

**NEW YORK STATE BAR ASSOCIATION
COMMITTEE TO ENSURE QUALITY MANDATED REPRESENTATION
REPORT ON SHARING RESOURCES**

The State of New York was a pioneer in guaranteeing that persons at risk of losing their liberty or significant personal rights, such as parental rights, should have legal representation, and in providing free legal services to those unable to afford such representation. However, the quality of these legal services, whether provided by institutional providers such as legal aid societies and public defenders, or private attorneys through bar-association approved assigned counsel plans, has not always been what it should be.

In 2003, anticipating that the January 1, 2004 long-overdue increase in the fees paid to private assigned counsel might result in some counties replacing their assigned counsel plans with public defenders, then-NYSBA President A. Thomas Levin established the Special Committee to Ensure Quality of Mandated Representation, with the mission of “making recommendations to the Executive Committee with regard to proposed standards to guide counties in the development of plans for representation pursuant to County Law Article 18-B so that due consideration is given to providing quality representation to clients, controlling the counties costs and utilizing the talent of the private bar.”

The Special Committee was made a Standing Committee, and its mission statement was amended to provide a broader mandate. It now has the responsibility of “making recommendations to the Executive Committee, relevant to methods of providing

mandated representation, and undertak[ing] other activities ... that will further the goal of ensuring quality mandated representation.” Its most significant effort in carrying out that mandate was the drafting of Standards for Providing Mandated Representation (adopted in a revised form by the House of Delegates in June 2010), applicable to “legal representation of any person financially unable to obtain counsel without hardship who is (1) accused of an offense punishable by incarceration; (2) entitled to or is afforded representation under sections 249, 262 or 1120 of the Family Court Act, Judiciary Law section 35 including child custody and habeas corpus cases, Article 6-C of the Correction Law, section 407 of the Surrogate’s Court Procedure Act, section 259-i of the Executive Law or section 717 of the County Law; or (3) otherwise entitled to counsel pursuant to constitutional, statutory or other authority” (“mandated representation”).

Most recently, the Committee was charged with “generat[ing] a report discussing methods of sharing resources between providers of mandated representation; addressing any legal impediments thereto; proposing model agreements and programs; and identifying efforts that successfully promote the sharing of resources.” This report seeks to fulfill that mandate. Our recommendations are informed by the findings of the Commission on the Future of Indigent Defense Services, created in May 2004 by then-Chief Judge Judith S. Kaye (the “Commission”) to examine the effectiveness of representation of the poor and consider alternatives. To assist it, the Commission hired The Spangenberg Group, a well-respected, nationally-known consultant in the area of civil and criminal legal services. Its 2006 report, “Status of Indigent Defense in New York:

A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services," documented the serious deficiencies in the provision of services.

The Commission and The Spangenberg Group noted that these deficiencies can be attributed to the fragmentation of our indigent defense system and insufficient funding:

New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused.

Commission on the Future of Indigent Defense Services, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006), p.15.

New York's indigent defense system is in a serious state of crisis. The "system" is a patchwork composite of multiple plans that provides inequitable services across the state to persons who are unable to afford counsel. Since 1965, sixty-two counties have created their own systems that suffer from a lack of uniformity, oversight and an acute and chronic lack of funding.

Spangenberg Group, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES (2006), p. ii.

With its large number and variety of local defense providers, the system's fragmentation makes it difficult, if not impossible, to determine even the number, cost and outcome of cases, let alone to establish representation standards and performance accountability. Underfunding often leads to excessive caseloads, absence of essential support services such as training, and even to lack of access to counsel at critical stages of proceedings.

To correct the existing systemic problems the Commission recommended that the delivery of indigent defense services in New York State should be restructured to insure

accountability, enforceability of standards, and quality of representation by establishing a statewide defender office consisting of an Indigent Defense Commission, a Chief Defender and Regional Defender and Local Defender Offices, a Deputy Defender for Appeals, and a Deputy Defender for Conflict Defense. Commission on the Future of Indigent Defense Services: FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006) p. 27.

On June 30, 2007 the House of Delegates promulgated a resolution endorsing the recommendations of the Commission and urged the New York State Legislature to set aside adequate funding to establish the creation of an Indigent Defense Commission. Several years passed, and it was not until 2010 that the Legislature created the Office of Indigent Legal Services (“ILS”) “... to monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the County Law ...”. Executive Law section 832(1).

The State Bar views the creation of ILS as a step in the right direction toward establishing an independent indigent defense commission with broad powers to adopt standards, evaluate existing programs and service providers, and generally supervise the operation of New York’s public defense system.

