

Analysis of The Indigent Legal Services Fund Maintenance of Effort Provisions

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Introduction: The Indigent Legal Services Fund is intended to improve the quality of public defense services in New York State

Of all the rights that individuals have relating to the judicial system, the right to counsel may be the most important, for it affects the ability to assert all other rights.¹ Yet, New York State's current public defense system often fails to ensure the constitutional and statutory right to effective legal representation.² This paper focuses on one statutory provision relating to the right to counsel – the portion of the State Finance Law establishing and governing the Indigent Legal Services Fund³ (ILSF). In particular, this paper addresses whether the intent of that provision to improve the quality of public defense services⁴ is being met.

Public defense in New York State: Article 18-B and NYSDA

In 1965,⁵ New York State delegated to counties (and New York City)⁶ its constitutional and statutory obligations to provide public defense services to individuals who cannot afford to hire a lawyer in criminal and certain family court and other matters.⁷ Over the years, the county-by-county system developed severe problems. Despite the best efforts of hard-working public defense lawyers, the best intentions of many county officials, and a large amount of local taxpayer dollars, justice was failing on many fronts. The Legislature recognized a need to improve the system in 1981 by contracting with the New York State Defenders Association (NYSDA)⁸ to establish the Public Defense Backup Center. Unique in the nation, the Backup Center provides research, training, and technical assistance to the many public defense programs and lawyers across the state.

NYSDA provides this paper pursuant to its contractual duty to “review, assess and analyze the public defense system, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities.”

The assigned counsel fee crisis at the turn of this century

An intense public defense crisis developed in New York State during the 1990s. The crisis was due in part to the long stagnation of statutorily-set fees for lawyers assigned on a case-by-case basis to represent public defense clients. Experienced lawyers ceased offering public defense services, creating case backlogs, leaving clients without lawyers, and disrupting the entire judicial system.

A series of reports on problems in the public defense system that obstructed the right to counsel followed. Among entities examining the problems were *The New York Times*, the Unified

¹ See, *United States v. Cronin*, 466 U.S. 648, 654 (1984): “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 [1956]).

² See, e.g., *Final Report to the Chief Judge of the State of New York, Commission on the Future of Indigent Defense Services (Final Report to the Chief Judge)*, published by the New York State Unified Court System (June 18, 2006).

³ State Finance Law §98-b.

⁴ See, State Finance Law §98-b (3)(a) and (4)(b).

⁵ Following the landmark right-to-counsel cases *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *People v. Witek*, 15 N.Y.2d 392 (1965).

⁶ In this paper, the terms “county,” “counties,” “locality,” and “localities” are used to mean one or more of the local governmental entities, including New York City unless noted otherwise, to which the State has delegated its duty to provide counsel to eligible individuals.

⁷ See, County Law Article 18-B.

⁸ The New York State Defenders Association (NYSDA), a not-for-profit, membership organization, has been providing support to New York's criminal defense community since 1967. Its mission is to improve the quality and scope of publicly supported legal representation to low income people. www.nysda.org.

Court System, a committee of the Appellate Division, and NYSDA. The solutions proposed included, minimally, an increase in assigned counsel fees and an infusion of state money to pay for it, with some type of oversight to ensure that the crisis would abate and the quality of public defense services would improve.⁹

In 2003, this crisis finally resulted in legislation raising the fees.¹⁰ In that statute, the State provided for the first time a dedicated state fund, administered by the Office of the State Comptroller, to assist localities in meeting the duty to provide counsel that had long ago been delegated to them by the State.¹¹ Nonetheless, three years later a blue-ribbon group created by then-Chief Judge Judith S. Kaye (the Kaye Commission) found New York’s public defense system to be “an on-going crisis.”¹²

The Indigent Legal Services Fund and its Maintenance of Effort provisions

On May 15, 2003 the New York State Legislature overrode the Governor’s veto of the budget bill containing the provisions that are the subject of this paper. As a result, assigned counsel fees increased effective January 2004 and distribution of state funds to localities from the ILSF began in 2005.

The mechanism for providing some state money to localities for public defense involved creating revenue streams¹³ and designating money accrued from these streams to be placed in the

⁹ Following a series of articles in 2001, the *Times* editorialized in favor of an assigned counsel fee increase but stated that money was not enough: “Lawmakers ought to provide for a strong state role – preferably through a politically insulated commission – in setting quality standards for defense services, including . . . vigorous oversight to make sure those standards are met.” *The New York Times* (April 12, 2001), “Drive-by Legal Defense,” p. A28.

NYSDA had made a similar call. NYSDA, *Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services (Resolving the Assigned Counsel Fee Crisis)* (2001).

The Appellate Division committee report said: “It is time for the New York State Legislature to reconsider the entire legislative structure relating to governmentally funded legal representation of the poor.” We are convinced that there is a compelling need for an institutionally grounded oversight commission [for NYC] to ensure that issues relating to the delivery of legal services to the poor are not permitted to be neglected, but rather are advanced in an aggressive and professional manner.” Committee on the Legal Representation of the Poor, “Crisis in the Legal Representation of the Poor: Recommendations for a Revised Plan to Implement Mandated Governmentally Funded Legal Representation of Persons Who Cannot Afford Counsel” (March 2001).

The Unified Court System’s report in 2000 had focused more narrowly on the effect of low fees. Its report calling for an increase in fees recommended the creation of a bi-partisan commission to review fees on an ongoing basis. The commission was envisioned as including members appointed by the Governor, the Legislature, and the Chief Judge, as well as representatives designated by other funding entities. At the time the bill under discussion here passed in 2003, the Unified Court System was scheduling a summit on public defense services. A list of issues exemplifying what was then characteristically wrong with the system was prepared for court administrators. The long list of problems, ranging from “[h]igh caseloads and the concomitant interference with quality representation” and the need for “[d]efense involvement and participation in criminal justice system planning” is instructive. It will be revisited in the Proposal at the end of this paper (p. 14).

¹⁰ Laws of 2003, ch. 62, Part J.

¹¹ Other aspects of the statute, including creation of the Legal Services Assistance Fund by State Finance Law §98-c, are not relevant here.

¹² See, *Final Report to the Chief Judge*, p. 5, *supra* at footnote 2.

¹³ These streams came from two agencies and included an increase in attorney registration fees, fees to be paid before suspension of driving privileges can be lifted, certain mandatory Department of Motor Vehicles surcharges, and an increase in the fee charged by the Office of Court Administration for criminal history searches and searches of other electronic databases:

\$10 Increase	DMV	Mandatory Surcharge Parking Violations
\$35 Fee	DMV	Terminating License Suspension
\$50 (of \$350) Fee	OCA	Attorney Biennial Registration Fee
\$27 (of \$52) Fee	OCA	Criminal History Record Search

ILSF. Funds from the ILSF were then distributed to counties and New York City¹⁴ according to a formula based on the amount of local funds spent for public defense services.¹⁵ As noted above, the statute said that ILSF money was intended to improve the quality of those services.¹⁶ In the words of Assembly Judiciary Committee Chair Helene E. Weinstein, ILSF expenditures were supposed to “...result in real improvements in the quality of the public defense system in New York.”¹⁷

The new law included creation of a task force to review the sufficiency of assigned counsel rates.¹⁸ That measure sunsetted on June 30, 2006 without the appointment of task force members, the required study, or any report assessing quality of public defense services following enactment of the legislation.

Critical to the 2003 statute are its Maintenance of Effort (MOE) provisions.¹⁹ These provisions are intended to ensure that state money flowing to localities from the ILSF was used to improve quality of public defense services, not supplant local spending.²⁰ The legislation creating the ILSF requires localities to submit reports to the State Comptroller about their expenditures for public defense, noting which funds are local, state, federal, or private.²¹ These reports provide the information used by the State Comptroller in determining localities’ compliance or non-compliance with the MOE provisions.²²

The MOE provisions require that counties’ annual local spending for public defense services equal or exceed the prior year’s local spending. Counties that do not meet this threshold are required to demonstrate how state money provided through the ILSF had been used to improve quality. The statute states that whether there had been quality improvement is to be demonstrated by consideration of:

- “the expertise, training and resources made available to attorneys, experts and investigators providing such services;
- the total caseload handled by such attorneys, experts and investigators as such relates to the time expended in each case and the quality of services provided;
- the system by which attorneys were matched to cases with a degree of complexity suitable to each attorney's training and experience;

¹⁴ The first \$25 million collected in the ILSF each year is used to reimburse the State for money expended on the Law Guardian program (*see*, State Finance Law §98-b (3)(a)) and is not included in this discussion of ILSF provisions.

¹⁵ The fund operates under the joint control of the Office of the State Comptroller and the Commissioner of Taxation and Finance. The State Comptroller administers the ILSF and makes annual distributions to New York counties (including New York City) based on proportional shares of total local funds expended on public defense representation statewide.

¹⁶ “All such state funds received by a county or city shall be used to improve the quality of services provided pursuant to article eighteen-B of the county law.” State Finance Law §98-b(4)(b).

¹⁷ *New York Law Journal*, January 16, 2004, p. 4.

¹⁸ Laws of 2003, ch. 62, §13.

¹⁹ State Finance Law §98-b (4).

²⁰ “State funds received by a county or city . . . shall be used to **supplement and not supplant** any local funds which such county or city would otherwise have had to expend for the provision of counsel and expert, investigative and other services pursuant to article eighteen-B of the county law.” [emphasis added]

²¹ County Law §722-f(2).

²² As noted *infra* at footnote 42, the information in reports filed with the State Comptroller sometimes differs from the information filed with the Office of Court Administration, demonstrating a need for improved state oversight.

- the provision of timely and confidential access to such attorneys and expert and investigative services; and
- any other similar factors related to delivery of quality public defense services.” [Bullets added.]²³

This paper discusses the implementation and effect to date of the MOE provisions, both the budgetary “look-back” or threshold test and the requirement that those failing the threshold test show that they used ILSF funds to improve quality. Additional details are contained in Appendix A.

NYSDA’S 2008 *Preliminary Data Analysis*

In 2008, NYSDA published *How the Indigent Legal Services Fund Functions: A Preliminary Data Analysis*.²⁴ That publication examined available data such as overall net local expenditures and ILSF distributions, and sought to identify trends (see, Appendix B) and determine whether any conclusions could be drawn by comparing the existing data in a variety of ways. While demonstrating that the overall ILSF allocation had increased 49.26% from 2005-2008 and total net local expenditures had increased 25.71% from 2002-2007, NYSDA’s review concluded that no overall data-based judgment could be made about the effectiveness of the ILSF in promoting quality:

*If ILSF is driving quality, the data cannot reveal it. Similarly, if counties are supplanting or avoiding quality improvement, the data cannot prove that.*²⁵

The preliminary analysis also sought to determine what would happen if proposed changes were made to the MOE provisions. Changes had been suggested in early 2008 after nine counties (Albany, Allegany, Delaware, Fulton, Genesee, Herkimer, Rockland, Washington, and Yates) were shown to be at risk of losing ILSF funding,²⁶ having failed to reach the threshold level of the prior year’s local spending.²⁷ NYSDA examined in detail the data available on those nine counties.

