, the term "county" shall be deemed to
12 include the city of New York.

13 § 2. The opening paragraph of paragraph (c) of subdivision 3 of
14 section 98-b of the state finance law, as amended by section 1 of part H
15 of chapter 56 of the laws of 2004, is amended to read as follows:

16 The balance of moneys received by such fund up to a maximum of seven-
17 ty-two million dollars shall be distributed by the state comptroller, in
18 the calendar year next succeeding the calendar year in which collected,
19 to counties and, in the case of a county wholly contained within a city,
20 such city, to assist such counties and such city in providing represen-
21 tation pursuant to article eighteen-B of the county law. The amount to
22 be made available each year to such counties and such city shall be
23 calculated by the state comptroller as follows:

24 § 3. Clause (A) of subparagraph (iv) of paragraph (c) of subdivision 3
25 of section 98-b of the state finance law, as amended by section 1 of
26 part H of chapter 56 of the laws of 2004, is amended to read as follows:

27 (A) the fund amount available to be distributed pursuant to this para-
28 graph, which shall be the amount received by the indigent legal services
29 fund in the immediately preceding calendar year, minus the amount to be
30 distributed to the state under paragraph (b) of this subdivision
31 provided, however, that [with respect to the first payment made to coun-
32 ties and such city on March thirty-first, two thousand five, such
33 payment shall be made from the amounts received by the indigent legal
34 services fund in the immediately preceding two calendar years, minus the
35 amount to be distributed to the state under paragraph (b) of this subdi-
36 vision] such amount shall not exceed seventy-two million dollars; and

37 § 4. Clause (B) of subparagraph (iv) of paragraph (c) of subdivision 3
38 of section 98-b of the state finance law, as amended by section 1 of
39 part H of chapter 56 of the laws of 2004, is amended to read as follows:

40 (B) the annual payment amount to be paid to each county and such city
41 pursuant to this subdivision, which, except as otherwise provided here-
42 in, shall be the product of the percentage share of statewide local
43 funds expended by each such county and city, as determined pursuant to
44 subparagraph (iii) of this paragraph, multiplied by the fund amount
45 available for distribution, as determined pursuant to clause (A) of this
46 subparagraph. In the event that a county or city, which is subject to
47 subparagraph (ii) of paragraph (c) of subdivision four of this section,
48 has used less than all state funds received in the most recent state
49 fiscal year pursuant to this subdivision to assure an improvement in the
50 quality of services provided in accordance with article eighteen-B of
51 the county law, the state comptroller shall recalculate the percentage
52 share of statewide local funds expended for such county and city by
53 subtracting from the total expenditure of local funds as certified by
54 such county or city, the amount of such state funds that were not used
55 to assure an improvement in the quality of such services, and make

1 corresponding adjustments to the percentage share of statewide local
2 funds expended for each other county and city.

3 § 5. Paragraph (d) of subdivision 3 of section 98-b of the state
4 finance law is relettered paragraph (e) and three new paragraphs (d),
5 (f) and (g) are added to read as follows:

6 (d) Beginning with the distribution made on March thirty-first, two
7 thousand nine, any monies in excess of the seventy-two million dollars
8 distributed pursuant to paragraph (c) of this subdivision may be paid,
9 to the extent available and within the limits of appropriations, for
10 programs supporting indigent defense pursuant to a plan developed by the
11 office of indigent defense services and approved by the director of the
12 budget.

13 (f) If the state comptroller shall, at any time, determine, upon
14 audit, that the amount of local funds expended by such county or city
15 for a particular calendar year, as supported by appropriate documenta-
16 tion provided by the county or city, was less than the amount as certi-
17 fied in the annual report filed pursuant to subdivision two of section
18 seven hundred twenty-two-f of the county law, resulting in overpayment
19 to such county or city, and the state comptroller determines to recoup
20 any such overpayment, the state comptroller shall:

21 (i) recalculate the total expenditures of local funds for that county
22 or city using the formula applicable to the calendar year in which the
23 excessive payments were made;

24 (ii) recalculate the annual payment amount from the fund for that
25 calendar year for that county or city based upon the recalculated
26 expenditures; and

27 (iii) reduce the annual payment amount from the fund for that county
28 or city for the calendar year next succeeding the calendar year in which
29 it was determined by the state comptroller that excessive payments were
30 made, to reflect the recalculated expenditures of subparagraph (ii) of
31 this paragraph.

32 (g) Any reduced amounts pursuant to subparagraph (iii) of paragraph
33 (f) of this subdivision shall be retained in the fund to be distributed
34 to counties and the city as part of the next succeeding annual distrib-
35 ution in accordance with the calculation pursuant to subparagraph (iv)
36 of paragraph (c) of this subdivision.

37 § 6. Paragraph (c) of subdivision 4 of section 98-b of the state
38 finance law, as added by section 12 of part J of chapter 62 of the laws
39 of 2003, is amended to read as follows:

40 (c) Notwithstanding the provisions of any other law, as a precondition
41 for receiving state assistance pursuant to subdivision three of this
42 section, a county or city shall be required pursuant to this paragraph
43 to demonstrate compliance with the maintenance of effort provisions of
44 paragraph (b) of this subdivision. Such compliance shall be shown as a
45 part of the annual report submitted by the county or city in accordance
46 with subdivision two of section seven hundred twenty-two-f of the county
47 law. Such maintenance of effort shall be shown by demonstrating with
48 specificity:

49 (i) that the total amount of local funds expended for services and
50 expenses pursuant to article eighteen-B of the county law during the
51 applicable calendar year reporting period did not decrease from the
52 lesser of either the amount of such local funds expended during the
53 previous calendar year, or the average amount of such local funds
54 expended during the immediately preceding three calendar years, as annu-
55 ally reported to the state comptroller, provided, however, that with
56 respect to the report filed in two thousand six regarding calendar year



1 two thousand five, such maintenance of effort shall be shown by demon-
2 strating with specificity that the total amount of local funds expended
3 for services and expenses pursuant to article eighteen-B of the county
4 law during the two thousand five calendar year did not decrease from the
5 amount of such local funds expended during calendar year two thousand
6 two; or
7 (ii) where [the amount of local funds expended for such services
8 decreased over such period] a county or city shall fail to meet the
9 maintenance of effort test as defined in subparagraph (i) of this para-
10 graph, that all state funds received during the most recent state fiscal
11 year pursuant to subdivision three of this section were used to assure
12 an improvement in the quality of services provided in accordance with
13 article eighteen-B of the county law and have not been used to supplant
14 local funds; provided, however, that if less than all such state funds
15 were so used, such county or city shall receive state assistance pursu-
16 ant to subdivision three of this section in an amount as recalculated
17 pursuant to the second sentence of clause (B) of subparagraph (iv) of
18 paragraph (c) of such subdivision three. For purposes of this subpara-
19 graph, whether there has been an improvement in the quality of such
20 services shall be determined by considering the expertise, training and
21 resources made available to attorneys, experts and investigators provid-
22 ing such services; the total caseload handled by such attorneys, experts
23 and investigators as such relates to the time expended in each case and
24 the quality of services provided; the system by which attorneys were
25 matched to cases with a degree of complexity suitable to each attorney's
26 training and experience; the provision of timely and confidential access
27 to such attorneys and expert and investigative services; and any other
28 similar factors related to the delivery of quality public defense
29 services.
30 § 7. This act shall take effect immediately and shall be deemed to
31 have been in full force and effect on and after April 1, 2008.

