

TESTIMONY BY NEW YORK COUNTY DEFENDER SERVICES BEFORE
THE NEW YORK CITY COUNCIL HEARINGS ON THE OVERSIGHT OF
INDIGENT LEGAL SERVICES.

MONDAY, JANUARY 26, 2015

Thank you for the opportunity to address you today.

New York City has been providing constitutionally mandated criminal defense services to indigent New Yorkers for over 50 years

For the last 15 -20 years it has provided this service primarily through a network of Institutional Public Defense Providers supplemented by an assigned counsel plan.

New York County Defender Services (NYCDS) has had a contract to provide a portion of these services here in Manhattan since 1997 – almost 20 years.

During this period the role of the criminal defense lawyer has changed dramatically. It has become far more complicated and more is expected of attorneys than ever before. Criminal defense lawyers are now required to advise clients on an increasingly complex number of areas not directly related to the criminal case. These “collateral consequences” and the need to make the client aware of them come from a variety of sources – The United States Supreme Court, other appellate decisions, regulatory and administrative agencies and professional standards.

Indigent criminal defendants have a right to all the relevant information about their cases and the consequences of possible convictions. They need to know:

What effect will this case have on:

- 1) My Job? – Will I be fired? Will I be legally barred from the job because of a conviction? Will I lose a license I need to continue work – driving, barbering, teaching, healthcare, and many other fields?
 - 2) My Home – Will I or my family be evicted from public or subsidized housing?
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- 3) My Family – Will I be barred from living with my own children? Will I lose custody of my children?
- 4) My Immigration Status – Will I be deported? Will I be able to visit my family in my country of origin and come back to my family here?

In addition to the collateral consequences I have described, the practice of Criminal Law itself has become far more complex. New York State's sentencing statutes are among the most complicated in the country with a myriad of possible types of sentences that can be imposed. Plea bargaining restrictions must be understood and explained to the client.

Other issues include:

- 1) What defenses are possible in which cases?
- 2) What are the available Alternatives to Incarceration programs, Drug Treatment Diversion programs, or other mitigation programs and what are their eligibility requirements?
- 3) What experts should be consulted and retained before proceeding to trial?

All these issues and many more are now part of every criminal case to some degree. Failure to adequately address them can result in post-conviction litigation that can result in reversed convictions, second or even third trials, and civil judgments for wrongful convictions.

Institutional Defense providers in general and New York County Defenders in particular are well-suited to this new mode of practice.

Because of the economies of scale that can be achieved in an institutional provider setting we can and do provide to our attorneys the training, support, supervision and services required to address all the issues raised by our clients' cases

We provide IN HOUSE:

- 1) Immigration Counsel – Trained specialists able to advise clients and their lawyers about the immigration consequences of their cases. These attorneys are available to consult with trial counsel during weekend or night court sessions
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- 2) Social work support which includes:
 - a) Psycho social reports for the Court or Prosecutors to facilitate appropriate dispositions in cases
 - b) Counselling and referral to Alternative to Incarceration programs
 - c) Drug treatment program referrals
 - d) Mental health treatment referrals
- 3) Investigations – former NYPD detectives, Spanish speakers, available for immediate , early investigation of cases,
- 4) Paralegals and Law Student Interns for legal research and logistical support
- 5) Continuing Legal Education - As an accredited provider, we provide training to all attorneys in a number of formats that more than satisfies the OCA CLE Requirements.
- 6) Case Law distributions – all relevant appellate case law is distributed to the attorneys on a daily basis

Our attorneys have a variety of experience levels. The majority are extremely experienced with 20 to 30 years of experience practicing criminal defense. Many participate in trial advocacy training at law schools in the metropolitan area. Our management group which provides the training and supervision has more than 30 years' experience in litigation and the training of criminal defense attorneys.

We have taken some newer attorneys on staff in recent years. All these attorneys have gone through an in-house training program and are directly supervised throughout their early appearances in Criminal Court and Supreme Court. All first trials or hearings are second sat by a supervising attorney. The types and severity of cases handled by this group are closely monitored.

On an organizational level, it should be noted that NYCDS and the other Institutional providers provide an accountable structure that is available to the Court to respond to specific problems or situations. Administrative problems can often be resolved with a phone call. Where emergency staffing issues arise, we can and have on numerous occasions assisted the Court. In addition, on a daily basis, we work to resolve scheduling conflicts for attorneys in specific courtrooms.

All of the training, services, and support that NYCDS provides our attorneys and clients insure that we have and will continue to provide the highest quality representation possible.

Written Comments of The Bronx Defenders

New York City Council Committees on Courts and Legal Services and Public Safety Oversight Hearing: “Examining How the City Evaluates the Effectiveness of the Provision of Indigent Defense” January 26, 2015

My name is Justine Olderman, and I am the Managing Director of the Criminal Defense Practice at The Bronx Defenders. I submit these comments on behalf of The Bronx Defenders and thank the City Council for the opportunity to testify.

The Bronx Defenders provides innovative, holistic, and client-centered criminal defense, family defense, civil legal services, social work support and advocacy to indigent people of the Bronx. Our staff of nearly 250 represents 32,000 individuals each year and reaches thousands more through outreach programs and community legal education. The Bronx Defenders is organized into ten interdisciplinary teams. Each team is comprised of criminal defense attorneys, family court attorneys, immigration and general civil attorneys, investigators, social workers and other social services advocates. Through the team model, each client of The Bronx Defenders has seamless access to multiple advocates and services to meet his or her legal and non-legal needs. The primary goal of our holistic defense model is to address the underlying issues that drive people into the criminal justice system and mitigate the devastating impact of criminal justice involvement, such as deportation, eviction, loss of employment, disqualification for student loans and public benefits, deterioration of mental health, or loss of custody. Instead of referring to these outcomes as “collateral consequences,” we use the term “enmeshed penalties,” which better reflects the grave risks and realities that our clients face from the moment of arrest.

Our Criminal Defense Practice is comprised of 81 full time criminal defense attorneys, 13 supervisors, 10 social workers, and 10 investigators who defend clients in 28,000 primary cases and 3,000 conflict cases per year. In addition to our substantive supervisors, we have a Trial Chief, 2 Trial Supervisors, a Legal Director, a Forensic Practice Supervisor, 2 Investigative Supervisors, and a Director of Early Advocacy.

In evaluating the effectiveness of indigent defense, traditional metrics have looked at a range of categories including independence, experience of lawyers, training, supervision, caseloads, and evaluation. On their face, these seem like appropriate categories to assess the delivery of indigent defense services. But in truth, traditional metrics fail to adequately measure effective representation. Some of them fail because the standards they measure set the bar too low or are too general to be meaningful. Others fail because they set the bar too high and so don't reflect the reality of the work we do. But fundamentally, existing standards fail to adequately assess the effectiveness of indigent defense because they are based on an outdated model of criminal defense – one that puts the case at the center of the representation instead of the client. In doing so, they ignore the importance of addressing the root causes of criminal justice involvement and treat enmeshed penalties as an afterthought.

We cannot talk about caseloads, qualifications, training, or supervision without taking into account the radical change in our responsibility to our clients. We must first recognize that no matter how well organized, staffed, trained, supervised, and evaluated we are, we are not meeting minimum standards of indigent defense if we are unknowingly pleading people out to low level offenses only to have them deported, fired from their jobs, or evicted from public housing.

When these standards were drafted, the criminal justice system was very different from the one we practice in today. Over the past ten years, we have seen a significant shift in the nature of our cases. As violent crime has fallen across the city, so have felony arrests. In 2013, there were 7.4% fewer felony arraignments than in 2003.¹ In the meantime, as a result of broken windows policing strategies, the criminal justice system has ballooned with low level, non-violent misdemeanors, violations, and infractions, such as trespass, marijuana possession, turnstile jumps, and driving with a suspended license. In 2013, the city saw a 17.8% increase in arraignments of misdemeanors, violations, and infractions over 2003.² The most recent criminal court data shows that misdemeanors, violations, infractions, and other low-level cases make up

¹ Lisa Lindsay, "Criminal Court Caseload – A 10 Year Overview," in *Criminal Court of the City of New York 2013 Annual Report*, ed. Justin Barry, (New York: Office of the Chief Clerk of the New York City Criminal Court, July 2014), 11. [Online](#).

² Lindsay, "Criminal Court Caseload – A 10 Year Overview", 11.

86 percent of the cases arraigned in NYC while felonies only make up 14 percent.³ In practice, the number of misdemeanors in the criminal justice system is even greater when you take into account the number of felonies which are reduced to misdemeanors once they are evaluated by the grand jury bureau, a percentage that our internal data shows is approximately 15 percent.

In addition, statistics show that the vast majority of both misdemeanors and felony cases are resolved through plea bargaining. In 2013, citywide only 0.2 percent (two-tenths of a percent) of Criminal Court cases were resolved by a trial verdict.⁴ That percentage was only slightly larger in Supreme Court where 5 percent were resolved by trial verdict.⁵

Given the large number of cases resolved through guilty pleas, it is more important than ever for criminal defense attorneys to fulfill the Court's mandate in Padilla v. Kentucky to advise their clients of the serious and likely consequences of a plea. While Padilla itself focused on the immigration consequences of a plea bargain, the language of the Court is more expansive and calls for individualized inquiry, advice, and advocacy related to any penalty that is serious, enmeshed, and likely, such as housing, employment, custody, benefits, and student loans. Attorneys need to be able to identify the enmeshed penalties of criminal justice involvement not only to advise clients of the impact of their pleas, but it also enables attorneys to use that information to effectively advocate for alternative dispositions that safeguard their clients' rights, status, and benefits. Unless we, as public defenders work to identify and mitigate these enmeshed penalties, we are unwittingly participating in further destabilizing our clients' lives and in perpetuating the revolving door of criminal justice involvement.

But our role as criminal defense attorneys has not just changed because of Padilla. Effective representation requires that we not only protect against the penalties of criminal justice involvement but that we also seek to address the root causes of that involvement. By focusing on

³ Lindsay, "Arraignments – Types of Charges", 25.

⁴ Lindsay, "Criminal Court Dispositions", 17. Please note that the categories "Guilty Plea," "ACD," and "SCI" were merged to create a "Plea" category, while "Convictions" was merged with "Acquitted" to create a "Resolved by Trial" category. Finally, we also removed from our whole the "Other" category, which accounts for "resolutions of Criminal Court warrants outstanding in another county; resolutions of Family Court warrants and Orders of Protection outstanding; removals to Family Court; extradition matters; and transfers to another court."

⁵ Mayor's Office of Criminal Justice, "Fewer Cases, Pleas & Trials," (meeting, New York, New York, Dec. 8, 2014).

the client instead of the case, we ascertain the full range of our clients' legal and social service needs, build better relationships with our clients, understand their goals and priorities, and as a result achieve better case and life outcomes for our clients.

Traditional evaluation metrics simply do not capture how the criminal justice system has changed, and therefore, our work and role in it. As indigent defense evolves so too must our understanding of what it means to provide effective representation and how we evaluate that effectiveness. While the old metrics still have value, they need to be supplemented by new metrics. While there are many ways of capturing the changing nature of our work, I will focus on three: holistic defense, client engagement, and innovation.

New metrics will go a long way towards helping public defender offices provide effective representation to their clients. But updating metrics alone will not result in the delivery of quality representation. If those who have oversight of indigent defense really care about the effectiveness of our representation, then they must also care about the effectiveness of the court system in which we work. Our courts are plagued by staggering congestion and delay, to the point where they have become one of the greatest obstacles we currently face to delivering on the promise of effective and zealous representation. Our effectiveness and the system's effectiveness are inextricably intertwined and that relationship, which has up until now largely gone ignored, cannot be ignored any longer.