Two changes were then under discussion. One was an alternate, more lenient MOE threshold standard. The second was a change in the penalty for MOE noncompliance, in the hope that at least some funding could be provided to the counties in question.

The proposed MOE threshold change was to use a three-year averaging test as opposed to the one-year look-back. The failing counties would be allowed to average their local spending from 2004-2006 and compare that average to their 2007 spending. If the 2007 spending equaled or surpassed the average spent in the three prior years, counties would be allocated the entire amount of their ILSF distribution.

²³ State Finance Law, §98-b (4)(c)(ii).

²⁴ New York State Defenders Association, *How the Indigent Legal Services Fund Functions: A Preliminary Data Analysis (Preliminary Data Analysis)* (April 28, 2008).

²⁵ *Id.*, p. 1.

²⁶ The Legislature provided time to consider these changes by passing on March 31, 2008, the annual date for distribution of ILSF funds to counties, legislation reserving the amount that would have been distributed to the nine counties on that date had they been in compliance. Laws of 2008, Ch. 39, §1(c). Without this legislation, these funds would have been distributed among the MOE-compliant counties.

²⁷ Thirteen counties were originally at risk of losing their ILSF allocation for failure to meet threshold local spending. Ulster and Warren counties resubmitted their ILSF reports and showed additional spending, therefore their 2007 local spending exceeded 2006 spending. Columbia County justified its 2007 local spending to the satisfaction of the State Comptroller; however, its 2007 local spending did not exceed 2006 spending. Madison County demonstrated that its 2006 local spending had been over reported. Its 2006 local spending amount was amended and 2007 local spending exceeded the amended amount. This amendment was accepted by the Comptroller.

The arguments for this change included the need to make some provision for unpredictable or one-time events (changes in crime rates or an unusually lengthy and complex felony trial, for example) and to allow for counties that “streamlined” or made more efficient their provision of public defense services. These points failed to take into account an important consideration: the deplorable state of public defense at the time the ILSF began operating. County systems unable to comply with all or most of the American Bar Association’s *Ten Principles of a Public Defense Delivery System* (2002)²⁸ or other standards for public defense representation could and should reinvest any funds saved through efficiencies in upgrading other aspects of their public defense system.

NYSDA’s preliminary analysis showed that only two of the nine counties (Albany and Fulton) would meet the three-year averaging test being proposed to replace the existing look-back to the prior year. The remaining seven counties would still fail, with Rockland County failing to exceed the three-year average by more than \$400,000.

The legislative proposal under consideration at the time of NYSDA’s preliminary analysis would also have made the penalty for the failing counties more lenient. Those counties would lose only a portion of their 2008 ILSF allocation rather than the entire amount; they would be penalized based on how much of their 2007 ILSF allocation could not be justified as having been used to improve the quality of public defense within their county.²⁹

At the time of NYSDA’s analysis, it was not known how much of each county’s 2007 ILSF distribution could be justified as having been used for quality improvement. Therefore an assumption was made, solely for the purposes of the analysis, that none of the counties’ use of their ILSF distribution could be justified. This was done to identify the maximum amount of ILSF money that could have been lost by each county under the proposal.

As an example under this analysis, Rockland County’s \$3,054,647 in 2007 local spending (1.13% of overall state net local expenditures) would have been reduced to \$2,157,242 if it could not show that they spent any of the \$897,405 received from the ILSF in 2007 on quality. Instead of receiving \$866,024 in 2008 ILSF money, under this proposal Rockland County would have received \$611,600, for a loss of 29% in ILSF money.

Legislative intervention and final distributions in 2008

Following the publication of NYSDA’s preliminary analysis, the counties continued to work with the State Comptroller to show compliance with the MOE. Eventually, legislation was passed affecting the 2008 ILSF distribution only.³⁰ For that year, a three-year averaging test was used to determine if counties had reached the MOE threshold test, and a penalty of only partial loss of the ILSF distribution was imposed on those who did not.

In the end, four counties³¹ resubmitted their ILSF reports and showed additional local spending not included in their initial reports. The additional expenses pushed 2007 local expenditures above 2006 spending and these counties received their full 2008 ILSF distribution. Albany and Fulton received their entire 2008 allocation because they passed the three-year averaging test.

²⁸ See, e.g., The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services Final Report* (2006), p. ii, referring to the *Ten Principles*.

²⁹ Counties failing to meet the MOE threshold were required to complete Part II of the ILSF Report to the State Comptroller, describing how 2007 ILSF money had been used to improve quality. Counties had to attach specific dollar amounts to quality improvements undertaken in 2007.

³⁰ Laws of 2008, Ch. 108 (Introduced on May 28, 2008, passed on June 3, 2008, and deemed effective May 30, 2008.)

³¹ Delaware, Genesee, Herkimer, and Yates.

Allegany, Rockland, and Washington counties were each penalized for failing to reach the MOE threshold.³² The penalty varied from the proposal under discussion at the time of NYSDA's preliminary analysis. That proposal would have penalized the counties based on how much of their ILSF money they had failed to use for quality improvements. The enacted 2008 law provided that failing counties receive a distribution reduced by looking at how much their 2007 local spending failed to exceed their 2006 local spending.³³ While this formula had no substantive relationship to failure to spend state funds for the statutorily-required purpose, it provided the counties with more money than the original proposed change would have. As an example, Rockland County's 2007 local spending decreased 11% compared to 2006, and their ILSF distribution was reduced accordingly, from \$866,024 to \$771,120. This 11% loss was substantially less than the predicted 29% loss under the initial proposal to link penalty to failure to use ILSF money to improve quality.

The ILSF Maintenance of Effort provisions: A current analysis

Since its 2008 preliminary analysis, NYSDA has continued to look at the workings of the ILSF and specifically its MOE provisions. Here, we present an analysis of the MOE provisions, how they have been administered, and their effectiveness in improving the quality of defense services provided by the localities.

We conclude that the administration of the ILSF statute has yielded:

- no information about how most ILSF funds have been spent,
- little information about whether localities are maintaining, much less improving, the quality of their public defense services, and
- little or no evidence that existing provisions are sufficient to guarantee that ILSF funds are used to improve the quality of public defense services as is statutorily required.

The MOE threshold test: Flawed in theory and in practice

The MOE threshold provision, intended to prevent use of ILSF money to supplant local spending, may have encouraged some counties to maintain their local public defense spending. However, as a mathematical proxy for determining that localities have not allowed the quality of public defense services obtained with local funds to decline, the threshold provision exhibits at least two serious failings.

First, by meeting this test, counties avoid any examination of how they spend the state money they receive from the ILSF. The result is that the State has disbursed a large amount of state funds since the ILSF was created but has no idea what that money actually bought. It is impossible to know whether the mathematical proxy has helped to assure quality or not.

Second, enforcement of the MOE threshold provision has failed to produce any data regarding the quality of public defense services.

The threshold test results in limited oversight of county spending of ILSF monies

Counties are not required to account for how they spent their ILSF distribution unless they spend fewer local funds than in the prior year. What this has meant in practice is that the State Comptroller has examined the spending of ILSF money in a very limited number of instances.

³² As is discussed further at footnote 68, *infra*, the withholding of funds from Washington County is emblematic of the negative aspects of the fiscal penalty imposed for MOE noncompliance.

³³ The law stated that failing counties were to receive "the amount such county would have received had such county met the [threshold test] less the value of the percentage decrease in local funds... expended by each such county in the calendar year [2007] as compared to the calendar year [2006]."

Since ILSF reporting began, twenty-three counties have submitted initial ILSF forms that reflected a decrease in local spending. Of those, ten then submitted new data which showed local expenditures had increased, thereby avoiding examination of their ILSF spending. Two more counties avoided examination of their ILSF spending due to the averaging test legislatively mandated for the 2008 distribution. Only eleven counties have therefore been required to submit data on how they had spent their ILSF monies since distributions began.

Put in context, this means that of 174 submissions by localities in a three-year period, only eleven have resulted in any scrutiny of ILSF monies. Overall, those counties subject to scrutiny had received disbursements from the ILSF totaling \$2,507,537, an amount equal to only 1.44% of total ILSF disbursements across these three years. Localities have never been required to describe how the remaining \$171,030,230 has been spent (see Table 1).

Table 1: Oversight of ILSF spending

Year	Total ILSF distribution	Counties providing ILSF spending data	ILSF distribution to counties providing spending data	ILSF funding unreviewed	% of ILSF distribution accounted for
2005	\$51,551,719	0	\$0	\$51,551,719	0.00%
2006	\$54,221,048	7 ³⁴	\$1,138,491	\$53,082,557	2.10%
2007	\$67,765,000	4 ³⁵	\$1,369,046	\$66,395,954	2.02%
Total	\$173,537,767	11	\$2,507,537	\$171,030,230	1.44%

Additionally, it should be noted that of the eleven counties providing data, six were adjudged to have failed to account for their ILSF distribution sufficiently, resulting ultimately in their failure of the MOE test. Of the \$2,507,537 in ILSF funds received by counties that was subjected to some level of scrutiny, only a fraction was ever accounted for as having been used to improve quality.

County reports submitted this year can be anticipated to reveal no greater information on how last year's \$76,944,550 was spent. In other words, despite the ILSF reporting requirements and the requirement that ILSF funds be used to improve quality of public defense representation, the State knows almost nothing about what it has gotten for its quarter-billion dollar outlay to date.

The threshold test results in no evaluation of whether local spending maintains quality

When New York State delegated to its localities operational responsibility for providing public defense services, it delegated full fiscal responsibility to them as well.³⁶ Perhaps for that reason, the State retained only negligible oversight of defense services.³⁷ And even that trace of

³⁴ Clinton, Greene, Hamilton, Ontario, Schoharie, Seneca, and Wayne counties.

³⁵ Allegany, Columbia, Rockland, and Washington counties.

³⁶ The hope of then-Governor Rockefeller and others that state "revenue-sharing" funds would prevent fiscal harm to localities (see, Approval Memorandum, reprinted in *McKinney's 1965 Session Laws of New York*, p. 2117) obviously proved illusory.