The Legislature gave ILS two critical tools for addressing the fragmentation and underfunding of the defense system. Among the office's duties and responsibilities are:

- (e) to develop recommendations to improve the delivery of such services in a manner that is consistent with the needs of the counties, the efficiency and adequacy of the public defense plan operated in the counties and the quality of representation offered, which may include receiving applications for and distributing grants pursuant to specified criteria;

(g) to target grants in support of innovative and cost effective solutions that enhance the provision of quality indigent legal services, including collaborative efforts serving multiple counties...

Executive Law §832 (3).

ILS is charged with the distribution of the funds in the Indigent Legal Services Fund, which are available to counties to improve public defense services by supplementing local funds used for such services. During FY 2012-13 ILS will be making available a certain percentage of those funds (approximately \$8.1 million) to counties for grants targeted to specific new programs and ILS will distribute an additional \$35 million in a competitive bidding process.

In conversations with members of this Committee, ILS Director William Leahy has expressed his support for the concept of resource-sharing as a cost-effective way of improving representation. He also understands the fiscal concerns of County governments. We believe ILS will provide financial support for worthy resource-sharing proposals and offer our recommendations concerning the parameters of such proposals in response to the expected Requests for Proposals (RFP).

The Committee recommends that ILS invite local defense services providers¹ to develop joint resource sharing agreements, These agreements would permit defense providers to identify and address local needs and quality of representation goals while building on the strengths of each provider. ILS would then award grants to fund aspects of the agreements that improve representation, but which the providers cannot afford.

¹Defense services providers include county governments, defender offices, legal aid societies, assigned counsel programs, conflict defender offices, and bar associations.

An important purpose of resource sharing agreements would be to encourage innovative responses to circumstances best known to local providers. The Committee believes that the resource sharing recommendations set forth below may be an effective means of stretching scarce financial resources among the counties.

General Principles Applicable to Any Resource Sharing Agreement

The Committee recommends that each proposed resource agreement should address the following matters:

1. Needs and Goals – identify the local service providers’ needs and the quality of representation issues the agreement seeks to address, including, but not limited to: (a) ensuring access to counsel at each critical stage of the proceedings; (b) establishing minimum qualification criteria for attorneys handling misdemeanors, lesser felony offenses and serious felony offenses e.g., rape, homicide, violent assaults; (c) monitoring of attorney performance; (d) development of a mechanism to ensure adherence to accepted representation standards; and (e) provide for appropriate attorney training and experience.
2. Services to be provided – each resource agreement should specify the services: (a) legal representation at trial and/or appeal; (b) support services, including continuing legal education; mentoring; second chairing; case consultation and legal research; and/or access to investigators and experts; and (c) administrative and management services, including: consultation on

- representation plan design; coordination of counsel assignments; administration of attorney qualifications, re-certification, performance assessment, and complaint resolution procedures; administration of client financial eligibility assessment; and review of voucher and billing procedures.
3. Operational Structure – each proposed agreement should describe the structure for providing the shared services. Operational structures could include: (a) joint agreements where a defense agency agrees to provide assigned counsel services for another county; (b) multi-county agreements where an established defense agency provides an array of identified defense services for two or more counties; or (c) regional agreements where a new agency or office would be established to provide identified defense services within a regional catchment area.
 4. Standards – each proposed agreement should include measures to ensure that the shared resource services comply with relevant provisions of the New York State Bar Association’s Standards for Providing Mandated Representation.

Suggested Resource Sharing Initiatives

Assigned Counsel Plans

The Spangenberg Report identified many areas of New York State in which some assigned counsel plans did not ensure that panel attorneys adhered to minimum standards of quality representation. Among other concerns, panel programs (1) had no or superficial procedures for determining the qualifications of panel attorneys, whether at the

time of initial appointment or during their service; (2) provided limited if any training or continuing supervision; (3) had inadequate record-keeping systems; (4) were unable to provide counsel at arraignments; (5) had inadequate resources for assisting clients on appeals or in post-conviction proceedings.

Assigned counsel plan providers should explore these possibilities:

1. An assigned counsel plan could establish a joint agreement with a defense agency in another county. For example, a comprehensive county bar association assigned counsel program might provide the assigned counsel plan in an adjacent county with introductory and continuing legal education resources, and consultation on attorney qualification, re-certification, and performance assessment policies and procedures.

2. Assigned counsel plans in different counties could establish a multi-county agreement with an established defense agency. For example, a county's legal aid society might provide adjacent counties with appellate and post-conviction representation, as well as case consultation and legal research support for trial counsel.