The Holistic Defense Metric

When I walked into room 490 on late September afternoon, the courtroom appeared to be empty but for a few court officers milling about. The judge was in the back, they said, and would be out in a few minutes. I put my bag and coat in the first row and for the first time faced the back of the courtroom. In the back, in the corner, I saw an old man. He sat tall on the bench and held his hands together in his lap. His skin was brown and weathered. The wrinkles around his eyes extended to out to where his face met a head of thick white hair. Next to him on the bench was a black plastic bag stuffed with papers. "Marcelino Valdez?" I asked. His lips broke into a wide grin, he nodded, and he reached out and grasped both of my hands.

Two years earlier, Mr. Valdez had been charged with assaulting his wife. He was originally represented by an attorney from the 18b panel who, during the year that she represented him, had become increasingly concerned that Mr. Valdez could not provide her with details about what happened, talked about government conspiracies, and frequently became suspicious that their conversations were being recorded. She eventually asked that Mr. Valdez be evaluated to see if he was fit. On the next court date, the results came back but Mr. Valdez didn't. The results - he was unfit to stand trial.

When he shuffled back into the courtroom a year later, with his black plastic bag overflowing with papers, his lawyer suggested that the judge appoint a public defender office – one with the internal resources to help identify and address all of Mr. Valdez's legal and non-legal needs. And the judge called The Bronx Defenders. What I learned over the next few months as I, an immigration attorney, mental health attorney, and social worker worked with Mr. Valdez was that he had been hospitalized in a psychiatric ward, was suffering from congenital heart failure, was homeless, had lost touch with his daughters and was slowly losing the ability to take care of himself. As if that weren't enough, he was a legal permanent resident would be deported if convicted of assault. And he still faced a finding of unfitness.

I and the rest of his team immediately set about identifying his priorities and coming up with a plan. First, we located his daughter, who was able to give us her father's full medical history. We reached out to the head psychiatrist at the hospital who explained that, even with a finding of unfitness, if Mr. Valdez were already connected to services in the community that met his needs, he might be able to be released to outpatient treatment. We then found a nursing home that could care for him and sent all the information to the hospital. As a result, Mr. Valdez was found unfit, his case was dismissed, we took him to the nursing home, where he now lives, gets mental health treatment and proper health care and receives regular visits from his daughter.

Marcelino Valdez is not unique. He is like most of the people across the United States who are driven into the criminal justice system because of mental illness, along with other issues such as addiction, poverty, homelessness, family instability, violence, and lack of education. And like most of those driven into the criminal justice system, the stakes are much higher than a criminal

conviction. Effective representation requires that public defenders be able to identify the root causes and enmeshed penalties of a client's criminal case.

At The Bronx Defenders we ensure that each and every criminal defense attorney is able to identify a client's legal and non-legal needs by providing an intensive six week interdisciplinary training to our new class of attorneys. They are trained by immigration, housing and employment lawyers. They learn the intersection of criminal justice involvement and licensing, benefits, and student loans. They are instructed on drug and alcohol abuse as well as mental illness. This comprehensive training enables them to identify both the underlying issues that drive people into the criminal justice system and to flag the hidden penalties of a plea.

But it is not enough to simply have the knowledge. To ensure effective representation, public defenders and those who are responsible for their oversight must ensure that these issues are being identified early on in the life of a criminal case. The 2013 report from the Criminal Court shows that half of all cases are resolved with guilty pleas at the initial arraignment.⁶ At The Bronx Defenders, we created an arraignment checklist and checklist guide to ensure the early identification of our clients' most pressing non-legal needs as well as the range of enmeshed penalties of a guilty plea. We also created an on-call system so that social workers, investigators, immigration attorneys and other legal advocates on the lawyers' interdisciplinary team are available to provide advice, counsel and services to our clients before they see the judge.

To be effective, it is not only critical that lawyers identify the full panoply of their clients' legal and non-legal needs, but they must also be able provide seamless access to services and ensure dynamic communication among advocates. At The Bronx Defenders, we do this through team structure and technology. After arraignments, the checklist data is entered into our case management system. If any issue is checked, then the lawyers receive an automated email reminding them to make a referral to the appropriate advocate on their team. With the click of a button, an automated referral will be generated and sent to that advocate. Our interdisciplinary team structure and open floor plan ensures that different lawyer and non-lawyer advocates

⁶ Lindsay, "Disposition at Arraignments", 28.

working together with a single client are just a stone's throw from one another, enabling them to communicate and collaborate easily about a client's case.

Traditional metrics evaluate indigent defense providers by case outcomes – number of cases dismissed, ACDs, pleas to reduced charges, and acquittals. By traditional metrics, none of the work done to address Mr. Valdez's homelessness, mental illness, isolation, and immigration status would have been captured. His case would simply have been found under the category titled – found unfit. Case outcomes are still important as an evaluation tool. But if taken alone, they ignore the important work that lawyers are doing to address the root causes of criminal justice involvement and the enmeshed penalties of that involvement.

We have been heartened to see this administration's support for our model. They have provided funding for our immigration lawyers and spearheaded campaigns to divert adolescents and the mentally ill from the criminal justice system. They have also funded a first of its kind program to provide representation to immigrant New Yorkers in immigration detention and increased funding for civil legal services. Over the past year, we have found the mayor and Liz Glazer to be true partners in helping to address the root causes of criminal justice involvement and to mitigate the enmeshed penalties of that involvement.

Recommended Holistic Defense Metrics for Evaluating the Effectiveness of Indigent Defense

- Does the provider offer training to its lawyers to identify the root causes of criminal justice involvement?
- Does the provider offer training to its lawyers on enmeshed penalties of criminal justice involvement?
- Does the provider have in-house lawyer and non-lawyer advocates who can advise clients about enmeshed penalties or access to external advocates and can lawyers consult with those advocates before taking guilty pleas, even at arraignments?
- Does the provider have the ability to refer clients to in-house or external advocates who can help clients address their other legal and non-legal needs?

- Does the provider have a system in place to enable the criminal defense attorney to communicate and collaborate with in-house or external advocates to meet clients' legal and non-legal needs?

Client Satisfaction Metric

Mr. Lassiter has been very compassionate, professional and thorough. I have not met a lawyer who is as dedicated and determined as Mr. Lassiter. I have left messages on his voice mail and the response time was great. One would have believed that I was his only client when in fact he probably had many clients. I have come to value Mr. Lassiter's opinion because he always looked out for my best interest. I really wish Mr. Lassiter well in his career and am very appreciative that such a powerful lawyer represented me.

A key component in evaluating the effectiveness of indigent defense is client satisfaction. Research by Tom Tyler at Yale Law School has shown that by far the most important factor in whether people accept a decision is their perception that the process is fair. According to his research, the fairness of the *process* is much more important to people than the outcome itself or even the fairness of the outcome.⁷ A study by the Center for Court Innovation (CCI) supports this notion of procedural fairness and highlights the importance of clients' satisfaction in evaluating the delivery of defense services. According to their study, after judges, the most important factor for clients in their perception of the court system, is their perception of their lawyer.⁸ CCI lays out 4 factors in ensuring that clients perceive the court system as fair. First, that the client's voice is heard. Second, that she is treated with dignity. Third, that decisions are unbiased and consistent, and fourth that clients understand what is going on, their role, and the reasons for the decisions.⁹ Defense attorneys play a critical role in ensuring these factors are met and should be evaluated on this role. We represent clients not cases. The extent to which

⁷ Tom Tyler, "Procedural Justice: Why It Matters So Much" (lecture at Community Justice 2012, Washington D.C., Feb. 2, 2012). This is only one of many sources where Prof. Tyler discusses the importance of procedural justice.

⁸ M. Somjen Frazer, "The Impact of the Community Court Model on Defendant Perceptions of Fairness: A Case Study at the Red Hook Community Justice Center," (New York: The Center for Court Innovation, Sept. 2006), 14-19. [Online](#). And Erin J. Farley, Elise Jensen, and Michael Rempel. "Improving Courtroom Communication: A Procedural Justice Experiment in Milwaukee," (New York: The Center for Court Innovation, Jan. 2014), v. [Online](#).

⁹ Kevin Burke and Steve Leben, "Procedural Fairness: A Key Ingredient in Public Satisfaction," *Court Review* 44 (2007): 4-25. [Online](#).

clients feel like their lawyer listened to them, understood them, advised them, fought for them, and helped them is the key measure of effective advocacy.

At The Bronx Defenders, we solicit feedback from clients in the form of annual client satisfaction surveys. Each summer, we train a group of summer interns to administer a survey to a random sample of prior clients. The data from the survey is collected, summarized, and delivered to the Executive Management Team, which uses the information to help identify areas for improvement.

Traditional metrics presume that case outcomes alone, defined historically as the number of dismissals, ACDs, pleas to lesser charges, alternatives to incarceration, and acquittals is what leads to client satisfaction and in so doing fail to take the complexity of the attorney-client relationship into account. They also fail to take into account the feedback of the people that matter most when it comes to the effective delivery of indigent defense – the clients we represent and serve.

Recommended Client Satisfaction Metric for Evaluating the Effectiveness of Indigent Defense

- Does the provider have a system in place for assessing client satisfaction with their representation?
- Is client satisfaction assessed on an annual basis?
- Does the provider have a system in place for analyzing the results of the client satisfaction assessment?
- Does the provider have a process for implementing changes based on the results of the client satisfaction assessment?

Innovation Metric

He, his wife and seven month old son had been kicked out of the home they were living in, sleeping in abandoned buildings, but recently found a shelter in Queens. They have no food and little money. I spoke with Colby, who helped me coordinate with Ryan and Helmi to get some food from the Team Ryan Pantry. The family is very thankful and I am thankful to Team Ryan for the Food Pantry.

Any evaluation of indigent defense should include an assessment of a provider's ability to identify the changing needs of their clients and create innovative ways of addressing those needs. As the criminal justice system changes and evolves so too must indigent defense providers. As crime patterns have shifted, so have the nature of our cases. As policing policies have changed so has our client population. With technological advances, the nature of evidence has changed. And as criminal justice research evolves, our knowledge and understanding of the need for systemic change grows.

At The Bronx Defenders, we are constantly changing, adapting, and growing to ensure that we are providing the most effective representation to our clients. To meet the unique needs of our most vulnerable clients, we have developed an Adolescent Defense Practice, a Mental Health Project, a Veterans Defense Project, and a Victims of Sex-Trafficking Defense Project. All of these projects and practices are staffed by specially trained attorneys and social workers.

To address the increasing complexity of cases involving forensic evidence, we created a Forensic Defense Practice that provides in-house expertise for cases involving DNA, digital evidence, eyewitness identification, false confessions, and ballistics. In recognition that many of our clients cycle back through the criminal justice system on violations of Probation, we sought and received funding for a Probation Advocate who provides extra support post-sentencing to clients on probation to help them successfully complete their sentence.

Given the research showing the negative impact that bail has on case outcomes as well as life outcomes, we created The Bronx Freedom Fund, a revolving bail fund supported by legislation that The Bronx Defenders helped get passed. The Fund posts bail up to \$2,000 for indigent Bronx residents charged with misdemeanors, and in its first year has been shown to have a 98% rate of clients returning to court. We also created a Client Emergency Fund, host an annual Coat Drive, and run a Food Pantry for our clients in need.