³⁷ County Law §722 requires the governing body of every county and New York City to "place in operation throughout the county a plan for providing counsel..." When a locality chooses to provide representation through use of an assigned counsel plan of a local bar association, that plan must be submitted to the State (OCA). County Law §722(3). Public defense programs of all types are statutorily required to submit annual reports to the judicial conference. County Law §722-f(1).

oversight, in practice, has been largely ignored. The report of the Kaye Commission tacitly acknowledged that review of whether assigned counsel programs operated pursuant to the requisite written plan had been lacking.³⁸ In a lawsuit against the State and five counties for failure to provide constitutionally adequate public defense services, the New York Civil Liberties Union has noted the State's lack of oversight.³⁹

As noted earlier, the legislation creating the ILSF did add a requirement that localities submit reports to the State Comptroller categorizing their expenditures as local, state, federal, or private.⁴⁰ This provides information for determining whether or not localities have complied with the MOE provisions. But these ILSF reporting provisions have not been used by the State Comptroller to gather information about the quality of the public defense services being rendered. NYSDA believed at the time that the ILSF statute was passed that the State Comptroller was obligated by the statute to examine the quality of public defense representation. In our view, a fair reading of the provision that "all... state funds received by a county or city shall be used to improve the quality of services..." made quality the overarching guide to the expenditure of ILSF funds.⁴¹ The State Comptroller adopted a much narrower view of the oversight required by the ILSF statute, and limited the information sought from localities accordingly. Among the results has been a continuing lack of reliable data about public defense services in New York State.⁴²

The way the MOE provisions have operated has served to undermine their intended purpose: to provide incentives to increase the quality of public defense by maintaining local expenditures and using ILSF money only for improvements. Of the twenty-three counties that have at some point submitted data indicating they were in breach of the MOE threshold requirements, not one has ever suffered the statutory penalty: the total loss of ILSF funding for a year.

Since the MOE provisions came into force in 2005, the 57 counties and New York City have been assessed for MOE compliance in three years – 2006, 2007, and 2008 – for a total of 174 assessments as noted above. Ultimately, on only six occasions have localities failed (see Table 2).

³⁸ An appendix to the Kaye Commission's final report, setting out interim proposals for improving public defense quality while awaiting creation of an independent public defense commission overseeing a statewide public defender system, called for, among other things, "immediate steps to ensure that, in accordance with County Law section 722(3), every existing county bar association assigned counsel program in the State is operated pursuant to a written plan that has been filed with, reviewed and approved by OCA [Office of Court Administration]." *Final Report to the Chief Judge*, *supra* at footnote 2, Addendum, p. AD-4.

³⁹ See, Joel Stashenko, "NYCLU Suit Seeks Reform of Defense for Indigent," *New York Law Journal* (November 9, 2007) ["By giving counties that responsibility in 1965, but failing to provide adequate funding or oversight of the legal aid services system that has since evolved, New York has 'abdicated' its responsibility to ensure that criminal defendants have proper representation regardless of their ability to pay, according to the suit."]

⁴⁰ County Law §722-f(2).

⁴¹ See *e.g.*, letter from Jonathan E. Gradess to Christine Rutigliano and John Clarkson, January 27, 2004. Later, the Office of the State Comptroller conducted an audit of the five localities receiving the highest percentage of ILSF funds to determine whether they had "established appropriate internal controls to ensure that ILSF program revenues and expenditures are accurately recorded and reported in accordance with statute and established guidelines." The word "quality" appeared nowhere in the resulting report. Office of the State Comptroller, *Accounting and Reporting for Indigent Legal Defense Services* (2006-MS-1), www.osc.state.ny.us/localgov/audits/swr/2006ms1.pdf.

⁴² The Kaye Commission and The Spangenberg Group noted in 2006 the lack of reliable data about the provision of public defense services in New York State. NYSDA has observed that information provided by localities to the Office of Court Administration under County Law Article 18-B and information provided to the State Comptroller as required by the ILSF statute sometimes differ, as noted *supra* at footnote 22.

Table 2: Number of Counties Failing Maintenance of Effort by year

Year of MOE assessment	Index year ⁴³	Comparison year ⁴⁴	Counties failing test initially	Counties failing test ultimately
2006	2005	2002	0	0
2007	2006	2005	10 ⁴⁵	3 ⁴⁶
2008	2007	2006	13 ⁴⁷	3 ⁴⁸
Totals			23	6

Counties escaped the loss of ILSF funding in a variety of ways, but fundamental to this process was that apparently-noncompliant counties have consistently been allowed to resubmit their reports. Across these years, all twenty-three counties that certified information indicating they would be in breach of MOE requirements have been invited to resubmit, and all have done so. Some resubmitted multiple times.

Changes fell into two categories. Counties either submitted new data on how much they had spent from local sources on public defense, or they provided new information on how they had spent their disbursements from the ILSF. In fifteen instances, the resubmissions showed that the county in question had not failed the MOE test, contrary to the indications of their original submissions; these resubmissions were accepted by the State Comptroller.

In addition to the counties found compliant with the MOE requirements based on their resubmissions, two other counties were found compliant under the temporary three-year averaging test provided by the 2008 legislation.

As Table 3 illustrates, of the twenty-three counties that initially submitted reports indicating they would fail the MOE threshold test, only six were ultimately found noncompliant.

Table 3: How Failing Counties Were Saved

Year	Counties failing test initially	New local spending data	New ILSF spending data	Compliant under 2008 legislation ⁴⁹	Ultimately found non-compliant
2006	0	0	0	N/A	0
2007	10	3 ⁵⁰	4 ⁵¹	N/A	3 ⁵²
2008	13	7 ⁵³	1 ⁵⁴	2 ⁵⁵	3
Totals	23	10	5	2	6

⁴³ The index year is always the prior year's net local expenditures.

⁴⁴ The comparison year is generally the year prior to the index year, though in 2005 it was selected to be 2002.

⁴⁵ Clinton, Cortland, Greene, Hamilton, Niagara, Ontario, Orange, Schoharie, Seneca, and Wayne counties.

⁴⁶ Schoharie, Seneca, and Wayne counties.

⁴⁷ Albany, Allegany, Columbia, Delaware, Fulton, Genesee, Herkimer, Madison, Rockland, Ulster, Warren, Washington, and Yates counties.

⁴⁸ Allegany, Rockland, and Washington counties.

⁴⁹ The legislation only applied to 2008.

⁵⁰ Cortland, Niagara, and Orange counties.

⁵¹ Clinton, Greene, Hamilton, and Ontario counties.

⁵² As discussed *infra* at p. 14 these counties received other state funding equivalent to the withheld ILSF funds.

⁵³ Delaware, Genesee, Herkimer, Madison, Ulster, Warren, and Yates counties.

⁵⁴ Columbia County.

⁵⁵ Albany and Fulton counties.

County spending on public defense has reduced relative to other spending

Overall county spending has increased considerably since the MOE has come into force. But the purpose of the MOE threshold provision was to ensure counties remained committed to funding public defense. In this context, it is apt to ask whether spending on public defense has kept pace with other county spending. As county expenditures generally go up every year due to inflation and other factors, a county truly “maintaining its effort” would on average increase public defense spending in proportion to those other increases. By that measure, spending on public defense has declined despite the MOE requirement that counties sustain spending on public defense at least at prior levels.

In the time the MOE has been in force, counties have allowed public defense funding to decline to 0.3077% of county spending in 2007 – the lowest ever level since the ILSF began collecting data in 2002. Overall spending across all New York’s counties increased 13% between 2005 and 2007 – the first years for which data was collected for ILSF purposes. Spending on public defense increased 11%.⁵⁶

The MOE provisions have created a paradox: while the vast majority of counties have fulfilled MOE requirements, average spending on public defense has actually gone down compared to other county spending. The table in Appendix C shows the percentage of public defense spending in individual counties for the six years for which data is available.

Before the current economic downturn, with the MOE in place, counties allowed local spending on public defense services to stagnate relative to other spending. This occurred despite the findings of the Kaye Commission, and new findings such as those of the National Legal Aid and Defender Association,⁵⁷ that public defense services across the state continue to suffer from serious constitutional deficiencies.

Scrutiny of state ILSF funds has been minimal even as to counties failing the MOE threshold test

Localities that fail the MOE threshold test must tell the State Comptroller how they spent ILSF money to improve quality of public defense services. The list set out in State Finance Law §98-b (4)(c)(ii)⁵⁸ of potential ways a locality might spend state money to improve quality can be traced to many existing public defense standards.⁵⁹ Those standards flesh out the statute’s general terms such as “the expertise, training and resources made available to attorneys...” and could be helpful in determining whether a county’s use of ILSF money had been used for something that improved quality. But examination of the county submissions seeking to satisfy the quality portion of the MOE test reveals a minimal level of scrutiny.

⁵⁶ According to the Office of the State Comptroller, total county spending across the state in 2005 was \$77,927,487,133. In 2007 it was \$88,232,435,294, an increase of 13%. Local spending on public defense in the same period increased from \$243,755,567 to \$271,531,462, an increase of 11%. Substantively identical results are found when New York City is excluded. Comparisons between 2002 and 2007 – 2002 being the first year that data were collected for the ILSF – also yield substantially the same result.

⁵⁷ See, NLADA, *Justice Impaired: The Impact of the State of New York’s Failure to Effectively Implement the Right to Counsel – Franklin County* (2007); see also the series of report cards issued by NLADA as to nine other New York State counties: www.nysda.org/html/public_defense.html#ReportCards.

⁵⁸ These categories are noted in full at pp. 3-4, *supra*.

⁵⁹ The ABA’s *Ten Principles*, *supra* at footnote 28, are a distillation of other voluminous ABA standards. See, ABA, *Standards for Criminal Justice, Providing Defense Services* (3rd ed. 1990). Other state and national standards are available on the internet at www.nysda.org/html/defense_services.html#Standards, including New York State Bar Association, *Standards for Providing Mandated Representation* (2005) and NYSDA, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (2004).

In many instances, it appears that localities can pass the MOE test by attaching dollar amounts to vague descriptions of purported quality improvements. Here are just two examples.

One county reduced local spending by \$13,675 – almost 17% – an amount comparable to what the county had received from the ILSF the previous year – \$18,043. Its initial report to the State Comptroller in February indicated that none of the ILSF monies had been spent to improve quality, and made no attempt to account for this. NYSDA’s analysis of the county’s submissions indicates that the county had sustained a 26% increase in caseload during the reporting period. This should raise questions about the effect on quality of a substantial reduction in local spending at the same time.