3. Assigned counsel plans in a designated area could enter into a regional agreement for the establishment of a central agency or office to provide assigned counsel services. For example, defense agencies in a single judicial district might establish a regional legal aid society to provide appellate representation, coordinate inter-county assigned counsel representation at arraignment, offer case consultation and legal research support for assigned counsel, develop

introductory and continuing legal education programming, and assist counties and bar associations in developing and implementing representation plans.

Appeals

The NYSBA Standards for Providing Mandated Representation call for the competent performance of specific tasks by appellate attorneys. Standard I-1 through I-10. In order to satisfy these standards, appellate attorneys, like trial attorneys, must have initial and continuing legal education, training and supervision, and adequate staff. See, e.g. Standards F-1, F-2, G-2, J-1, and J-5. In addition, fully effective representation for appellate clients may require representation in post-conviction matters as well. See, Standard I-10.

The Spangenberg Report found that mandated providers have inadequate staff and resources to handle their appellate caseloads. The Committee's own examination confirmed that this is the case and that some mandated providers have no appellate capability at all. Mandated providers should explore these possibilities:

1. Joint agreements, where a defense provider represents all the appellate defense clients of another county.
2. Multi-county agreements, where an established defense agency represents appellate defense clients of several counties.
3. Regional agreements, where a new agency or office is established to represent appellate defense clients of the counties in the region.

Support Services

NYSBA's Standards for Providing Mandated Representation recognize that quality representation requires that institutional defenders and assigned private attorneys have available to them support services such as investigators, experts, social workers, mental health professionals, and interpreters, a listing that is intended to be representative and not exclusive. See Standards H-1, H-5. Yet The Spangberg Group documented that these standards are not being met. Some institutional providers have no or too few investigators, social workers, interpreters and experts, whether on staff or available by contract. Assigned private counsel often find judges reluctant to authorize the expenditure of public funds, whether on their own initiative or due to pressure from funding authorities, for assignment of investigators, social workers, interpreters and experts.

It may not be practical for each institutional provider to employ enough support services personnel to satisfy the needs of all its attorneys on all its cases or to obtain needed services on a contract basis. And we anticipate that assigned private attorneys will continue to face resistance from judges to their requests for assignment of support services.² The need can be filled by cooperative programs with existing institutions.

Mandated representation providers should explore these possibilities:

1. An individual provider or group of providers could develop cooperative relationships with universities, medical schools, colleges, or community colleges with social work, forensic, language or medical programs. These relationships

²The problem of attorneys, whether plan participants or institutional defender employees, who do not request services that would be available must be dealt with through training and supervision.

could include internships (with course credit) for modest or no pay, or clinics sponsored by the educational institution. Educational institutions could also provide training to staff support services personnel to increase their efficiency.

2. An individual provider or group of providers could develop (possibly in cooperation with the court system) an "approved" list of providers of support services willing to work at Article 18-B rates. Administration of the list could be provided by an existing staff person(s) or a new person(s) with the responsibility of recruiting persons interested in being on the list, getting enough information (CVs, recommendations from attorneys) to provide some comfort concerning the individual's competence, updating the list, dealing with complaints, etc. The court system's participation should eliminate judicial resistance.

3. A regional office could be established with staff available to a group of providers in some or all areas of support services.

4. Offices and plans could utilize existing established translation and interpreting services to assist with oral and written communications between attorney and client/client family with limited English proficiency.

Training

Standard F of NYSBA's Standards requires that all attorneys and staff providing mandated representation receive continuing legal education and training in skills, substantive and procedural law, and ethics through affordable programs and public funds so all attorneys and staff can attend such programs.

The Spangenberg Report documented that many institutional providers have inadequate training programs and training is virtually non-existent for assigned counsel panel attorneys. Our own survey revealed that the existing programs are not easily available or affordable for all attorneys and the only publicly funded programs are provided to attorneys for the child by the various Appellate Divisions. Mandated representation providers should explore these possibilities:

1. Mandated providers could negotiate for group CLE rates with bar associations, the New York State Defenders Association, NITA or other formal training programs.

2. Mandated providers in smaller counties could develop training agreements with larger nearby counties to allow staff or panel attorneys to attend training programs provided by larger providers.

3. ILS should develop a comprehensive training curriculum for all new attorneys hired at an office that does not have a formalized training/orientation program.

Conclusion

The Committee seeks adoption of this report and its recommendation, and active advocacy by NYSBA for resource sharing arrangements targeting mandated providers, and other relevant parties. In particular, NYSBA should strongly urge ILS to provide substantial financial incentives to providers who enter into sharing arrangements or provide resources on a more than single county basis.

Respectfully Submitted,

Committee To Ensure Quality of Mandated Representation