Traditional metrics do not capture innovation in public defense providers. They do not capture the ability of a public defender office to provide individualized representation to different clients

whether they be adolescents, the mentally ill, victims of sex trafficking or veterans. Nor do they recognize the value of spending resources to develop in house expertise in particular areas of practice. And they do not capture the extent to which public defender offices, like The Bronx Defenders, are taking the lead in addressing systemic problems in our criminal justice system, like the problem of bail. Our effectiveness depends on our ability to innovate, create, adapt, and evolve. Any oversight of indigent criminal defense work in the 21st Century must take that into account.

Recommended Innovation Metric for Evaluating the Effectiveness of Indigent Defense

- Does the provider have the ability to use data to identify and respond to emerging client needs?
- Does the provider have procedures and oversight for piloting and evaluating new programs and for expanding those that are successful?
- Is the provider able to leverage funding from foundations, private donors, and other sources to expand services?

The Call to Evaluate the Effectiveness of the Court System and its Impact on the Delivery of Effective Indigent Defense Services

Two weeks ago, I received this email from one of the most hardworking, thoughtful, and zealous lawyers in my office:

So, I know that my client's story is not by any means unique, but perhaps that's all the more reason to share.

The case of John Carridice is longer than my career thus far; on September 27th, 2012, he was arrested for unlawful assembly, harassment and disorderly conduct. He was badly beaten, requiring stitches, pepper sprayed so badly that even the officer couldn't breathe, and contracted a skin disease while in arraignments.

Since September 2012, Mr. Carridice has made 19 court appearances. 13 of those appearances have been for trial. On 7 of those trial dates there have been no judges to hear his case. On the other 6, the prosecution has answered not ready.

Meanwhile, John Carridice, who was employed at Children's Aid Society and is now a full time college student, has missed exams, lectures, and scholarship opportunities as he shuttles back and forth to court over and over again.

Today, we were again told that there are no parts, and that my client had to be present on the next court date, despite it being exam season. The judge wouldn't even allow me to utter the sentence to make the request to have his appearance excused. My client wept. This large, adult man, wept, because his rights are violated on the streets and within the courthouse; he's forced to come to court, but cannot have his day in court; and the system is insidiously and explicitly thwarting his efforts to improve his life through work and education. And what am I doing? Making requests, being shot down, and adjourning cases while the system tramples and ruins lives?

So, my question to you is, what else can I do in these situations? I'm not comfortable with my role at the moment. I'm not comfortable regularly participating in this routine, especially under these circumstances, and essentially giving my clients some version of, "you're right, and I know this is ruining your life, but that's just the way it is, for now". What else can I do?

Any suggestions would be appreciated.

I do have a suggestion. But it is not for her. It is for anyone who has oversight of indigent defense providers. The suggestion is this: that any evaluation of indigent defense providers be conducted side by side with an evaluation of the system in which they operate. If those that oversee indigent defense providers care about the delivery of quality indigent defense services to poor people accused of crimes in this city, then they have to care about the effectiveness of the courthouses in which we work.

Our courthouses are at a breaking point. Quality of life policing has flooded the courts with low-level, non-violent infractions, violations, and misdemeanors, and are now the court system,

especially in the Bronx, is incapable of handling the volume. People like John Carridice, wait in long lines to get into the courthouse only to find that despite their efforts to arrive early, the courtroom is filled with people just like them waiting to have their day in court. A court appearance may last a matter of seconds – as long as it takes to say “The prosecution is ready. So is the defense. Well, there are no parts. How about 6 weeks from now?” But our clients sit idle in court, barred from reading or using their phones, for hours waiting for those futile few seconds. As the lawyer stated, the story of John Carridice is not unique. As Managing Director, it is a story I know well but has become so common place that people have stopped telling it. But it is a story that speaks not only to why people like John Carridice have lost faith in the criminal justice system but why we, as public defenders, are failing to deliver on our constitutional mandate.

The pernicious problem of delay and the promise of effective representation are inextricably intertwined. To understand the ways they are intertwined requires an understanding of how delay manifests itself. Delay takes two forms. The first is daily delay. As of December 2014, there were 11,370 misdemeanor cases pending in Bronx Criminal Court.¹⁰ Each day there are approximately, five all-purpose parts open, as well as the Domestic Violence Part, Misdemeanor Standards and Goals Part, and VTL/Quality of Life Part.¹¹ In 2013, the Annual Report of the City of New York reported that each misdemeanor court part had a mean of 80 cases calendared each day.¹² Every client is told to come at the same time – 9:30 am. The result is a daily backlog of lawyers and clients waiting to get their cases called. Based on some time calculations this past Friday, I estimate that each two minute court appearance requires approximately 50 minutes of idle wait time.

A typical attorney will have on average five cases on in a given day, which means that lawyers are spending on average four hours a day waiting to have their clients’ cases called in court. That is four hours of motions that are not getting written, investigation requests that are not getting done, social work referrals that are not getting made, client meetings that are not taking place, negotiations with prosecutors that are not happening, and trials that are not getting

¹⁰ New York State Unified Court System, NYC Criminal Court, “Bronx County Misdemeanor Activity Report 2014 - Term 12,” Dec. 16, 2014.

¹¹ Lindsay, “Pre-Trial All-Purpose Parts”, 37.

¹² Lindsay, “Number of Cases Calendared Per Day in AP Parts”, 40.

prepared. Being a good public defender, even by traditional metrics, requires time. But the courthouse congestion and delay is sucking up that time and leaving little for being the kind of lawyers that we want to be and that our clients deserve.

The second form of delay is pending case length. As the case of John Carridice illustrates, numerous clients who are trying to fight their case are forced to return to court for years and years, only to find that there are no trial parts available. According the Criminal Court of the City of New York Annual Report, the mean time it took for a case to be resolved in an All Purpose Part was 127.6 days. In the Bronx, that number was 186.9 days.¹³ For cases that were resolved by bench trials in the Bronx, it took 512.3 days and for jury trials 732.9 days.¹⁴ Given how long it takes to get a trial, it is perhaps not surprising that of the 14,574 misdemeanors, violations, and infractions pending in Bronx Criminal Court,¹⁵ only 40 cases went to trial. Fifty-five percent of those trials resulted in full acquittals.¹⁶ As of December 2014, there were 1,437 misdemeanor cases in Bronx Criminal Court that had been pending for over a year and 345 misdemeanor cases pending for over two years.¹⁷ Of course, every year many hundreds, if not thousands, of clients with viable defenses and constitutional issues never have their day in court. Most clients simply and understandably lose their resolve after two or three seemingly futile court appearances and opt to resolve their cases through a negotiated disposition. To wait for your day in court in the Bronx takes emotional and financial resources that few of our clients have to spare on the criminal justice system.

Waiting for your client's day in court also takes resources that few public defender officers have to spare. Caseload reduction legislation and the funding it provided has had a significant impact in bringing down pending caseloads. However, court congestion and delay are factors that undermine those legislative goals. The longer a case pends in court, the longer it stays on a lawyer's docket. When delay is as ubiquitous a problem as it is in the Bronx, the result is that lawyers handle fewer clients over the course of the year but their pending caseload remains unacceptably high. Delay not only leads to higher pending caseloads but as clients are required

¹³ Lindsay, "Mean Disposition Age of Dockets Surviving Arraignments and Disposed in AP Parts (Days)", 38.

¹⁴ Lindsay, "Bench Trial Verdicts Mean Age at Disposition (days)" and "Jury Trial Verdicts Mean Age at Disposition (days)", 50.

¹⁵ Lindsay, "Dockets Pending on December 31 (Snapshot of Pending Cases)", 15.

¹⁶ Lindsay, "Trial Verdicts", 49. This data refers to jury trials alone.

¹⁷ New York State Unified Court System, NYC Criminal Court, "Bronx County Misdemeanor Activity Report 2014 - Term 12," Dec. 16, 2014.

to go back and forth to court every six to eight weeks for a court appearance, so are their lawyers. Given the problem of daily delay, it is not surprising that after a day spent appearing on cases where nothing happens, lawyers have little time left to spend on substantive work.

While court congestion and delay are not metrics that can be used to evaluate the effectiveness of indigent defense, they are metrics that must be examined nonetheless. Attorneys simply cannot be effective in a broken system. While the impact of the court system on our work is something any criminal defense attorney is keenly aware of, for the first time, the administration has taken note of it too. In the last few months, we have experienced unprecedented collaboration with the Mayor's Office for Criminal Justice on this very issue. We are pleased that the administration takes the pernicious effect of court congestion and delay seriously and we look forward to working side by side with the Mayor's Office to help identify and implement some solutions to the problem.

Recommendations for Evaluating the Effectiveness of the Court System and its Impact on the Delivery of Effective Indigent Defense Services

- Decrease the Volume
 - The primary problem is the sheer volume of cases in the system every year. With over 300,000 misdemeanor cases every year, delay is, to some extent, inevitable and due process hard to come by. The City should do everything within its power to bring down the number of quality-of-life arrests.
- Hearings on Consent
 - Motion practice in both misdemeanor and felony cases is largely perfunctory. Adjournments for motion practice represent a tremendous waste of time and resources, as hearings are granted in virtually every case. The City should encourage all District Attorneys to consent to pre-trial suppression hearings, a practice the Brooklyn D.A. has already adopted.
- Decrease the Length of Adjournments for Trial
 - Because of complacency and congestion, the time between court dates is rarely less than four weeks and often exceeds eight weeks. The judiciary should be encouraged to shorten the length of adjournments when cases are in a trial-ready posture.

- Increase Capacity for Misdemeanor Jury Trials
 - There were only 209 jury trials in NYC Criminal Courts in all of 2013. The mean age for jury trial dispositions is just shy of 600 days (over 730 in the Bronx). The City should drastically increase the courts' capacity to conduct misdemeanor jury trials.
- Excusing Clients
 - Because of court congestion and delay, the vast majority of appearances in misdemeanor cases are perfunctory adjournments. Clients, however, are still required to be in court, often spending many hours waiting for their cases to be called. The courts should adopt a policy of excusing clients from court appearances after their first post-arraignment court date and make the automated court-date reminder system more robust.
- Prompt Discovery
 - Often, discovery in both misdemeanor and felony cases is not turned over by prosecutors until very late in the proceedings. District Attorneys should be encouraged to adopt early open-file discovery so that lawyers and clients can assess the strength of the case early and reach quicker dispositions.
- Charge-Specific Changes
 - VTL § 511 Cases Should Be Heard in the DMV
 - The Criminal Courts effectively function as collection agencies for the DMV in VTL § 511 cases. Cases are adjourned for months while clients pay off traffic tickets with no real expectation by defendants, prosecutors, or judges that the cases will ever actually go to trial. The City should either divert the majority of these cases to the DMV or set up DMV satellite offices in the Criminal Courts so that clients can work out payment plans on-site in a single transaction.
 - Immigration-Safe Plea Policies
 - Cases of non-citizen clients often linger in the system for extended periods of time until the District Attorney makes an immigration-safe offer. The City's District Attorneys should adopt uniform policies that allow for the quick disposition of cases involving non-citizens.

- Technological Solutions
 - Electronic Filing of Motions/Decisions
 - Litigation of motions and other pre-trial legal issues is largely done in an ad hoc fashion on the record during court appearances. Cases are regularly adjourned unnecessarily because crowded court calendars do not allow for thoughtful consideration of legal issues. The Criminal Courts should move toward an electronic filing system so that legal issues can be litigated off-calendar in advance of court appearances, so that parties can be better prepared for scheduled court dates.
 - Real-Time Stats in All Purpose Parts (like Arraignments)
 - The All Purpose parts should be equipped with real-time electronic case tracking (time the judge took the bench, order of cases to be called, etc.). Tracking would encourage accountability from the judiciary and would allow attorneys to make better use of their time.
- Support for § 30.30/Speedy Trial Reform
 - As it has been interpreted by the courts, New York's speedy trial statute, CPL § 30.30, does not provide an effective mechanism for trial court judges to manage their calendars or to force prosecutors to bring cases to trial. The City should support comprehensive speedy trial reform at the state level.