Nearly a month after its first ILSF submission for the year, this county faxed a revised version, saying that a portion of the previous year’s ILSF distribution had been spent on increasing by about 15% the number of attorneys available for assignment. No explanation was made as to why the increase in available attorneys should require an investment of over \$7,000 in a county where the total public defense budget is only \$85,868, or how increasing the numbers of attorneys available for assignment increased the quality of representation.⁶⁰

Later the same day the county faxed yet another revision, accounting for additional money allegedly spent to improve quality, including funds spent to achieve a 10% increase in the average time spent with clients and payment of \$75 an hour to assigned counsel attorneys for all cases – which for misdemeanor cases would be in excess of the statutory rates.⁶¹ Based on these last-minute resubmissions, the county received its ILSF distribution for the year.⁶²

Another county indicated in a resubmission that \$313,144 of its 2007 ILSF distribution – the exact amount initially unaccounted for – had been spent within the “other” category to improve quality. Actions taken included: improvements to the organization of the court calendar to eliminate unnecessary waiting periods for assigned counsel, obtaining adjournments by e-mail and fax to eliminate unnecessary court appearances, and a greater effort to assign attorneys to local courts in their geographic area to reduce travel time and expenses. No details were provided as to how ILSF funds were used to bring about these changes, or how the measures, clearly designed to reduce county expenditures, improved the quality of representation. The resubmission was accepted by the State Comptroller and the county received the entirety of its ILSF distribution.⁶³

These examples are not exceptional. For other examples, see Appendix A.

The apparently minimal examination of how counties spent their ILSF money leads to the question: is the State Comptroller the appropriate entity to be charged with determining whether localities are spending ILSF money in a way that improves the quality of public defense services?

The statute giving ILSF oversight to the State Comptroller did not increase the Comptroller’s staff or budget, and the office has worked diligently to perform the tasks required of it. The Comptroller’s office has also availed itself of NYSDA’s help and been receptive to some suggestions. The office, however, is not one that can be expected to have the expertise necessary to assess public defense quality.

⁶⁰ As assigned counsel have private practices that impact their overall workload, no assumption can be made without caseload data that more attorneys to assign ensures more time spent per client.

⁶¹ The fee increase enacted in 2003 set rates of \$60 per hour for representation in misdemeanor cases and \$75 per hour for all other cases. *See*, County Law §722-b (1). Under current law, payments above the statutory rate are permitted only in extraordinary circumstances and must be authorized by the court. *See*, County Law §722-b (3).

⁶² *See* Appendix A at p. 4-5, regarding Hamilton County.

⁶³ *Id.*, at p. 6, regarding Ontario County.

Legislative intervention has prevented application of the penalty for failing the MOE provisions

The State Legislature has on more than one occasion suspended or modified application of the MOE provisions. In 2007, the counties of Schoharie, Seneca, and Wayne were found MOE noncompliant and received no ILSF distribution. All were fiscally “restored,” however, in the state budget in the amount of their lost disbursements. As a result, these counties suffered no fiscal loss for failing the MOE requirements. Other counties actually received more money, because the ILSF money originally withheld from noncompliant counties is redistributed among those that comply.⁶⁴

That the three counties still received state funding may well have undermined the deterrent value of the MOE provisions against supplanting. In 2008, several more counties were initially found noncompliant with the MOE provisions and, as discussed above, the Legislature again stepped in.⁶⁵ As a result, all six counties that have failed the MOE provisions and faced the loss of ILSF funding – which, while not the bulk of public defense expenditures, is considerable⁶⁶ – have eventually received from the State funding in amounts equal or close to what they would have obtained had they passed.

The 2008 legislative change in the penalty – from total forfeiture of the ILSF distribution for a year to forfeiture of a substantially smaller percentage – has been proposed as a permanent change this year.⁶⁷ Analysis of that change shows that, because local spending is always much greater than ILSF distributions, the changed penalties would be far smaller than the amount of local expenditures required to meet the MOE threshold test. This is demonstrated in Table 4, which shows a real example from 2008.

Table 4: 2008 example of reduction in ILSF distribution due to failure to meet MOE

County	2006 NLE [Net local expenditure]	2007 NLE	Decrease in NLE 06-07	Distribution if MOE had been met	Distribution following reduction due to MOE failure	Reduction in distribution
Allegany	\$539,666	\$486,882	(\$52,784) -9.8%	\$138,036	\$124,466	(\$13,501) -9.8%

As Table 4 shows, Allegany reduced local spending by 9.8% in 2007 compared to 2006. Under the percentage reduction formula adopted last year, the county’s ILSF distribution was reduced by an amount directly proportionate to its reduction in local spending. The county spent 9.8% less, so its ILSF distribution was reduced by 9.8%. The amount of the reduction intended to penalize the county (\$13,501) was far less than what the county would have had to spend to meet MOE (\$52,784). In other words, to receive an additional \$13,501 from the State, the county would have had to expend an additional \$52,784 from local sources. Such an investment would clearly be economically irrational from a purely fiscal point of view. The new system would thus provide no

⁶⁴ Midyear, post-county-budget windfalls carry their own set of problems. The amount is unbudgeted for; its use unplanned.

⁶⁵ Such legislative actions also lend unfortunate credence to the erroneous belief that the ILSF is an aid program to localities rather than a program designed to improve public defense services. The focus becomes “getting the counties their money” rather than “using the ILSF to improve the quality of public defense services.” Public defense programs’ need for funding is undeniable, as discussed *infra* at p. 13, but the intent that counties not supplant local spending with ILSF money, and that ILSF funds should be used for quality, should not be disregarded.

⁶⁶ In 2006, passing counties received an ILSF distribution equivalent to 21% of local spending on public defense. In 2007, the figure was 25%. Data for local spending in 2008 are not yet available.

⁶⁷ S. 56/A. 156, Part X §1.

fiscal incentive to meet MOE, but rather would make it rational for marginal counties to underspend and fail consciously.

Imposition of any fiscal penalty for failing the MOE provisions deprives already-deficient public defense programs of needed resources

Because no locality has been allowed to suffer the statutory penalty for failing the MOE provisions, the actual consequences of such a penalty cannot be studied. Whether actual loss of any ILSF distribution for a year would lead to even greater deficiencies in a locality's public defense program or would cause the locality to make up the difference is a matter of speculation. Whether applying the penalty would provide incentive to all localities to meet the MOE threshold test the next year is equally unknowable.

What is clear is that public defense programs in every locality need more, not less, funding. Programs already experiencing a decline in their share of county spending need all the State funding that can be made available to them for improving services. No efficiency measures can give lawyers the time they need to represent 520 clients a year, well above national caseload standards.⁶⁸ No streamlining of court calendars will allow proper investigation of cases if the public defense office has only one part-time investigator whose primary duty is to determine clients' eligibility for services.

Conclusion: The MOE provisions of the ILSF fail to measure or ensure quality

The MOE threshold test is a crude measure. Instead of measuring quality in public defense services – in terms of effective advocacy, contact with clients, or case outcomes – it measures minimal financial commitment. Assuredly, quality defense services cannot come without adequate financial commitment, but the two are far from being the same thing.

Yet the fundamental problem with the MOE threshold provision is not that it doesn't measure the right things, but that it doesn't measure anything at all. The procedures surrounding county reporting to the Office of the State Comptroller have lacked precision. Failing counties have been given opportunities to "resubmit" their data until the desired result is achieved. This procedure has not been reserved to exceptional cases, but is a matter of established routine. Extreme examples, such as county reports changing hour by hour, to claim in the afternoon that improvements have been made when only that morning no improvements were reported, are a matter of public record.

The threshold test allows the vast majority of counties to escape even a low-level attempt at scrutiny of how they spend money from the ILSF. So long as they report that they have maintained local spending, they receive ILSF money; no effort is made to determine whether that money was invested in improving public defense quality.

The few times that counties have had to disclose how they used ILSF funds to improve quality, the statutorily-required provision and review of information has lacked rigor. The State Comptroller lacks expertise for evaluating quality of public defense services.

These problems have rendered the MOE provisions unsuccessful. In effect, counties have never been allowed to fail, and the MOE system has not been allowed to work.

⁶⁸ Washington County, one of the five counties named as a defendant in the NYCLU lawsuit, and one of the counties that failed to comply with the MOE provisions for the 2008 distribution, was also one of the counties studied by NLADA. The report card issued for Washington County in November 2007 stated: "The mixed felony and misdemeanor caseload of the Public Defender Office, at over 520 clients per full-time equivalent counsel position, far exceeds accepted national maximum caseload standards for a full-time attorney. Moreover, this deficiency is compounded by the lack of any investigative or secretarial services, the existence of which is presumed under the national standards." www.nysda.org/NY_Washington_County_3.pdf.

In the time that the MOE provisions have been in force, counties have received large amounts of state funding from the ILSF for public defense with no oversight of for how the funds were spent. Simultaneously, local public defense funding has languished relative to other county spending. Despite the ILSF reporting requirements and the requirement that ILSF funds be used to improve quality of public defense representation, the State knows almost nothing today about what it has gotten for its quarter-billion dollar ILSF outlay to date. The existing ILSF measures intended to improve the quality of public defense in New York State are broken both in principle and in practice.

Proposal: Create an Independent Public Defense Commission now

New York's whole public defense system is broken, and has been for a long time. In 1998, NYSDA began, with the League of Women Voters of New York State, a series of hearings around the state to gather information on the condition of public defense services. In 2001, based on the results of those hearings and its decades of experience with the county-by-county system prescribed by Article 18-B of the County Law, NYSDA advised the State to create an independent public defense commission to oversee the distribution of state funds and the provision of public defense services.⁶⁹ Following the Kaye Commission's call for an Independent Public Defense Commission heading a statewide, fully and adequately state-funded public defense system, NYSDA endorsed that even more comprehensive recommendation.

The list of issues exemplifying what was wrong with the system at the time of the 2003 Summit [*supra*, end of footnote 9] is today identical.⁷⁰ The needs that existed when the ILSF was created still exist. It is past time for the State to act on the Kaye Commission's recommendations.

Therefore, a plan for beginning the infrastructure for fundamental change – change that would supersede the ILSF entirely – is outlined below.

⁶⁹ *Resolving the Assigned Counsel Fee Crisis, supra* at footnote 9, p. 28.

⁷⁰ The full list was:

- 1) The need for an independent Public Defense Commission including the need for standards and oversight of the public defense system (particularly now while it will be in flux arising from present efforts to jettison assigned counsel programs).
- 2) The need for state financing of the public defense system and resource parity with the prosecution.
- 3) The quality of representation provided to clients.
- 4) High caseloads and the concomitant interference with quality representation.
- 5) Lack of access to investigation and investigators.
- 6) Lack of access to experts.
- 7) Lack of sentencing specialists and social workers.
- 8) The need for mandatory quality training that is content specific not just MCLE.
- 9) The myriad problems associated with late entry of defense lawyers into cases.
- 10) The need for professional independence, including interdicting patronage and conflicts of interest; assuring conflict free lawyers and systems.
- 11) Continuity of representation, not new lawyers at every court appearance.
- 12) Client visitation and involvement, including client community involvement in the design, maintenance, and administration of public defense systems.
- 13) Issues surrounding the deprivation of counsel including low eligibility thresholds, mining clients and families for money, judicial taking into account of spousal income, parental income, and ability to make bail as a precondition to the constitutional appointment of counsel.
- 14) The need to increase the scope of representation to include appropriate courts and collateral matters including post conviction right to counsel (CPL 440).
- 15) Defense involvement and participation in criminal justice system planning.