Testimony of Kara Dansky
Mayor's Office of Criminal Justice
New York City Council
Committees on Public Safety and Courts & Legal Services
Evaluating the Provision of Indigent Defense Services

Good morning, Chairpersons Gibson and Lancman and members of the Public Safety and Courts & Legal Services Committees. My name is Kara Dansky, Special Advisor in the Mayor's Office of Criminal Justice. Jennifer Jack, a Contract Analyst also from the Mayor's Office of Criminal Justice, joins me today. I welcome the opportunity to speak with you about the provision of indigent defense services in New York City.

The Mayor's Office of Criminal Justice serves as the Mayor's advisor on public safety strategy and develops and implements strategies aimed at achieving three main goals: continuing to drive down crime; reducing unnecessary incarceration; and promoting fairness. Our office works with the courts, law enforcement, defenders, and agencies including the Department of Correction and the Department of Probation to set consistent citywide criminal justice policy, evaluate systemic strengths and weaknesses, and implement new initiatives to solve problems.

New York City should be proud of its system for providing indigent defense. A few metrics distinguish us from nationwide norms. For example, in New York City, every criminal defendant gets a lawyer, which is not true in all jurisdictions throughout the state or country. New York City is also a national leader in the successful implementation of specialty courts, such as drug treatment and mental health courts. These specialty courts require the effective assistance of defense counsel in order to succeed—a testament to the ways in which high quality indigent defense counsel helps to sustain system-wide successes. And currently, there are efforts on the

state level that aim to bring the rest of New York in line with the services New York City provides.

Indigent defense services are provided by a combination of institutional providers and private attorneys who are part of the Assigned Counsel Plan, otherwise known as 18-b attorneys. The Mayor's Office of Criminal Justice contracts directly with the institutional providers and works closely with 18-b Administrators and the Department of Finance in overseeing the plan's operations.

Institutional providers include the Legal Aid Society, Neighborhood Defender Services of Harlem, New York County Defender Services, Queens Law Associates, Brooklyn Defender Services and The Bronx Defenders. The Mayor's Office of Criminal Justice oversees one hundred fifty million dollars in criminal trial-level contracts for these providers and tracks their services on a monthly and quarterly basis. These organizations not only provide high quality criminal legal services, but also provide comprehensive wrap-around services in areas such as housing and immigration.

For both institutional providers and 18-b attorneys, there are quality control measures to ensure that all of the people represented by these attorneys receive high quality representation. 18-b Attorneys must apply to be admitted to one of three panels: the Felony panel, consisting of attorneys who have been admitted to the bar for a minimum of seven years and have substantial criminal trial experience that includes felony trials; the Misdemeanor Panel, consisting of attorneys who have demonstrated actual court experience in at least ten criminal cases, including

at least one jury trial; or the Homicide Panel, consisting of attorneys with at least sixty criminal cases including serving as the sole attorney in a minimum five felony jury trials or as co-counsel in a minimum of eight felony trials. In addition, 18-b attorneys are required to do frequent trainings and complete a recertification process in the Second Department.

Institutional Providers have various quality control measures in place, including rigorous standards in hiring, performance reviews, and an internal structure of robust supervision and training for attorneys.

Measuring the quality of indigent legal services is widely acknowledged to be difficult and most existing evaluations are limited. For example, some performance metrics only evaluate one-time snapshots of a public defender office, have access to limited data, or do not allow for evaluation of changes in policies, practices, or procedures. Most existing evaluations also fail to provide information about the most effective resource allocation, and do not always tell you what is or is not working and why. The challenges associated with evaluating indigent defense systems exist nationwide.

Currently, the City tracks conviction rates, incarceration rates, case duration, charge reduction, and disposition at arraignment for felonies, non-felonies, and violent felonies by borough and by provider. In addition, the Mayor's Office of Criminal Justice is currently in the process of developing a more robust evaluation system to ensure effectiveness of indigent defense provision. As a first step, we have examined comprehensive indigent defense system evaluations recently completed by Harris County, Texas and the state of North Carolina, two of the only

places to do such a thorough evaluation, and are working to identify an appropriate mechanism for conducting a system-wide evaluation in New York City.

Additionally, we intend to collect information on compliance with established standards in ten fundamental areas:

- Independence from undue judicial or executive influence;
- Resource parity with the prosecution;
- Vertical representation;
- Attorney qualifications;
- Attorney training;
- Client financial eligibility determinations;
- Timeliness of appointment of counsel and contact with client;
- Confidential meetings with clients;
- Attorney performance; and
- Attorney caseload and workload.

The Mayor's Office of Criminal Justice works with academics, statisticians, and behavioral economists, and in-house, and we conduct sophisticated data analyses to help City agencies determine how their criminal justice resources can be best invested. In the coming months we plan to work to determine how to collect the right data and construct the right indicators to measure the effectiveness of indigent legal services in New York City with respect to these ten new standards.

Ensuring that we are using smart science to evaluate indigent legal services is one component of the de Blasio administration's ongoing efforts to use evidence-driven methods to reduce unnecessary arrests and incarceration, direct criminal justice resources to where they will have the greatest public safety impact, and make the system fairer.

Indigent legal services are not provided in a vacuum; instead, they must be considered as part of a hydraulic criminal justice system. This administration will not only strive to bring more sophisticated methods to our measurement of effectiveness in this arena, but will also pursue reforms that reduce unnecessary arrests, reduce case processing times, and divert people to programs and services in cases where those interventions are appropriate. While we do need to ensure that indigent defense services are functioning well and reinforced, the ultimate goal is to prevent crime well before it begins.

In closing, we feel that our current system does provide quality indigent defense services, and that we have an exciting opportunity to expand our ability to evaluate these services. Thank you again for the opportunity to speak to you today. I am happy to take your questions.

TESTIMONY

Before

The Council of the City of New York

Sponsored by:

Committee on Public Safety
and
Committee on Courts and Legal Services

Examining How the City Evaluates the Effectiveness of the Provision of Indigent Defense

January 26, 2015

City Hall
New York, New York

Submitted by:

The Legal Aid Society
199 Water Street
New York, NY 10038

Presented by:

Justine Luongo, Attorney In Charge, Criminal Defense Practice

Good morning. My name is Justine Luongo and I am the Attorney in Charge of the Criminal Defense Practice of the Legal Aid Society. On behalf of The Legal Aid Society, I would like to thank Council Members Lancman and Gibson for inviting us to participate in this important hearing.

The Legal Aid Society is the nation's largest and oldest provider of legal services to low-income families and individuals. From offices in all five boroughs in New York City, the Society annually provides legal assistance to low-income families and individuals in some 300,000 cases and legal matters involving civil, criminal and juvenile rights problems. The Society operates three major practices: the Criminal Practice, which serves as the primary provider of indigent defense services in New York City; the Civil Practice, which improves the lives of low-income New Yorkers by helping families and individuals obtain and maintain the basic necessities of life – housing, health care, food and subsistence income or self-sufficiency; and the Juvenile Rights Practice, which represents virtually all of the children who appear in Family Court as victims of abuse or neglect or as troubled young people facing charges of misconduct.

Our Criminal Practice is the oldest and largest public defender in New York City representing nearly 230,000 low income clients in trial, appellate, and post-conviction matters. Our long history of providing indigent defense to millions of New Yorkers places us in a unique position to testify to the ever changing role of public defense. We recognize that with this unique position comes a responsibility to address the evolving needs of the clients that we serve. This means, not only providing highly effective

defense services, but also addressing the root causes of criminal behavior so as to reduce recidivism.

Trial Advocacy and Zealous Representation:

The cornerstone of any successful public defense is trial advocacy and zealous litigation. As the primary defender in New York City, we represent low-income New Yorkers from the very start of their criminal case, at arraignment, in over 220,000 trial-level cases annually. We have offices in all five boroughs that consist of staff attorneys, supervising attorneys, paralegals, investigators, social workers and other support personnel who work collaboratively to provide high quality, client-centered representation. Our training program has been nationally recognized and focuses on building strong legal and litigation skills, as well as educating staff on the many issues our clients face that cause them to enter, and remain, in the criminal justice system.

While hearings and trials have significantly decreased over the years, the importance of insuring that attorneys continue to litigate important legal issues on behalf of their clients still remains paramount. Just this past month, our DNA Unit successfully completed a complex, eighteen month *Frye* hearing challenging the use of low copy DNA and OCME's Forensic Statistical Tool in Kings County. Also, this past summer, prior to this City's change in ICE detainer policy, attorneys in all of our offices filed writs of habeas corpus on behalf of low income, immigrant clients believed to be held in violation of the Fourth Amendment. Many of the clients were released to return to their families and communities.

Early investigation is critical to litigation and occurs well before a trial ever happens. This investigation will often lead to information that assists a client's case. Recognizing the importance of having field investigators ready and able to quickly investigate facts, we staff each office with one investigator for every ten attorneys.¹ Our investigators scour the city to locate witnesses, take statements and find video footage to insure that the attorney has information to help determine the strategy of the case. Last year, due to the increased use of digital forensic evidence, such as cell phones, tablets and laptops, the Criminal Defense Practice created a new Digital Forensic Unit. This Unit, comprised of experienced IT investigators, team with our field investigators and attorneys to assist in case preparation- often finding evidence to support that a person has been wrongfully accused of a crime. In one of the first successes, the unit used their expertise to analyze the GPS of an iPhone to prove that our client was out of New York State when the prosecutor claimed he committed the crime. The client was acquitted of all charges.

Litigation is Simply Not Enough- Client Advocacy Requires More

While litigation and investigation are indeed paramount defense functions, we must recognize that the nature of the role of the public defender continues to broaden beyond mere litigation. Immigration advice, once thought to be a collateral matter to a case, is now a defense attorney's obligation. We believe strongly that there are other issues still

¹ In 2014 The Legal Aid Society submitted a report to the First Department Indigent Defense Oversight Committee requesting that the ratio of investigators and social workers be reexamined with the goal of making the ratio less than the current 1:10.

viewed as “collateral”, that we must address in order to effectively represent a client fully.

Often the criminal case is not the most pressing issue for our clients. Mental illness, substance abuse, unemployment, homelessness and other poverty driven issues are often the obstacles that create barriers for our clients. Indeed, in many instances these issues are the root causes of why our clients have found themselves with a criminal case. Because of this, much of our work goes beyond the criminal case. In each of our trial offices immigration attorneys, forensic social workers and mitigation specialists are part of the defense team assisting clients with myriad issues that need to be addressed. Our criminal defense teams also work closely with our Civil, Juvenile Rights and Pro Bono Practices to assist clients to reduce the devastating and life-altering consequences that arrests and convictions have on such things as immigration, housing, employment, education, and other important aspects of our clients' lives. Here is an example of how important this team approach is:

Our client, WC, was arrested for several burglary charges that could have resulted in several years of state prison and deportation if he was convicted. When our staff attorney met WC in arraignments, it was clear that WC was suffering from substance abuse and that the theft related crimes he was charged with were due to his addiction. Working together, his attorney and social worker, reached out to our immigration unit to assist in creating a plan to address WC's issues and try to convince the Court that WC needed treatment and not prison. Thanks to their hard work, the Court agreed. After eighteen months of intensive substance abuse treatment, the client graduated treatment successfully and was not sentenced to prison. Our immigration attorneys continued to work with WC to insure that his arrest and sentence did not cause him to be deported.