- The State should use \$3 million annually from the Indigent Legal Services Fund over the next three years to phase in the Independent Public Defense Commission that will take over administration of public defense services in 2012.
- The State should begin the infrastructure of the commission in this budget year.⁷¹

The Commission, after appointment, along with other related tasks, would for a three-year phase in period:

- hire staff and contractors,
- engage in a fair and unbiased system-wide evaluation,
- facilitate a process of self evaluation,
- adapt the public defense case management system,
- adopt a uniform definition of a case,
- cost out the current system,
- identify and design proposed revenue streams,
- project the cost of standards-based improvements,
- identify and design economies of scale,
- develop a plan for regions,
- prepare performance standards, and
- prepare a staffing/implementation plan for the new system.

Thereafter, county and city fiscal liability would be capped pursuant to an equitable formula and the state would administer a new public defense system covering criminal cases and adult family court respondent representation.

⁷¹ Appendix D shows the projected effect diverting the \$3 million would have on the amount projected to be received by localities this year.

Appendix A: Detailed Analysis of the Operation of the ILSF in 2007 and 2008

In 2007 ten counties failed to meet MOE requirements. In 2008 the figure was 13 counties. In both years, failing counties were invited to resubmit their ILSF forms. These resubmissions gave counties an opportunity to revise the expenditure figures they presented, justify their shortfalls, or employ a number of other innovative solutions to the problem. Following this resubmission process, only three counties in both 2007 and 2008 were still in violation of MOE requirements.

The resubmission process allows us to see the auditing and accounting work of counties and the State Comptroller's Office in operation. The picture painted is of a system which treats fiscal data casually and accepts questionable explanations for expenditures. Example after example illustrate the lack of guidance in the ILSF statute as to evaluating improvement of quality through use of the state funding received and show a lack of rigor in the accounting figures used to illustrate sufficient local expenditures.

2007

The 2007 ILSF submissions compared spending in 2006 to that in 2005.

2007 Notable Findings

- Counties have been awarded ILSF funding after submitting data which indicate, either explicitly or implicitly, that they are supplanting local funds with ILSF money.
- Counties have been allowed to make multiple ILSF submissions in order to avoid losing ILSF funding. The State Comptroller's Office has awarded ILSF funding to counties even when the data in successive submissions has been contradictory.
- Counties have been allowed to attach dollar amounts to "improvement" initiatives without justification, allowing them to account for ILSF funding without showing how the money was spent.
- Counties have been allowed to claim that ILSF was spent on measures to improve quality even where the measures in question bear no relation to quality defense provision.

2007 Notable Examples

All of the New York counties in the examples below were found to be in compliance with MOE requirements. All of these counties received ILSF funding.

- Clinton County claimed in 2007 that quality had increased, even though the public defender's caseload had increased in complexity (including more felonies and fewer misdemeanors) and funding had been reduced by over \$20,000.

- In an early submission in 2007, Clinton County indicated it had used ILSF monies to supplant local funds. The form read “[t]he reason that the ‘Net local funds’ decreased from 2005 to 2006 is that the State Aid increased, thereby reducing the net local funds.”
- Hamilton County was awarded ILSF funding in 2007 after it reported local spending on public defense had been reduced by 17%, while the total number of criminal cases disposed in the county had increased by 26%. 100% of convictions in the county were obtained by guilty plea in both 2005 and 2006.
- Hamilton County was found compliant in 2007 based on an apparent one-day analysis of client contact time which showed that attorneys had spent 10% more time with clients. No details of the analysis or its basis were presented. The amount invested in this “improvement” was held to be \$8,587 – a figure apparently found by calculating 10% of the county’s public defense budget.
- Hamilton County argued in 2007 that increasing the number of attorneys available for assignment by 15% represented an “improvement” to its public defense system costing \$7,260. No rationale was provided for how this improved services, or why it cost exactly this amount.
- After failing to account for \$313,144 in ILSF funding, Ontario County argued in 2007 in a resubmission that it had spent exactly this amount on improvements to the organization of the court calendar and increases in electronic communication.
- An initial submission from Orange County in 2007 described the supplanting of local funds with ILSF monies. The County Attorney wrote that “[t]he remaining gap between 2005 and 2006 expenditures is attributable to an increase in state funding by more than \$200,000 in 2006.” This increase was accounted for almost entirely by an increase in the ILSF distribution.

2007 Details

Clinton County

Clinton County reduced spending on public defense by \$20,999 in 2006, a reduction of 1.74%. On February 1, the county submitted documentation to the ILSF indicating that the reason for the shortfall was that the county had been supplanting local funds with ILSF monies. The form, signed by County Administrator Michael Zurlo, read:

Actual expenditures in 2006 exceeded actual expenditures in 2005. The reason that the “Net local funds” decreased from 2005 to 2006 is that the State Aid increased, thereby reducing the net local funds.

The only “state aid” listed on the ILSF form was the previous year’s ILSF distribution itself, totaling \$267,839.

On February 21, Clinton County submitted a second set of ILSF forms with a different justification for their shortfall. In this submission the justification was that caseload had reduced in the county, resulting in a reduction of workload. The county did not attempt to account for the ways that it had spent the \$267,839 it had received from the ILSF, however, as the form required.

On March 19, the County submitted a third set of forms. Contradicting the first submission, the third stated that ILSF monies “have not been used to supplant local funds” (page 7). A detailed accounting was provided showing how the county claimed it had spent the \$267,839 it had received the previous year from the ILSF. It accounted for this amount in the following ways:

- \$250 for converting assigned counsel plan paperwork to electronic form, and convening a “best practices” panel to discuss the program.
- \$191,419 for matching cases to attorneys with appropriate experience more effectively; the adoption of “informal” caseload guidelines; the payment of increased assigned counsel fees.
- \$74,995 for a system which “permitted its contract attorneys in Family Court to handle caseloads greater than their contractual obligation.”
- \$425 for IT enhancements to case processing.
- \$750 on reduced processing time for voucher payments and the appointment of a former DA to oversee the assigned counsel plan.

No more specific documentation showing how exactly these monies were expended was included with the county’s submission.

Contradicting the second submission, the third suggested that the demands placed on the public defense system had actually increased. Although caseloads had gone down, it argued, the types of cases had become more complex, with increasing numbers of felonies and a homicide the previous year. Critically, the submission also acknowledged that funding had not increased to accommodate this new demand.

Even though there was an expensive homicide case and a shifting of offenses from violations/misdemeanors to felonies, Clinton County’s gross expenditures remained about equal from year to year. ...All of the above justifies that the program has been improved. (page 7)

Contrary to the statement made in the form, there is no possible way to interpret this set of facts to mean that quality had improved. Clinton County’s final submission thus contained a frank statement to the effect that although the demands on public defense had increased, funding for the system had remained constant.

The lack of quality accounting, the contradictory statements from one submission to the next, and the clear indication that quality had declined in Clinton County rather than improved (notwithstanding the improvements claimed elsewhere) make a finding that the county had met its Maintenance of Effort requirements questionable.

Cortland County

According to its first ILSF submission, Cortland County reduced spending on public defense by \$11,720 in 2006, a reduction of 1.77%. On February 28, the county submitted documentation to the ILSF indicating that quality had been improved by increased attorney-client contact and new

efficiencies in the organization of attorney appointments. This submission did not account for the county's entire ILSF disbursement, however.

A second submission by the county adjusted its local expenditure figure for 2006, indicating that local expenditures had in fact exceeded 2005 levels. The revised figure was based on additional amounts spent for "personal services," "contractual expenditures," and "employee benefits" in the Public Defender's office which had not been indicated in the first submission. These revisions were not explained further.

Greene County

Greene County reduced spending on public defense by \$42,095 in 2006, a reduction of 7.64%. On February 26, the county submitted documentation to the ILSF which did not attempt to explain this shortfall. A second submission, dated March 19, showed that all the county's ILSF distribution had been spent on increasing the quality of defense provision in the county.

The following expenditures were noted:

- \$1,205 on improving access to electronic legal research resources, CLE courses, reduced salary costs due to death of an employee, and new "on-site access to drug evaluators" provided by the county.
- \$49,050 on the hiring of a drug/alcohol rehabilitation specialist to facilitate diversion from incarceration.
- \$53,955 on a new attorney to ensure all felony clients meet with attorney prior to going to court.
- \$40,000 on increasing the Public Defender to full-time. The county claimed this had resulted in more indictments being dismissed or reduced to misdemeanors.

Several of the explanations of ILSF spending do correlate with public defense quality. Increasing the amount of available attorney time through hiring and moving the Defender to full time comports with standards that call for defense programs to keep workloads below an excessive level. (*See*, NYSDA, *Standards for Providing Constitutionally and Statutorily Mandated Legal Services* (2004), Standard IV; New York State Bar Association, *Standards for Providing Mandated Legal Services* (2005), Standard G-1.) Similarly, obtaining the services of a specialist to facilitate non-incarcerative sentences should improve the quality of representation offered. (*See*, NYSDA Standards III.C and VI.C (regarding funding salaries and training for sentencing specialists) and State Bar Standards H-1 and I-7.h (regarding support services and performance at sentencing)). However, money saved due to an employee's death does not appear related to improving the quality of defense services.

Hamilton County

Hamilton County reduced spending on public defense by \$13,675 in 2006, a reduction in local spending of almost 17%, and an amount comparable to the county's total ILSF distribution the previous year of \$18,043, suggesting the possibility of supplanting. Its first submission to ILSF was made on February 22 in which the county reported that none of the money from ILSF had been spent to increase quality, and made no attempt to account for this fact.

On March 13 at 10:57 a.m., a revised version of the February 22 submission was faxed to the ILSF. This submission accounted for \$7,260 of the previous year's ILSF distribution. The money had

been spent on increasing “[t]he number of Attorney’s [*sic.*] available for assignment...by approximately 15%” (page 7).

On March 13 at 3:31 p.m., a third revision of the February 22 submission was faxed which noted \$19,282 in spending on improvements to public defense in the county. The additional money was accounted for in two alterations to the second submission.

- \$8,587 had been spent on “a 10% increase in time spent with clients on an average [*sic.*],” a figure arrived at “[b]ased on an analysis of the hours spent on or with each client prior to court appearances” (page 9). No details were given of how this analysis was conducted, nor was any justification attached to the dollar value assigned to the attorney time in question.
- \$3,435 was for the payment of \$75 an hour to assigned counsel attorneys for all cases – above the mandated level of \$60 for misdemeanor and \$75 for felony work.

All three of Hamilton County’s submissions were typed onto the same ILSF form, with the signature of the County Administrator and a date of February 22.