This broadening of our role allows us to create opportunities to help clients literally change their life's trajectory. Our work with victims of human trafficking through our Trafficking Victims Advocacy Project is one such example of "thinking out of the box". Several years ago, with the generous financial assistance of the Novo Foundation, we established the Trafficking Victims Legal Defense and Advocacy Project, an innovative interdisciplinary pilot project with an attorney and social worker, to address the comprehensive needs of victims of human trafficking who are arrested and prosecuted for prostitution in New York County. Now in its sixth year, expanded to include all our trial offices and renamed the Trafficking Victims Advocacy Project, staff attorneys work with a supervising attorney, a mitigation specialist and a paralegal to represent clients on pending criminal cases, file motions to vacate prior convictions where the person was trafficked, and assist with civil legal services to aid clients to establish independence from their trafficker. Here is an excerpt of an email from the unit's Director detailing such a success:

Our client came to us for post-conviction relief primarily because the Department of Education had denied her security clearance for a job as a school bus matron. The denial was based on her two misdemeanor prostitution convictions from over 5 years ago, from a time when she was trafficked into prostitution. Once we started working on her case for vacatur of these convictions, we partnered with a law firm and our Civil Practice's Employment Law Unit to represent her in a potential action against the DOE for wrongful denial. Together with Amy Hong and Karen Cacace of our Employment Law Unit, they drafted a strong letter to DOE urging reconsideration of the denial. Last week, we were successful in vacating the client's first conviction in New York County, leaving her with one conviction in Queens County to vacate. We immediately advised the DOE of the partial vacatur. In response to this advocacy, DOE notified us late Friday afternoon that they were overturning their initial determination. They cleared our client for work immediately. What was great about this case is the client was connected to us by a paralegal at 49 Thomas who was on general intake when this client called, unaware of the vacatur law or her eligibility, merely to see if anything could be done about her old convictions. The paralegal knew the work TVAP was doing in this area, and reached out to me to see if I would be willing to speak to the client.

The work of the project has reached beyond New York City. This year the project was invited to give a briefing at the United Nations Human Rights Committee (UNHRC) periodic review of U.S. Compliance with the International Covenant on Civil and Political Rights on how the United States handles people who are trafficked. The advocacy of TVAP and its partner organizations led to a powerful conclusion by the UNHRC, in its published observations, expressing concern about the “criminalization of victims on prostitution-related charges,” and urging specific reforms.

Lack of Services for People with Mental Illness Increases Our Role

The New York City Office of the Criminal Justice Coordinator (now known as the Mayor’s Office of Criminal Justice) has reported that serious mental illness has been documented in 14.5 percent of men and 31 percent of women in jail settings, which is three times higher than in the general population. Last year, Mayor DiBlasio asked Seymour James, former Attorney in Charge of the Criminal Defense Practice, now Attorney in Chief of the Society, to represent the defense bar on a task force commissioned to reduce the number of people with mental illness in the criminal justice system.

Long before the call for a commission, The Criminal Defense Practice has been addressing this staggering reality by developing a broad range of services for our clients with mental illness. Our social workers and mitigation specialists provide an essential element of effective, comprehensive representation for our clients. In the past year, we have significantly increased the scope of our social work practice, which provides

assessment, evaluation and program placement, oral advocacy, and support services at all points of the criminal justice representation from arraignment to re-entry.

Our Defender Services Program is the largest component of social workers in the Criminal Practice. Operating out of our Bronx, Brooklyn, Manhattan, Queens and Staten Island offices, social workers interview clients and their families; gather life history records; and ultimately present mitigation evidence, both oral and written, on misdemeanor and felony cases in our trial offices. Our Defender Services social workers put our clients' contacts with the criminal justice system into context by telling their stories. Social workers prepare Pre-Pleading or Pre-Sentencing Memoranda, letters to Court, psychosocial reports and affidavits in support of motions. These social workers also provide oral testimony in an effort to persuade the court that our client is more than the sum of his/her alleged criminal acts. An example of this crucial work is illustrated in the case of our 25 year old female client:

Until an arrest for Burglary in the Second Degree, our client had a very minimal criminal history, had been living with her wife and caring for her five year old stepdaughter while attending college. What became apparent to the assigned social workers was that our client was struggling with mental health issues that had been not formally diagnosed, and was self-medicating with alcohol. Right before the arrest her drinking had spiraled out of control to the point where her wife demanded a separation and our client's life began to unravel. She was also the victim of a recent sexual assault, which occurred while she was drinking, and she had seen many of her relationships and other opportunities disappear as a result of her chronic binge drinking. The social worker and the social work supervisor worked together interviewing family and friends of our client, getting the mental health history, meeting with the attorney, and attending a meeting with the District Attorney to discuss the client's issues. The social worker explained the extenuating circumstances and made a case for how jail and a felony would be not only be traumatizing after her recent sexual assault, but counter-productive towards her getting much needed substance and mental health treatment and leading a better life. In the end the District Attorney consented to a treatment alternative to jail, and a full dismissal once treatment was successfully completed. In the end the client was provided the needed mental health treatment to regain control of her life.

Similarly, our MICA Project is comprised of four attorney/social worker teams that represent clients who suffer from both mental illness and substance abuse. The mitigation specialists help secure alternatives to incarceration for clients who can be diverted into community-based treatment. Many of these clients are participating in the Mental Health Treatment Courts. Once our client is engaged in community-based treatment, we provide essential support to our MICA Project clients for 18 to 24 months to assist them in completion of treatment services.

For example, during this past year, our MICA team represented a 21 year-old Latino male who is diagnosed with Bipolar Disorder and Polysubstance abuse. He has a history of sexual trauma and neglect during his early childhood, and received special education services for his cognitive and emotional problems. Prior to his involvement with the MICA Project, he had extensive criminal justice involvement including an open warrant on a violation of probation from New Jersey. He was now in custody for a Robbery 2nd Degree charge. After assessing the client, determining his treatment needs, and advocating to the Court and District Attorney's office for approximately 6 months, the MICA Project was able to work out an alternative-to-incarceration disposition where the client would enter into treatment designed to address both his significant mental health issues and chronic substance abuse. Additionally, the MICA Project worked with the New Jersey public defender's office to get the warrant on the violation of probation lifted. The client was released on the New Jersey matter entered long term treatment.

Advocacy and Representation Beyond the End of the Criminal Case

Historically, and in more traditional criminal defense practices, representation of a client ends at the point of a plea, dismissal or trial verdict. A comprehensive approach to representation includes advocacy way beyond the trial level. For decades, The Legal Aid Society has provided post-conviction defense advocacy and representation through our Parole Revocation Defense Unit and our Criminal Appeals Bureau

Our Parole Revocation Defense Unit represents individuals released from prison to community supervision who are charged with violating the conditions of their supervision. Many of the clients represented by the parole defense staff attorneys face enormous obstacles in reintegrating back to the communities they and their live in after being in prison. Lack of employment, housing and health care, particularly mental health treatment, often place these people back into the criminal justice system. Our trained attorneys and social workers work tirelessly to try to prevent the cycle of recidivism by connecting clients to treatment and services after parole violations. Our client RR's story demonstrates the importance of this vital representation.

After being released from prison in 1998, our client, RR, voluntarily returned to parole custody in February 2014. RR was non-violent drug offender and served about 3 years of parole before absconding from supervision. RR relocated to another state and spent 10 years with no contact with the criminal justice system. A few years ago, RR was diagnosed with a terminal Stage IV cancer. Unable to access public services out of state due to his NYS parole and federal immigration warrant, RR returned voluntarily to NYS parole for a parole violation proceeding. A parole defense staff attorney and social work began a long and involved process of marshalling Legal Aid's vast resources to provide a meaningful outcome for our client that would address RR's very serious medical conditions. Working with our Prisoner's Rights Project we reached out to administrators at Rikers Island to ensure our client received his much needed medication and to arrange to have RR transferred from a general population facility into the jail's specialized medical unit. Then, through the unit's advocacy for compassionate release, the Administrative Law Judge for RR's case was eventually persuaded to agree to revoke and restore him back to parole supervision once stable housing and medical care was in place. RR's biggest issue, however, was that he had no family in NYS where he needed to serve his parole sentence. Despite this huge obstacle, the staff pushed for release and after sometime RR was released from Rikers and returned home to family and hospice care

Our Criminal Appeals Bureau represents clients on direct appeals from convictions in Criminal and Supreme Court in addition to providing a wide range of post-conviction services. This year, the Criminal Appeals Unit had major victories on behalf of our clients as well as the overall fairness of the criminal justice system.

Bureau attorneys litigated fifteen cases in the New York Court of Appeals, the State's highest court, prevailing in eight of them. In addition to winning relief for these clients, CAB successfully challenged long-standing practices that worked to the detriment of all indigent criminal defense clients. In *People v. T*, for example, CAB asked the High Court to put an end to what, long ago, had become a daily routine of the New York City Criminal Courts in which judges accepted guilty pleas to so-called minor offenses in summary proceedings that entirely failed to explore whether clients understood the significant constitutional rights that they were forgoing. For CAB's client, CCT, these summary pleas to possession and sale of small amounts of marijuana had landed him in deportation proceedings. In entering these pleas, Mr. T stood before a judge for no more than a minute. The entire proceedings spanned fewer than two transcript pages. The court made no mention of the critical constitutional rights at issue. On CAB's appeal, the Court of Appeals emphatically declared an end to such proceedings. No longer could a judge accept, or an appellate court uphold, a guilty plea based on a silent record. At minimum, a court must inform defendants that, by pleading guilty, they are surrendering their rights to a trial, to confront the witnesses against them and to remain silent. The Court reversed Mr. T's conviction and, given the minor nature of the underlying charges, dismissed the case outright, thereby preserving Mr. T's opportunity

to remain in the United States. In the wake of of this case, CAB has won relief for numerous other clients whose lives were being adversely affected by such convictions and Criminal Court practice has changed in a meaningful way.

In *People v. Marsha Sibblies*, CAB presented the most important question under C.P.L. §30.30, New York's speedy trial statute, that the High Court had confronted in more than a decade. At issue was the common prosecutorial tactic of declaring "ready" for trial either at or shortly after the initial arraignment, but later repeatedly requesting adjournment after adjournment to further investigate the case. Until *Sibblies*, this tactic enabled the State to take advantage of 30.30's post-readiness measurement of delay, a measurement far more generous to the prosecution than the measurement of time before the declaration of readiness. In *Sibblies*, the Court, though evenly divided in two concurring opinions, unanimously condemned this tactic, deemed the prosecutor's declaration of readiness "illusory" and reversed the contrary decision of the Appellate Division. As a result, all of the charges against Ms. Sibblies were dismissed and a significant prosecutorial delaying tactic reined in.

CAB's successes in 2014 were not limited to New York's Highest Court. After revelations of misconduct by former Brooklyn homicide detective Louis Scarcella became public, the Kings County District Attorney's office announced its intention to reinvestigate dozens of homicide convictions from the 1980s and 1990s in which Detective Scarcella played a role. In response, CAB, working closely with *pro bono* attorneys from the City's largest law firms, launched its own reinvestigations on behalf of clients whom the Society had previously represented. In May, after a year-long effort by CAB and the law firm of Davis Polk and Wardwell, our client, RH had his conviction

for second-degree murder vacated and he was freed after 28 years of incarceration. The Brooklyn District Attorney agreed with the defense that the conviction, for which Mr. H had originally been sentenced to life imprisonment, lacked integrity, because it depended on the testimony of an unreliable witness, Theresa Gomez. Ms. Gomez, now deceased, worked as an informant for Detective Scarcella. In this capacity, she claimed, somewhat miraculously, to have witnessed at least six separate homicides in Brooklyn in the course of a short period of time. As a result of its reinvestigation, the District Attorney also dismissed all charges against two of Mr. H's brothers, one of whom died in prison, who were also convicted based on Ms. Gomez's testimony, in an unrelated homicide.

Advocacy and Representation to Reduce Violence

Our Anti-Gun Violence Unit (AGVU) is a special City Council-funded anti-gun violence initiative to provide legal services for community residents in neighborhoods impacted by gun violence. We provide legal services/case consults in each of the five boroughs which have been designated by the Council for the provision of anti-violence services through the Ceasefire model (now called "Cure Violence"). This is a public health model that responds to gun violence with services in the community – mediation, social services, violence interrupters, etc. The model works on the theory that if conflicts can be worked out by people in the community, further violence can be avoided. As a part of this program we provide both individual legal assistance and "Know Your Rights" outreach programs.

As a example, one of the Cure Violence partners reached out to us regarding Ms. O, a tenant of NYCHA (New York City Housing Authority) public housing and a mother of four. Someone shot a gun into her apartment one night. She believed her son may have been the target. She immediately applied for a NYCHA safety transfer. NYCHA, however, made her reapply more than once for transfer. She was having extreme difficulties getting a transfer approved and then finding a suitable three bedroom apartment in a location where her family would no longer be in danger. The Legal Aid Society advocated with various heads of departments within NYCHA and elected officials to expedite, first the transfer, then the assignment to a safe and suitable apartment, and, lastly, to rush the repairs to the new apartment so that she could move quickly. Additionally, The Legal Aid Society assisted Ms. O with obtaining one shot assistance to help with moving fees. She and her family are now living safely and comfortably in their new apartment.

We believe that this type of anti-violence work has great potential to help communities that are plagued by violence. The fact that we are trusted in the communities that we serve enables us to play an effective role in reducing violence. We look forward to continuing this exciting work that has such great potential to improve the quality of life not only in the target neighborhoods but throughout the City.

When Policy Must Change and Laws Reformed: Public Defenders Take It On

Our Criminal Practice's Special Litigation Unit engages in a litigation and law reform practice that seeks solutions to issues that are best resolved by a class-wide or systemic challenge and also provides our front-line criminal defense attorneys in all five boroughs, attorneys at other organizations, and private attorneys with advice, training and litigation support on novel or complex issues. Our major successes have resulted in significant changes in the law whose benefits accrue to all New Yorkers charged with criminal conduct, often wrongfully. For example, the requirement that New Yorkers must be arraigned within 24 hours of arrest was established in litigation filed by our

Special Litigation Unit. The Unit also played a significant role in the reform of the draconian Rockefeller Drug Laws.

Currently, our Special Litigation Unit is playing a key role in challenging police practices in New York City that result in large numbers of improper arrests. For example, together with pro bono counsel Paul, Weiss, Rifkind, Wharton & Garrison LLP and the NAACP Legal Defense and Education Fund, we filed a federal class action challenging the wave of illegal arrests for trespass in public housing developments that result when residents and visitors with a legitimate reason to be on the property are improperly stopped, questioned, frisked, searched, and arrested. Just recently, as a result of a proposed settlement with The City of New York we are happy to report that many positive changes in both policing and public housing quality of life will be addressed. One part of the settlement calls for a monitoring period during which community forums involving residents of the New York City Housing Authority, New York City officials and the New York City Police Department will occur. Together with the new rules for police behavior, which emphasize respect for the residents of the NYCHS developments, a dialogue involving youth of color, who are so often the target of over-aggressive policing, has the potential to improve police community relations in a meaningful way.

Another example of the work of the unit centers around working closely with our Prisoners' Right Project to insure that people housed on Rikers Island and other local jails are free from abuse at the hands of Correction Officers and afforded their due process rights at discipline hearings. Much of this work centers around inmates that are

either adolescents, those suffering from mental illness or both. This advocacy led to the end of solitary confinement for young people 21 and younger, as well as the end to keeping people in solitary confinement for months at a time on “old bing time.”

Training and Supervision: Insuring Quality, Client Centered Representation

The Criminal Practice at The Legal Aid Society has a well-developed, hands-on training program for new attorneys.

Our new attorney training involves a combination of lecture, workshop, shadowing, and mentoring by supervisors and more senior attorneys. The first phase of the training program occurs centrally, typically at our 199 Street headquarters, and is followed by intensive borough training for during the full year of an attorneys start us. The borough phase of training is a combination of lecture, workshop/skills training, shadowing, mentoring, and close supervision within each complex or cluster of 20-30 attorneys.

The New Attorney Training Program covers the gamut of substantive and practical skills required for criminal practice. We draw upon the expertise throughout The Legal Aid Society, which is particularly useful given the increasing collateral consequences of criminal convictions. Thus, our civil and juvenile rights practice trainers provide concrete guidance on civil issues that overlap with criminal practice. Outside faculty includes guest speakers, law school faculty, and former clients. The popular ex-client panel and other client-centered training have been featured in national community-oriented defender symposia. Other defender programs have adopted the approach.

Increasingly, our new attorney training is relying less on straight lecture and more on problem-solving, simulations, and small group exercises.

In January, 2009, the Criminal Practice, in conjunction with Hofstra Law School, pilot tested a three-day Suppression Training Program for new attorneys. This was repeated in 2010 and spring of 2011. In 2012, we inaugurated a new and more intensive 3 day Suppression Training Program. The new Suppression program has literally changed suppression practice for the attendees and is now being provided to all staff. Each June, the Criminal Practice, in partnership with local law schools, conducts a week-long Trial Advocacy Program (TAP), followed by day long mock trials in real New York City courtrooms.

In addition to the above, attorneys within the Criminal Practice have available an enormous array of in-house and outside training opportunities. Outside experts and experienced Legal Aid attorneys provide lecture, workshop, and related training programs through our "Lunch and the Law" programs in each office. In addition to this, attorneys attend a variety of programs offered through the headquarters at 199 Water Street (e.g., through the Special Litigation Unit, the Criminal Appeals Bureau). This year, in recognition of the role that bias and oppression play in the lives of our clients, The Legal Aid Society has recently consulted with experts in this field to develop an Anti-Bias/Anti-Oppression training program and an LGBT Cultural Competency training that is mandatory for all staff. We have provided our LGBT cultural Competency training to court personnel, judges, assigned counsel and other institutional defense providers in New York City and across the country.

In addition to training and ongoing CLE, attorneys and non-legal staff are supervised by experienced managers that insure our clients receive high quality representation. Supervising attorneys meet regularly with attorneys to discuss case strategy, including ethical considerations, assist attorneys with case preparation, including: preparation of witnesses for hearings, trials and the grand jury; consultations between a client and the assigned attorney; negotiations with opposing counsel; reviews of motion practice and simulated argument; and reviews of examinations of witnesses and summation; and, observe attorneys in court, including: second seating of junior attorneys or senior attorneys in complex cases; providing critique, feedback and evaluation based on their observations of performance; and file reviews.

Supervising attorneys complete frequent and meaningful case file reviews. Full reviews of an attorney's caseload are conducted periodically, with felony cases requiring a mandatory review 21 days after criminal court arraignment. Supervisors review all case files, including those which have been adjudicated at arraignment, immediately after arraignment. In addition, all case files are reviewed by supervisors at the conclusion of the case to evaluate the overall thoroughness and quality of representation provided to the client, including pleas

CAB staff attorneys are currently supervised by five line supervisors. CAB supervisors have two primary responsibilities, monitoring staff attorney caseloads and reviewing staff attorney briefs. Staff attorneys are divided into groups of "monitorees," and assigned a supervisor who is responsible for monitoring their caseload management and meeting with them on a regular basis to discuss their caseload and any case-handling issues that arise. Supervisors' second primary responsibility is to review staff

attorney briefs, which are assigned for review on a brief-by-brief basis so that each supervisor reviews the work of all staff attorneys over the course of time. As part of the process of brief review, the assigned supervisor will often review pertinent parts of the record and consult with staff attorneys about what other potential issues were investigated and what legal research was conducted.

While ongoing, regular supervision serves as the best means to evaluate staff, the Society also requires a formal annual evaluation be done on each staff person. These evaluations are reviewed by the Attorney in Charge of the Criminal Defense Practice to insure that all staff meet the requirements of their position.

In addition to staff evaluation, caseloads are also reviewed periodically to insure that the Criminal Defense Practice is in compliance with the case cap standard as set forth in the law implemented in 2009.

Recommendations

As the above hopefully demonstrates, the role of the public defender has broadened, as the needs of those we represent need to be addressed. Evaluation tools, funding and resources must also shift. While it is important to track how many trials and hearings an office conducts, it is equally important to evaluate an office on the client successes as we described above. To fully advise clients on civil collateral consequences relating to an arrest or plea, our offices funding to provide indigent legal defense must include civil

legal service attorneys if we hope to be able to stem the role poverty and the lack of access to justice plays in recidivism.

Thank you in advance

Justine Luongo

**Written Statement of
Norman L. Reimer, Executive Director
National Association of Criminal Defense Lawyers**

**Before the
City Council of the City of New York**

**Public Hearing: “Oversight – Examining How the City Evaluates the
Effectiveness of the Provision of Indigent Defense”**

**Committee on Courts and Legal Services
Committee on Public Safety**

**Monday, January 26, 10:00 AM
Council Chambers – City Hall**

I want to thank the Chairs and the members of the committees for inviting the National Association of Criminal Defense Lawyers (NACDL) and me to testify.

I especially want to thank you for caring about the quality of the representation we provide to indigent accused persons. This is an issue that seldom draws the interest or attention of elected leaders because the indigent accused is a constituency whose voices are seldom heard. But in a nation that now arrests approximately 14 million people every year and that leads the world in incarceration, increasingly all of us have come to realize that these so-called criminals are our neighbors, our friends, our co-workers, and our family members.

The criminal justice system touches all of us.

And so all of us have a duty to ensure that when a person is charged with a crime, the constitutional mandate to provide counsel is fulfilled.

Fulfilled - not just with a harried lawyer who is so overburdened that she scarcely gets to know her client before disposing of the case, but fulfilled with a fully trained, dedicated and resourced attorney: One who can address the criminal charge, the underlying pathologies that may have led to the arrest, and the raft of collateral consequences that can befall a person who has a brush with the criminal justice system.

Council members, the nature of criminal defense has changed drastically in the past several decades.

The proliferation of collateral consequences has created a vast hidden network of legal penalties, debarments and disabilities that arise not just from the penal statutes themselves but from a raft of ancillary statutes and regulations that now stigmatizes the 70 million-plus people in this country who have a criminal record. Virtually every aspect of human life may be impacted by these collateral consequences: employment, immigration status, access to education loans, family rights, housing rights, and the list goes on and on. See *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime – A Roadmap to Restore Rights and Status after Arrest or Conviction*, available at: <http://www.nacdl.org/restoration/roadmapreport/>.

So when you think about the thousands who pass through New York City's criminal courts every year, you must ensure that every single one of them has a lawyer who has the time, knowledge and resources to understand and address these silent sentences and hidden penalties.

We live in an era in which a speedy, ill-conceived guilty plea may forever consign a person to second class status in our society.

By way of personal introduction, I am not a stranger to New York. New York has been and always will be my true home. As some of you may know, I was intimately involved in fighting to reform New York indigent system for about 15 years. I led a Task Force on Indigent Defense established in the mid-1990s by the New York County Lawyers' Association.