No clear rationale was presented regarding how increasing the number of attorneys available for assignment increases quality; assigned counsel have private practices that impact their overall workload. Without those data, no assumption can be made that adding attorneys means more time spent per public defense client. The attachment of arbitrary figures to hastily produced “analyses” of attorney time should raise questions warranting an investigation of the basis for this claim and its presumed monetary value.

Further, no explanation was made as to why the increase in available attorneys should require an investment of over \$7,000 in a county where the total public defense budget is only \$85,868. The amount of assigned counsel fees is set by statute. While payment in excess of the statutory rates is permitted in extraordinary circumstances, such payment must be authorized by the court in which the representation is offered. *See*, County Law § 722-b (3). Nothing in the submission here indicates that this occurred.

Equally, the fact that Hamilton’s UCS submissions for 2005 and 2006 indicated an increase from 35 dispositions in criminal cases to 44 (an increase of 26%) should have raised suspicions that a reduction in local spending on public defense of almost 17% would mean that no matter how the ILSF funds were spent, quality could not have been improved.

Niagara County

According to its first ILSF submission, Niagara County reduced spending on public defense by \$103,188 in 2006, a reduction in local spending of 6.26%. In this February 26 submission, the county accounted for only \$22,212 of their ILSF distribution of \$365,112 as having been spent on quality improvements. The improvements made included increases in access to legal reference resources and the relocation of the Public Defender office, providing greater privacy to clients.

The county’s second submission dated March 20, however, contained new figures which showed the county had in fact met the Maintenance of Effort requirement by spending more in 2006 than 2005. The second submission stated that:

Amendments to the report have been made to reflect the expense accruals that were not posted to the General Ledger at the time the original report was compiled.

In total, public defense expenditures were revised upward by over 5% in the resubmission. The revised accounting provided by the county shows increases in “personal services,” “equipment & capital outlay,” “contractual expenditures,” “employee benefits,” and “bar association” expenditures.

Ontario County

Ontario County reduced spending on public defense by \$144,767.08 in 2006, a reduction in local spending of 10%. Its first submission to ILSF was made on February 21 in which the county accounted for only \$5,000 of its total ILSF distribution of \$318,144. This left the county with \$313,144 unaccounted for. Additional claimed quality improvements including monitoring caseload levels, matching attorney experience to case complexity, and screening potential 18-B attorneys had no numerical values attached to them.

A second submission was made on March 15 in which the only change was to detail a number of efficiencies occurring in the public defense system. Improvements were said to be made in the organization of court calendars (without explanation of how this incurred expenditures) that resulted in 18-B attorneys spending less time in court. Electronic communication was also said to have become more common, so that adjournments did not always require attorney in-court time. The total amount spent on these “improvements” to the public defense system was said to be exactly equal to \$313,144.

Orange County

Orange County submitted three ILSF forms in 2007. The first two reflected reduced expenditures of \$284,175 and \$109,175 respectively. In neither case was the county able to account for how it had spent its ILSF distribution. The third adjusted the county’s expenditure figures for both 2005 and 2006 and showed increased expenditures of \$35,050, meaning the county was not obliged to account for its ILSF distribution.

In a letter accompanying the second submission, the County Attorney explained that:

The remaining gap between 2005 and 2006 expenditures is attributable to an increase in state funding by more than \$200,000 in 2006...

Orange County’s ILSF distribution had increased from \$686,838 to \$852,878 across these two years. The remainder of the \$200,000 is accounted for by small changes in Aid to Defense and Parole Appeal and Revocations funding.

Explaining the revisions, the third submission indicated:

We reviewed the figures for 2005 and 2006 and revised them to report just the expenditures for the respective years for the Bar Association Rotational Plan.

The annual expenditures now represent only the assigned counsel expenses pertaining to that particular year. For 2005, the prior report showed \$2,466,509.13; this included \$1,169,225 of prior year expenses. For 2006, the prior report showed \$2,671,394.81; this included \$1,025,030 of prior year expenses.

Schoharie, Seneca, and Wayne Counties

These counties were judged to have failed to meet the Maintenance of Effort requirement and were denied their ILSF distribution. This failure ultimately resulted in no penalty; amounts equal to those distributions were inserted in the 2007-08 State budget for those counties.

2008

The 2008 ILSF submissions compared spending in 2007 to that in 2006.

In 2008, thirteen counties were initially at risk of not receiving their ILSF distribution. Of those, two counties were able to meet a one-time three-year averaging test under a 2008 statute and received all their ILSF monies (Albany and Fulton); three counties failed the averaging test and were penalized a portion of their ILSF distribution (Allegany, Rockland, and Washington); only one county was able to demonstrate MOE to the satisfaction of the Comptroller's Office (Columbia); and the remaining seven counties resubmitted their ILSF filing to include additional expenses (Delaware, Genesee, Herkimer, Madison, Ulster, Warren, and Yates).

2008 Notable Examples

- Genesee County included \$4,352 in indirect costs for “building and grounds cleaning and maintenance services” as part of their resubmission expenses.
- Columbia County’s successful MOE submission indicated that the \$24,156.86 in ILSF expenses used to add attorneys and staff to expedite the assigned counsel voucher submission process made it possible to attract more experienced attorneys to the program, thereby providing more qualified representation to clients.
- Herkimer County, citing a breakdown in the vouchering process due to turnover in local justice court magistrates and new assigned counsel attorneys, found that \$99,595.19 in vouchers for cases assigned in 2007 had not been processed in a timely manner and would be paid out of the 2008 budget but should be counted as local expenditures for 2007 so that they met the MOE threshold.
- Madison County initially included \$25,854 as ILSF money spent to improve quality; however, in its resubmission, assigned counsel expenses increased \$15,962 with no explanation for the source of that increase. No explanation of how ILSF was used to improve quality was therefore provided.
- Warren County’s initial submission argued that the creation of the conflict defender office had increased quality within its public defense system. However, in its resubmission (presumably after this justification was not deemed satisfactory by the Comptroller), Warren County “elected to use [its] indirect cost fringe benefit rate to calculate the employee benefit amount which resulted in additional costs of \$41,075.” Warren County also reported an additional invoice in the amount of \$4,443 for undefined contractual expenditures.

- Delaware and Madison counties resubmitted their ILSF filings with higher expenses but provided no explanation for the source of those additional expenses.

2008 Details

The following is an outline of the rationales provided by the eight counties that resubmitted and attempted to either meet MOE or articulated additional spending. For each county, where possible, the exact language used by the submitting agent has been included.

Columbia County

Columbia County reduced spending by \$152,729 in 2007, a reduction of 18.55%. The county's first submission on February 28 did not include any explanatory information about quality improvements in Part II. The county's resubmission on March 21 listed ILSF expenditures to improve quality as follows:

- \$3,940 for Westlaw research costs and CLE funding for Public Defender, Conflict Defender and Alternate Conflict Defender attorneys.
- \$133,038.91 for the hiring of the Conflict Defender and Alternate Conflict Defender.
- \$52,360 for filling a vacancy in the Public Defender office; also implemented a Family Court intake system.
- \$24,156.86 to partially fund two additional attorneys and additional staff in the County Attorney's Office for the vouchering process, thereby decreasing the amount of time that it takes to pay vouchers. "This reduction in time allowed a greater number of and more experienced attorneys to participate in the program, thereby provided better representation for qualified clients."

Columbia County's resubmission on March 21 also showed a reduced 2007 ILSF allocation of \$34,150, which increased their 2007 local spending to \$704,746.20, a reduction of 14.40%.

Delaware County

Delaware County reduced spending on public defense by \$45,653 in 2007, a reduction of 9.89%. The initial March 3 submission showed \$535,718 in assigned counsel expenses, while the resubmission showed \$586,979 in assigned counsel expenses, resulting in \$467,294 2007 local spending against \$461,686 in 2006 local spending. The county provided no additional documentation to explain how these additional expenses were identified.

Genesee County

Genesee County reduced spending on public defense by \$19,859 in 2007, a reduction of 2.60%. In a handwritten resubmission on May 21, Genesee County changed 2007 local spending to \$767,144 against \$763,322 in 2006 local spending. The \$23,681 increase in local spending is outlined in a document which includes "2007 Indirect Costs Incurred" for the public defender and assigned counsel programs. Included in these indirect costs is \$4,352 for "Building and Grounds for cleaning and maintenance services."

Herkimer County

Herkimer County reduced spending on public defense by \$81,894 in 2007, a reduction of 23.63%. In a letter to the Comptroller dated April 1, 2008 (with no attached ILSF resubmission), the assigned counsel administrator stated that due to a high level of turnover among justice court magistrates and

new assigned counsel attorneys, the vouchering system had become extremely delayed. New attorneys were not submitting their vouchers in a timely manner and new magistrates, unfamiliar with the voucher process, were not expeditiously submitting the vouchers for payment and in some instances had signed vouchers and returned them to the attorneys without forwarding them on to the county for payment. According to the Assigned Counsel Administrator:

An interim review which I have conducted relative to the first three (3) months of 2008 reveal that 211 vouchers totaling \$99,595.19 have been processed through my office which were assigned in 2007. Approximately 1/3 of such 2007 assignments have been paid by the County with the remaining 2/3 of such 2007 vouchers having been just recently processed by my office and are en route to the Auditor's Office for payment, meaning the vouchers are currently en route to the Courts, in the hands of the Court or en route from the Courts to the Auditors.

The document states that there were "an unusually large number of 2007 assignments which will be paid out of the 2008 budget." However, the Herkimer County resubmission does not provide an updated 2007 local spending amount to reflect these additional vouchers.

Madison County

Madison County reduced spending on public defense by \$3,234 in 2007, a reduction of 0.64%. This first submission on February 28 listed expenditures concerning expenditures of ILSF money as follows:

- \$5,600 for legal research computer program upgrades.
- \$9,654 for increase in staffing costs for four new public defender office attorneys.
- \$9,600 for relocating to larger office space for easier access by clients; \$2,400 in experts for 18-B attorneys and \$3,000 for experts in Public Defenders Office.
- \$1,000 for an increase in liability insurance costs to the Public Defenders Office.

Madison County's resubmission on March 18 raised 2007 local spending to \$517,393 against \$504,665 in 2006 local spending. This increase was due to a \$15,962 increase in the Assigned Counsel expenses articulated in Part A, Section II, with no other justification or explanation.

Although Madison County's first ILSF submission included information about how they spent some ILSF funds, their resubmission showed an increase in spending and as such did not require a showing as to ILSF money used to improve quality. It appears as though they attempted to meet MOE, and having failed to do so – by not accounting for all \$130,840 received from the ILSF in 2007 and/or by positing liability insurance increases as quality improvement measures – instead included additional expenses not articulated in the original submission.

Ulster County

Ulster County reduced spending on public defense by \$75,915 in 2007, a reduction of 3.71%. In a letter dated March 12, 2008, the Ulster County Treasurer stated:

As noted on page 7 of our original 2007 annual report, the 2006 annual report contained 14 months of expenditures due to a change in our procurement process. In the last quarter of 2006, the County Auditor had requested the vouchers for the

18-B program to be paid on an accrual basis starting with the beginning of 2007. This resulted in vouchers that were paid in January and February of 2007 that were for 2006, expensed in 2006. This same procedure was not done in January and February 2006. Based on the process used, we reviewed vouchers in January and February 2006 and found that \$79,780 was in fact 2005 expenses. We have made the necessary changes to the 2006 and 2007 reports and thank you for your cooperation.

Therefore, Ulster County's resubmission showed \$1,968,069 in 2007 local spending against \$1,964,204 in 2006 local spending.

Warren County

Warren County reduced spending on public defense by \$41,647 in 2007, a reduction of 5.41%. The February 28 submission as to use of ILSF funds to improve quality stated:

Assignments of cases which are a conflict to the Public Defender's Office have been changed from an 18-B assignment to a conflict defender program. Warren County has contracted with private defense firms to be conflict defenders in all local courts and in Warren County Family Court. Each law firm selected is not a solo practice firm. This allows for more expertise in the cases assigned.

As this argument was apparently not persuasive to the State Comptroller, the Warren County Treasurer resubmitted on March 14 and stated:

We have elected to use our indirect cost fringe benefit rate to calculate the employee benefit amount which resulted in additional costs of \$41,075. We would also like to report an additional 2007 invoice which was not initially included in contractual expenditures in the amount of \$4,443. The net result of these amendments is a \$45,518 increase in total expenditures.

Therefore Warren County's resubmission showed \$773,511 in 2007 local spending against \$769,640 in 2006.

Yates County

Yates County reduced spending on public defense by \$21,201.24 in 2007, a reduction of 9.12%. Yates County's May 24 resubmission showed an increase in Public Defender expenses which was outlined as:

Personal Services:	
Alternatives to Incarceration	\$7,338.09
Contractual Expenditures:	
Cost Allocation to PD	\$15,971.00
Alternatives to Incarceration	\$228.76
Employee Benefits	\$232.43
Total	\$23,770.28

Yates County's handwritten resubmission also stated that an additional \$2,550 was received in State Funds for Alternatives to Incarceration. Therefore Yates County's resubmission showed \$232,457.04 in 2007 local spending against \$232,438 in 2006 local spending.

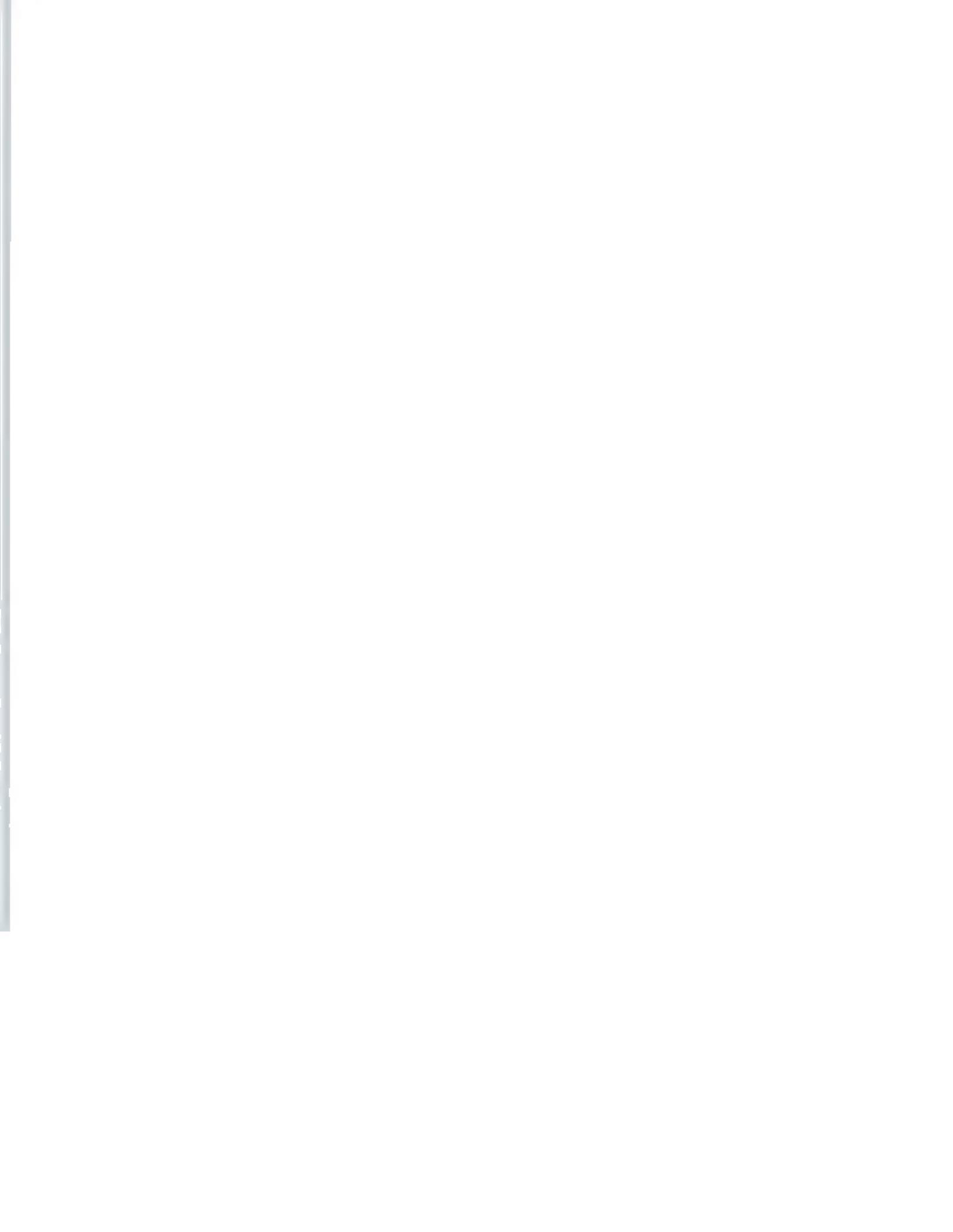
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Appendix B: NLE & ILSF Trends 2002-2008

[From Table 1a, NYSDA, *How the Indigent Legal Services Fund Functions: A Preliminary Data Analysis* (2008), p. 3]

	Net Local Expenditures					
	2002	2003	2004	2005	2006	2007
	\$ 215,892,783	\$ 228,731,153	\$ 280,588,598	\$ 244,924,822	\$ 264,053,972	\$ 271,399,431
1 yr \$ Change		\$ 12,838,370	\$ 51,857,445	\$ (35,663,776)	\$ 19,129,150	\$ 7,345,459
1 yr % Change		5.95%	22.67%	-12.71%	7.81%	2.78%
2 yr \$ Change			\$ 64,695,815	\$ 16,193,669	\$ (16,534,626)	\$ 26,474,609
2 yr % Change			29.97%	7.08%	-5.89%	10.81%
3 yr \$ Change				\$ 29,032,039	\$ 35,322,819	\$ (9,189,167)
3 yr % Change				13.45%	15.44%	-3.27%
4 yr \$ Change					\$ 48,161,189	\$ 42,668,278
4 yr % Change					22.31%	18.65%
2002-2007 \$ Change						\$ 55,506,648
2002-2007 % Change						25.71%

	Indigent Legal Services Fund Distributions			
	2005 (Based on 2004 NLE)	2006 (Based on 2005 NLE)	2007 (Based on 2006 NLE)	2008 (Based on 2007 NLE)
	\$ 51,551,719	\$ 54,221,048	\$ 67,765,000	\$ 76,944,551
1 yr \$ Change		\$ 2,669,329	\$ 13,543,952	\$ 9,179,551
1 yr % Change		5.18%	24.98%	13.55%
2 yr \$ Change			\$ 16,213,281	\$ 22,723,503
2 yr % Change			31.45%	41.91%
2005-2008 \$ Change				\$ 25,392,832
2005-2008 % Change				49.26%



Appendix C: Local public defense spending as a percentage of county spending

	% in 02	% in 03	% in 04	% in 05	% in 06	% in 07	Change 02 to 07	Change 05 to 07
Albany	0.5704%	0.6300%	0.8035%	0.6609%	0.8367%	0.6528%	Increase	Decrease
Allegany	0.4529%	0.4888%	0.6036%	0.5659%	0.6252%	0.5765%	Increase	Increase
Broome	0.6430%	0.6571%	0.8937%	0.7225%	0.8616%	0.7747%	Increase	Increase
Cattaraugus	0.4389%	0.5420%	0.6651%	0.6335%	0.6792%	0.6379%	Increase	Increase
Cayuga	0.3157%	0.3112%	0.5378%	0.4186%	0.4331%	0.4034%	Increase	Decrease
Chautauqua	0.4880%	0.4742%	0.5303%	0.5910%	0.5223%	0.4622%	Decrease	Decrease
Chemung	0.5682%	0.5556%	0.8875%	0.6848%	0.7881%	0.7000%	Increase	Increase
Chenango	0.4163%	0.4520%	0.4247%	0.5033%	0.4942%	0.4291%	Increase	Decrease
Clinton	0.7112%	0.6620%	1.0277%	0.8567%	0.8555%	0.7606%	Increase	Decrease
Columbia	0.6219%	0.5708%	0.6886%	0.5982%	0.7856%		Increase	Increase
Cortland	0.5940%	0.6170%	0.7762%	0.7948%	0.7274%	0.7200%	Increase	Decrease
Delaware	0.2225%	0.2690%	0.4375%	0.4447%	0.4446%	0.4566%	Increase	Increase
Dutchess	0.9972%	0.9628%	1.0245%	0.8435%	0.9979%	0.9053%	Decrease	Increase
Erie	0.4051%	0.3968%	0.7253%	0.6071%	0.6296%	0.5351%	Increase	Decrease
Essex	0.1845%	0.3766%	0.5720%	0.5051%	0.4915%	0.5988%	Increase	Increase
Franklin	0.4952%	0.4709%	0.5765%	0.4605%	0.3768%	0.5642%	Increase	Increase
Fulton	0.2974%	0.2774%	0.3581%	0.3772%	0.6174%	0.4854%	Increase	Increase
Genesee	0.5841%	0.6066%	0.7875%	0.6751%	0.7128%	0.5586%	Decrease	Decrease
Greene	0.5031%	0.3795%	0.6892%	0.7093%	0.5896%	0.7305%	Increase	Increase
Hamilton	0.2483%	0.2475%	0.6279%	0.6180%	0.4968%	0.5897%	Increase	Decrease
Herkimer	0.2238%	0.2344%	0.3518%	0.4053%	0.4243%	0.4139%	Increase	Increase
Jefferson	0.6887%	0.5598%	0.7552%	0.7101%	0.6751%	0.5513%	Decrease	Decrease
Lewis	0.2685%	0.2935%	0.3278%	0.2519%	0.2520%	0.2584%	Decrease	Increase
Livingston	0.4033%	0.3563%	0.5302%	0.4265%	0.3877%	0.4319%	Increase	Increase
Madison	0.5969%	0.5768%	0.7142%	0.5387%	0.5904%	0.5218%	Decrease	Decrease
Monroe	0.5801%	0.6463%	0.7099%	0.6543%	0.5502%	0.5534%	Decrease	Decrease
Montgomery	0.2982%	0.2858%	0.4290%	0.4327%	0.5384%	0.5601%	Increase	Increase
Nassau	0.2091%	0.2130%	0.2501%	0.2264%	0.2541%	0.3050%	Increase	Increase
New York City	0.2751%	0.2802%	0.3146%	0.2418%	0.2529%	0.2366%	Decrease	Decrease
Niagara	0.4451%	0.4570%	0.4970%	0.5305%	0.5447%	0.4703%	Increase	Decrease
Oneida	0.8052%	0.8261%	0.9307%	0.8246%	0.7188%	0.7076%	Decrease	Decrease
Onondaga	0.4444%	0.4581%	0.6336%	0.5496%	0.4732%	0.4692%	Increase	Decrease
Ontario	0.4829%	0.5060%	1.0696%	1.0231%	0.8941%	0.7804%	Increase	Decrease
Orange	0.4800%	0.5128%	0.6907%	0.4752%	0.4644%	0.5035%	Increase	Increase
Orleans	0.3627%	0.3902%	0.6734%	0.7609%	0.7063%	0.7758%	Increase	Increase
Oswego	0.3300%	0.3582%	0.5764%	0.5970%	0.6702%	0.6113%	Increase	Increase