As Vice Chair and later Chair of the Central Screening Committee of the Assigned Counsel Plan for the First Department, I led the first panel-wide recertification of the more than 1,200 lawyers conducted in more than a generation. I was the prime organizer of the successful lawsuit *NYCLA v. New York* which challenged the failure of the state for 15 years to raise the rate paid to assigned attorneys from 25 per hour for out-of-court work and 40 dollars for in-court work.

And working with various bar groups, when a former Mayor first resolved to aggressively fund alternative providers to the Legal Aid Society, following efforts by rank-and-file lawyers to enhance the quality of service provided, I advocated for the creation of the Independent Defense Organization Oversight Committee (IDOOOC) to ensure that there would be some independent guarantor of minimum quality. We did not believe that you could vest the authority to ensure quality in the contracting authority, especially when you are dealing with providing a constitutional right to a class of people that is largely voiceless in the halls of power. And when, frankly, depending upon the philosophical orientation of the incumbent, you could have outright hostility toward the defense function.

That is my personal background, but I am not here to comment on the current state of indigent defense in New York. I am now eight years removed from my work here in New York.

Rather I am here on behalf of NACDL, the National Association of Criminal Defense Lawyers, to address your issues from a national perspective.

We are the nation's criminal defense bar. Our members include the entire criminal defense bar: private lawyers, public defenders, military defense counsel, and private lawyers who represent the indigent by contract or court assignment.

One of our core missions nationally is to work to achieve the promise of *Gideon*. Support for the indigent defense community and aggressive pursuit of reform of the nation's indigent defense system – or lack thereof is a central focus of our activity. We are honored to work collaboratively with such groups as the ABA, the ACLU, the Brennan Center, the Sixth Amendment Center, and many others. Indeed, I have been honored to work with each of the groups or individuals on this panel. My colleague and fellow panelist from the Brennan Center, Nicole Austin-Hillery, will describe many of the national strategies to enhance support for indigent defense and promote reform strategies to fully implement the right to counsel.

In addition to its national advocacy efforts, NACDL is currently working in various jurisdictions to implement meaningful workload standards – standards that are based not on the lowest common denominator or arbitrary caseload numbers, but rather qualitative benchmarks that are essential to provide meaningful and effective assistance of counsel.

It is incredible to find in an era in which metrics are so important that many defender offices simply do not require their lawyers to record the tasks they perform and the time they spending doing those tasks on the cases they handle. That is why we are working with defender offices to

implement time tracking – so that it is possible to assess how much time a defender spends on specific tasks. We are then conducting Delphi studies with an array of practitioners to develop benchmarks so that defenders can have the tools necessary to advocate for the level of funding necessary to achieve those benchmarks.

And NACDL's single biggest focus is on training. Last year, NACDL trained more than 6,000 lawyers, and we are increasingly committing resources to support the indigent defense community. We do this by dispatching teams of trainers to regions where training resources are scarce, and we are providing scholarship assistance to help defenders attend established training programs conducted by various groups and in myriad locations. And a key principle is that we are devoting these resources, and making these opportunities available to lawyers who defend the indigent irrespective of whether they work for institutional defender offices or are privately accepting assignments.

Training and support resources should be universally available. And those who fund training programs should insist that they be made available to all who play a role in indigent defense. The walls that separate various providers of indigent defense services to prevent client conflicts are wasteful and unnecessary barriers when it comes to training lawyers.

From that national platform, let me suggest that if you are serious about assessing quality, you do not have to reinvent the wheel. The tools are there if you have the will to use them. There are many standards, benchmarks and best practices provided by many groups.

But, first and foremost, if you are to effectively gauge the quality of the representation you provide to the indigent, it is essential that you start by looking at how well your system comports with the ABA's Ten Principles of a Public Defense Delivery System. (See *Ten Principles of a Public Defense Delivery System*, Standing Committee On Legal Aid And Indigent Defense, American Bar Association, February 2002, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.)

Any legislation to address quality should explicitly reference the Ten Principles as critical guideposts.

All Ten Principles are critical to the health of an indigent defense system. But for today's purposes, I suggest that as you seek to measure quality – focus on principles one, two, five, eight.

In reverse order:

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.”

- Can you say that is the case here in New York?

- Is there equivalency in pay, in resources, and in training?
- What about availability of ancillary services?
- Are you even measuring these things?
- When a new law enforcement initiative is launched, is the defense community at the table to address the impact on defense resources?

Principle 5: “Defense counsel’s workload is controlled to permit the rendering of quality representation.”

- Note the emphasis on workloads, not caseloads. Arbitrary caseload limits that have no regard for the complexity of particular cases, or the needs of individual clients, are no guarantor of quality. Are you assessing workloads?
- Does the lawyer have adequate time to meaningfully and effectively represent each client?
- Do they have the time and resources to investigate the matter?
- How much time do they spend on each case?
- Are you requiring indigent defense providers to record the time and tasks they perform? There is a growing national consensus that this is an absolute necessity.
- NACDL did a study in a number of counties in Florida and it resulted in a report entitled *Three Minute Justice*. That was the average time a person spent before the court – with most cases disposed of at first appearance. This and numerous other NACDL reports on indigent defense and other topics are available at www.nacdl.org/reports. Is there “Three Minute Justice” happening in New York?
- Do you have courts that feature “meet and plead” practices?
- How much time do lawyers spend with their clients before entering a guilty plea?
- What is the percentage of cases disposed of at the first appearance?

These are the metrics that will tell you if you have quality representation.

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.”

How are you doing in that regard?

Do you have the robust participation of the private bar?

How do you support the assigned counsel plans?

Does Panel Administration have adequate staff to properly screen and recertify?

Are the lawyers receiving adequate training?

Is there a sufficient caseload to ensure that the panel attorneys maintain sufficient proficiency in criminal defense?

Many experts have written about the importance of maintaining such a hybrid system. It acts as a release valve to prevent over-burdening public defenders. It provides a natural constituency within the legal profession to advocate for adequate funding.

Support for private bar involvement, including seeing that the lawyers have access to training and resources, also ensures the availability of effective defense counsel to represent the many thousands who do not qualify for the appointment of counsel, but can only afford a modest sum for their representation. We need trained and effective lawyers to do that work. Without adequate opportunity for the private bar to participate in the indigent defense system, the entire defense bar suffers.

Principle 1: “The public defense function, including the selection, funding and payment of defense counsel is independent.”

The number one principle is independence. A public defense system must be independent from political influence. A non-partisan board should oversee defender, assigned counsel or contract systems to safeguard independence, promote efficiency and quality of services.

- Is that what you have here in New York?

As I mentioned earlier, the reason why many of us fought for independent oversight -was a deep concern about having the contracting authority serve as the arbiter of quality. It is an inherent conflict. The usual metric of success in most business models – cost per unit – translated into cost per cast – is a metric that leads to injustice, wrongful conviction and the denigration of human dignity. Finally, when the contracting authority is not independent and is subject to the vicissitudes of shifting political winds, it is uniquely ill-suited to assess quality.

The defense function – especially in a nation that has become addicted to the use of the criminal law to regulate all manner of social, economic and personal behavior – is too precious, and too fragile, and too important not to be independent.

See how your system measures up against these principles and you will have gone a long way toward assessing its true quality.

Thank you for the opportunity to share these insights, and, again, I congratulate you for caring about the quality of indigent defense.

**BRENNAN
CENTER
FOR JUSTICE**

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**Testimony of Nicole Austin-Hillery
Director and Counsel, Washington Office
Brennan Center for Justice at NYU School of Law**

**Before the
New York City Council Committees on Courts & Legal Services and Public Safety**

Regarding Indigent Criminal Defense Services

January 26, 2015

Good morning, Chairman Lancman and Chairwoman Gibson and members of the Committees on Courts and Legal Services and Public Safety. Thank you for the opportunity to provide testimony to the New York City Council on indigent defense reform on behalf of the Brennan Center for Justice at NYU School of Law. The Brennan Center is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from reducing mass incarceration to Constitutional protection in the fight against terrorism. Our work encompasses efforts at both the state and national levels. I have the distinct honor of serving as the Center's Washington Office Director where I work, among other things, on justice issues, including efforts to reform indigent defense. The Brennan Center works in collaboration with several national organizations in Washington, most notably with the National Indigent Defense Collaborative¹, in efforts to influence both the Executive and Legislative branches of government to improve our nation's indigent defense system.

We are pleased that the Committees on Courts and Legal Services and Public Safety are holding today's joint hearing on how New York City evaluates its provisions of indigent defense criminal

¹ The National Indigent Defense Collaborative (NIDC) is a coalition of legal organizations that have historically worked on advancing and protecting legal services to the poor through a combination of litigation and advocacy work. NIDC has, most recently, been overseen by the National Legal Aid and Defender Association. Its member organizations consist of several national organizations including, but not limited to, the Brennan Center for Justice at NYU School of Law, the National Association of Criminal Defense Lawyers, the NAACP Legal Defense and Educational Fund, Inc., and the American Civil Liberties Union.

services. I am here today to offer testimony regarding efforts to improve indigent defense at the federal level and to share recommendations and best practices for federal reform that may be useful to the Council as you consider changes to the City's indigent defense delivery system.

I. The Brennan Center Has Consistently Supported Efforts to Enhance and Improve Legal Services for the Poor

When the Brennan Center was founded almost twenty years ago, our Justice Program had as one of its main focuses, protecting legal services for the poor. The Brennan Center became involved with efforts to ensure adequate funding for indigent defense and worked on the national front to protect adequate funding levels for the Legal Services Corporation, the nation's single largest funder of civil legal aid for low-income Americans in the nation.² This dedication to advancing and protecting the right to counsel has continued throughout the Center's existence.

Our current Justice Program is focused on creating a rational and effective criminal and civil justice system that treats all people fairly and equally by reducing mass incarceration, closing the justice gap and ensuring racial equality within these systems. This work continues to encompass efforts to ensure adequate legal defense for the poor. The Brennan Center is alarmed at the fact that 80% of low income people have trouble obtaining legal representation or otherwise accessing the civil court system to protect their property, family and livelihood. As discussed in several Brennan Center reports, access to counsel has very real implications for individuals being processed in the justice system. In the criminal context, research suggests that socially vulnerable individuals more readily submit to assertions of government authority.³ This is particularly so with respect to people of color. Black suspects are more likely to feel coerced by the police compared to white suspects, less confident that their rights will be respected. Poor black and brown suspects similarly accede more quickly to government demands in the courtroom, such as pressures to plead guilty by prosecutors or judges. Without meaningful and adequate legal representation, socially vulnerable people are more likely to succumb to external pressures to plead guilty to offenses, regardless whether they committed the offense or not.⁴ Given such realities, the need for balanced and independent representation of individuals is critical. In order to close this "justice gap" the Brennan Center aims to improve the effectiveness of the civil justice system to better serve all.⁵

In late 2014, legal services advocates won a significant victory in the effort to ensure a defendants' Sixth Amendment right to counsel in *Hurrell-Haring v. State of New York*. Plaintiffs in this case argued that the New York counties provided inadequate representation to the indigent. In 2010, the Brennan Center filed an amicus brief in the case representing 62 prosecutors, including former Manhattan District Attorney Robert Morgenthau, former District Attorney Joseph Jaffe, and former U.S. Attorneys Zachary Carter, Robert Fiske, Jr., and John S.

² See <http://www.lsc.gov> for general information and a description of the Legal Services Corporation.

³ Jessica Eaglin, Danyelle Solomon, *Reducing Racial Disparities in American Jails* (2015), Brennan Center for Justice report to be released in February 2015.

⁴ *Id.*

⁵ See <http://www.brennancenter.org>

Martin. The brief explained that "the judiciary has a particularly strong duty to act here, where the alleged constitutional deficiencies threaten the integrity of the judicial system and its very capacity to render justice." The settlement reached in the case on October 21, 2014 offered remedies that are meant to fix the systemic flaws through the use of broad reforms.

The Brennan Center previously filed an amicus brief on behalf of the Florida Association of Criminal Defense Lawyers arguing that overworked public defenders should be allowed to refuse new case assignments when their caseloads become unmanageable. The brief argues defense attorneys have shown that excessive caseloads threaten to create "conflicts of interest" and deprives their current and former indigent clients of the effective assistance of counsel and that public defenders should therefore be entitled to limit further representation.

Currently, the Center is drafting a new report entitled "Reducing Racial Disparities in American Jails." This report examines the many factors that lead to racial disparities in our nation's jails and outlines a set of recommendations to help eliminate these disparities in our jails. Our findings show that one of the major contributing factors leading to this disparity is the lack of available legal counsel. For example, of the approximate 10 million misdemeanor cases filed every year, almost 25 percent of individuals charged go before a judge without a lawyer. Public defenders are guaranteed for all cases where a criminal defendant faces a term of incarceration. Nevertheless, counsel is physically or effectively denied due to court practices, overwhelming caseloads, and underfunded public defense systems.⁶ Our report will outline ways in which this problem can be combatted.

Finally, the Brennan Center continues to use our tools of advocacy, litigation and strategic communication to focus on representation of the poor with respect to the nation's foreclosure crisis. We recognize the crucial need for representation in the criminal context but also understand that many vulnerable Americans lose precious rights and protections due to lack of representation in civil proceedings. The nation's recent foreclosure crisis has stripped many economically challenged populations, particularly in black and brown communities, from the generational benefits of homeownership. We think that combatting these disparities due to lack of counsel is equally worthy of our attention. We continue to work to ensure access to legal services and improving court procedures in foreclosure cases.

These are just a few examples of the ways in which the Brennan Center works to help protect the interests of the poor whose access to representation is often severely limited.

II. National Efforts to Reform Indigent Defense Systems

The Brennan Center, along with our partners at other national advocacy organizations, has worked diligently to increase the national focus on indigent defense reform. Our goal of improving indigent defense, nationwide, was buoyed when Attorney General, Eric Holder, made clear at the start of his tenure that improving indigent defense would be one of his top priorities. This commitment was further enhanced when, in 2010, he created the Access to Justice Initiative

⁶ Jessica Eaglin, Danyelle Solomon, *Reducing Racial Disparities in American Jails* (2015), Brennan Center for Justice report to be released in February 2015.

within the Department of Justice and, at the same time, created a range of new grant programs meant to support indigent defense.⁷ We and our partners took the Attorney General's new found commitment to heart and began working diligently to capitalize on this moment of new found national focus on improving legal services for the poor. These efforts have manifested themselves in the creation of myriad reform recommendations.

First, as a result of the joint effort of several of the organizations that make up the National Indigent Defense Collaborative and other key groups that either provide or work to protect legal services, the Department of Justice formed an Indigent Defense Working Group. This group meets regularly with the Department of Justice to discuss what steps the Department is taking to improve indigent defense, what issues the groups want to bring to the Department's attention concerning areas that could benefit from Executive level support, and to discuss recommendations for indigent defense improvements. This direct access to the very decision-makers who oversee relevant grant programs and other mechanisms for supporting indigent defense is a crucial part of advancing the continued effort to ensure right to counsel for the poor.

Second, the national groups that work on efforts to protect and reform legal services for the poor have, and continue to, engage in efforts to meet and confer regularly about shared work and ideas. The range of groups involved in these efforts include, but are not limited to the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, the ACLU, the Constitution Project and the Public Defender Service of the District of Columbia, just to name a few. These regular meetings have resulted in developing a common set of issues around which the national groups can coalesce and, through our unified voice, we work jointly to press for reforms on the national level. These reforms, range from executive action, requests for assistance and support from the Department of Justice and proposed legislation. Similar collaborative efforts among stakeholders with similar interests can be beneficial on the local level as well.

III. Specific National Reform Recommendations and Strategies

As a result of the joint efforts of the national groups, a platform of recommendations is being advanced at the national level. Similar reforms may be useful as this body considers the best ways to improve indigent defense at the local level.

a. Assistance from the Department of Justice

The Department of Justice has been helpful by inserting support where needed on relevant cases. DOJ has done so by providing Statements of Interest in key cases such as the *Hurrell-Herring* case. DOJ's assistance on the state level has been tremendously helpful and there may be instances in which local jurisdictions will find it useful to request such assistance.

b. The Department of Justice Can Be Instrumental in Investigating Failing Systems

⁷ Eric Holder, *Defendants' Legal Rights Undermined by Budget Cuts*, The Washington Post, August 22, 2013.

Conducting investigations into failing systems is an important step that must be taken in order to pinpoint where problems exist. The national groups have requested DOJ intervention into particularly troubling matters at the state level. For example, DOJ has led investigations into failing juvenile court systems in several jurisdictions, such as St. Louis, MO and the state of West Virginia. Not only can DOJ be helpful through use of its investigatory power, but also the use of the DOJ bully pulpit can be equally instrumental. DOJ sets positive examples for the rest of the country by ensuring enforcement of the laws meant to protect the indigent.

c. Work to Ensure Support for Adequate Funding

Having adequate funding for indigent defense is crucial to ensuring as much legal representation for the poor is put in place in as many jurisdictions as possible. The national groups have focused a great deal of effort on encouraging DOJ to expand funding for indigent defense. These requests have not gone unanswered. During 2014, DOJ provided funding for the “Smart Defender” program to provide money for data collection and analysis. The national groups have also been focused on reforming those parts of large funding programs that we believe can work more effectively to support indigent defense. For example, we have requested that recipients of Byrne/JAG grant monies—the largest DOJ administered grant providing monies to law enforcement agencies throughout the nation—report on their coordination with affected agencies, including public defense agencies. We have also requested that DOJ support including indigent defense as one of the “re-investment” areas in the Justice Reinvestment Initiative.

The Brennan Center is particularly focused on reforming the Byrne/JAG grant program’s system of how the success of its grant recipients is measured. The Brennan Center released a report in November 2013 entitled “Reforming Funding to Reduce Mass Incarceration” which outlined a new proposal to reform grant funding of the nation’s largest criminal justice funding program to promote innovative crime reduction policies nationwide. This funding proposal, if adopted, would, among other things, help to ensure that grant recipients are using their dollars in ways that will help reduce mass incarceration, and this includes protecting the rights of the indigent.

All of these efforts have a huge impact on the overall effort to expand indigent defense funding and, ultimately, to provide a greater level of representation for the poor.

d. Ensure Leadership Roles Are Filled That Provide Support for Indigent Defense

Protecting and advancing the right to counsel goes far beyond ensuring adequate funding and investigating failing systems. In fact, it requires a panoply of approaches to tackle the problem. Among those approaches, it is imperative that individuals who recognize the importance of ensuring and protecting the right to counsel are placed in key leadership positions. This leadership is crucial to ensuring that the concerns of those who seek to ensure the promise of *Gideon*⁸ are heard and that their voices are a part of reform efforts. When the Access to Justice office at DOJ was in need of a new head, the national advocacy community was fully engaged with the Department of Justice and continuously pushed to ensure that this crucial leadership position would be filled as quickly as possible with someone who championed the right to counsel. Similarly, our efforts have focused on getting defender representation in key posts such

⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

as at the United States Sentencing Commission and with the National Commission on Forensic Science.

e. Legislative Issues

It is impossible to focus on indigent defense reform without considering the impact that the legislative process can have on the eventual outcomes. Using legislation as a tool to create needed changes is an important part of any effort to protect and advance legal services for the poor. On the national level, our collective groups have continued to support legislative efforts that will positively affect indigent defendants. During the 113th Congress, several pieces of legislation were closely followed by the advocacy community including: (1) The National Center for the Right to Counsel Act introduced by Rep. Deutch and (2) reauthorization of the Justice for All Act, sponsored by Sen. Leahy of Vermont. We are also focused on legislation that will reduce the effects of collateral consequences that are inherent in the criminal justice system, which disproportionately impacts those who find themselves in the system without proper and adequate representation. Legislation such as the bi-partisan REDEEM Act, introduced by Sens. Rand Paul and Cory Booker, is an example of such a vehicle.

IV. Conclusion

While many of the efforts that are ongoing on the national level are not necessarily transferrable to efforts that New York City may consider in its quest to provide appropriate indigent defense, they should serve as models for how varied approaches can reap significant benefits. Those of us working at the national level are always pleased when local jurisdictions are focused on ways to improve delivery of effective counsel to the poor. The Brennan Center, and our national partners, are available and look forward to serving as a resource as New York City continues to improve its efforts to provide representation to its most vulnerable population.

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 01/26/15

(PLEASE PRINT)

Name: Nicole Austin-Hillery

Address: ~~1000 Mass~~ 1140 Connecticut Ave., N.W., Suite 1150
Washington, D.C. 20036

I represent: The Brennan Center for Justice at NYU School of Law

Address: same as above

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THE CITY OF NEW YORK**

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☒ in favor ☐ in opposition

Date: 1/26/15

(PLEASE PRINT)

Name: Adele Bartlett

Address: 1 Centre St. 19th Fl

I represent: Office of Manhattan Borough Pres.

Address: same

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Date: _____

(PLEASE PRINT)

Name: Paulette Brown, President Elect

Address: 44 Whippary Rd, Morristown, NJ

I represent: The American Bar Association

Address: 321 N. Clark Street, Chicago, IL 60654

Please complete this card and return to the Sergeant-at-Arms

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Appearance Card

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Date: _____

Name: Lissa Schreibersdorf (PLEASE PRINT)

Address: Brooklyn Defender Services

I represent: 173 Crinington St, Bklyn

Address: _____

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☐ in favor ☐ in opposition

Date: _____

Name: Vincent Higgins (PLEASE PRINT)

Address: 1530 Penn. Ave

I represent: BRITE Leadership Coalition

Address: _____

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I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: _____

Name: Justine Luong - Legal Aid Society (PLEASE PRINT)

Address: 199 Water Street street

I represent: LAS - Criminal Defense Practice

Address: same as above

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Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 1/26/15

(PLEASE PRINT)

Name: William J. Leahy
Address: 500 Madison Ave, Albany NY 12208

I represent: NYS Office of Indigent Legal Services
Address: 80 S. Swan St. 29th Floor Albany
NY 12210

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Date: _____

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Name: JUSTINE OLDERMAN
Address: 360 E- 161st ST. BRONX NY

I represent: THE BRONX DEFENDERS
Address: _____

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(PLEASE PRINT)

Name: NORMAN L. REIMER
Address: _____

I represent: NATIONAL ASSOC. CRIM DEF LAWYERS
Address: 1660 L ST NW WASH. DC

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Date: _____

(PLEASE PRINT)

Name: CAROLYN P WILSON

Address: 225 Broadway NY NY

I represent: New York County Defender Servs

Address: 225 Broadway

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(PLEASE PRINT)

Name: Steven Zeidman

Address: CUNY Law School 2 Ct Sq LIC NY 114

I represent: _____

Address: see above

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Date: _____

(PLEASE PRINT)

Name: Jennifer Jack

Address: 1 Centre St, R1012N, New York, NY 10007

I represent: The Mayor's Office of Criminal Justice

Address: 1 Centre St R1012N, New York, NY 10007

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Appearance Card

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☐ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Kara Dansky

Address: One Centre St

I represent: Mayor's Office of Criminal Justice

Address: One Centre St

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