Otsego	0.7019%	0.7236%	0.9440%	0.8517%	1.0272%	0.9129%	Increase	Increase
Putnam	0.5748%	0.4604%	0.5280%	0.4681%	0.4965%	0.5132%	Decrease	Increase
Rensselaer	0.4674%	0.4961%	0.6355%	0.5472%	0.5214%	0.4962%	Increase	Decrease
Rockland	0.5226%	0.5827%	0.6871%	0.5212%	0.5372%	0.4510%	Decrease	Decrease
St. Lawrence	0.5935%	0.8107%	1.0117%	0.9615%	0.9211%	0.7500%	Increase	Decrease
Saratoga	0.4657%	0.5052%	0.5949%	0.4675%	0.5263%	0.4233%	Decrease	Decrease
Schenectady	0.6729%	0.7602%	0.9451%	1.0039%	1.0242%	0.8908%	Increase	Decrease
Schoharie	0.3971%	0.4393%	0.5918%	0.6637%	0.4635%	0.6550%	Increase	Decrease
Schuyler	0.4996%	0.5825%	0.7651%	0.8921%	0.7545%	0.6479%	Increase	Decrease
Seneca	0.5432%	0.7206%	0.7033%	0.5696%	0.4950%	0.6868%	Increase	Increase
Steuben	0.5147%	0.5744%	0.7057%	0.7332%	0.6729%	0.6211%	Increase	Decrease
Suffolk	0.3787%	0.3662%	0.4187%	0.3674%	0.3605%	0.3674%	Decrease	Decrease
Sullivan	0.7417%	0.6881%	0.9044%	0.7449%	0.7500%	0.7122%	Decrease	Decrease
Tioga	0.4252%	0.4196%	0.4502%	0.4852%	0.4859%	0.4856%	Increase	Increase
Tompkins	0.7171%	0.8344%	1.1092%	0.9516%	0.9683%	0.8329%	Increase	Decrease
Ulster	0.5526%	0.5291%	0.6423%	0.5924%	0.6490%	0.6324%	Increase	Increase
Warren	0.3351%	0.3165%	0.5016%	0.6446%	0.6331%	0.5400%	Increase	Decrease
Washington	0.2909%	0.2938%	0.4672%	0.3923%	0.4364%	0.3411%	Increase	Decrease
Wayne	0.8310%	0.8523%	0.9571%	0.9018%	0.8743%	0.9798%	Increase	Increase
Westchester	0.5941%	0.6700%	0.9035%	0.6841%	0.7389%	0.6490%	Increase	Decrease
Wyoming	0.2621%	0.2980%	0.2879%	0.2647%	0.2656%	0.2633%	Increase	Decrease
Yates	0.4440%	0.4728%	0.7396%	0.5964%	0.6583%	0.5553%	Increase	Decrease
Upstate	0.4623%	0.4815%	0.6131%	0.5313%	0.5488%	0.5265%	Increase	Decrease
Whole state	0.3230%	0.3321%	0.3925%	0.3128%	0.3254%	0.3077%	Decrease	Decrease

Appendix D: Projections of Per-County Share of \$3 Million from ILSF for Beginning the Independent Public Defense Commission

\$ 3 Million Cost Projections for the Independent Public Defense Commission from each county
using the Office of the State Comptroller Projected Percentage distribution of 2008 ILSF (distributed in 2009)

County	2006		2007		Avg Used for 2008 ILSF		Projected ILSF 2008 Distribution (Note 3) \$76,478,074	ILSF Projection Minus % of \$3 Million Using Avg for 2008 ILSF
	% of ILSF (Note 1)	Percent of \$3 Million	% of ILSF (Note 1)	Percent of \$3 Million	Projection (Note 2)	Percent of \$3 Million		
Albany	1.490%	\$ 44,701	1.387%	\$ 41,601	1.438%	\$ 43,151	\$ 1,100,044	\$ 1,056,892
Alegany	0.204%	\$ 6,131	0.179%	\$ 5,377	0.192%	\$ 5,754	\$ 146,690	\$ 140,936
Broome	1.303%	\$ 39,085	1.267%	\$ 38,016	1.285%	\$ 38,551	\$ 982,756	\$ 944,206
Cattaraugus	0.406%	\$ 12,193	0.417%	\$ 12,516	0.412%	\$ 12,355	\$ 314,956	\$ 302,601
Cayuga	0.208%	\$ 6,226	0.210%	\$ 6,312	0.209%	\$ 6,269	\$ 159,814	\$ 153,545
Chautauqua	0.479%	\$ 14,358	0.475%	\$ 14,238	0.477%	\$ 14,298	\$ 364,493	\$ 350,195
Chemung	0.536%	\$ 16,094	0.537%	\$ 16,102	0.537%	\$ 16,098	\$ 410,389	\$ 394,290
Chenango	0.142%	\$ 4,250	0.143%	\$ 4,285	0.142%	\$ 4,268	\$ 108,792	\$ 104,525
Clinton	0.450%	\$ 13,507	0.438%	\$ 13,150	0.444%	\$ 13,329	\$ 339,781	\$ 326,452
Columbia	0.312%	\$ 9,354	0.247%	\$ 7,406	0.279%	\$ 8,380	\$ 213,630	\$ 205,250
Cortland	0.251%	\$ 7,525	0.306%	\$ 9,187	0.279%	\$ 8,356	\$ 213,014	\$ 204,658
Delaware	0.175%	\$ 5,245	0.172%	\$ 5,161	0.173%	\$ 5,203	\$ 132,640	\$ 127,437
Dutchess	1.467%	\$ 44,002	1.446%	\$ 43,382	1.456%	\$ 43,692	\$ 1,113,820	\$ 1,070,128
Erie	2.959%	\$ 88,775	2.883%	\$ 86,496	2.921%	\$ 87,636	\$ 2,234,065	\$ 2,146,430
Essex	0.181%	\$ 5,422	0.185%	\$ 5,541	0.183%	\$ 5,481	\$ 139,726	\$ 134,245
Franklin	0.122%	\$ 3,672	0.179%	\$ 5,366	0.151%	\$ 4,519	\$ 115,194	\$ 110,675
Fullon	0.204%	\$ 6,111	0.173%	\$ 5,198	0.188%	\$ 5,654	\$ 144,148	\$ 138,494
Genesee	0.289%	\$ 8,672	0.282%	\$ 8,472	0.286%	\$ 8,572	\$ 218,531	\$ 209,959
Greene	0.193%	\$ 5,780	0.237%	\$ 7,119	0.215%	\$ 6,449	\$ 164,412	\$ 157,963
Hamilton	0.026%	\$ 771	0.033%	\$ 983	0.029%	\$ 877	\$ 22,345	\$ 21,469
Herkimer	0.131%	\$ 3,937	0.146%	\$ 4,381	0.139%	\$ 4,159	\$ 106,033	\$ 101,873
Jefferson	0.371%	\$ 11,118	0.376%	\$ 11,286	0.373%	\$ 11,202	\$ 285,581	\$ 274,378
Lewis	0.083%	\$ 2,501	0.093%	\$ 2,793	0.088%	\$ 2,647	\$ 67,478	\$ 64,831
Livingston	0.180%	\$ 5,402	0.207%	\$ 6,214	0.194%	\$ 5,808	\$ 148,057	\$ 142,249
Madison	0.191%	\$ 5,734	0.190%	\$ 5,714	0.191%	\$ 5,724	\$ 145,917	\$ 140,193
Monroe	3.040%	\$ 91,203	2.983%	\$ 89,483	3.011%	\$ 90,343	\$ 2,303,085	\$ 2,212,742
Montgomery	0.165%	\$ 4,961	0.172%	\$ 5,158	0.169%	\$ 5,060	\$ 128,982	\$ 123,922
Nassau	2.850%	\$ 85,504	3.421%	\$ 102,639	3.136%	\$ 94,071	\$ 2,398,135	\$ 2,304,063
Niagara	0.626%	\$ 18,790	0.610%	\$ 18,292	0.618%	\$ 18,541	\$ 472,669	\$ 454,128
Oneida	0.903%	\$ 27,091	0.960%	\$ 28,791	0.931%	\$ 27,941	\$ 712,284	\$ 684,343
Onondaga	1.898%	\$ 56,953	1.851%	\$ 55,532	1.875%	\$ 56,243	\$ 1,433,775	\$ 1,377,532
Ontario	0.489%	\$ 14,683	0.524%	\$ 15,714	0.507%	\$ 15,198	\$ 387,450	\$ 372,251
Orange	1.029%	\$ 30,884	1.356%	\$ 40,668	1.193%	\$ 35,776	\$ 912,029	\$ 876,253
Orleans	0.173%	\$ 5,194	0.183%	\$ 5,485	0.178%	\$ 5,339	\$ 136,110	\$ 130,771
Oswego	0.399%	\$ 11,976	0.389%	\$ 11,655	0.394%	\$ 11,816	\$ 301,216	\$ 289,400
Otsego	0.342%	\$ 10,265	0.337%	\$ 10,119	0.340%	\$ 10,192	\$ 259,816	\$ 249,624
Pulnam	0.264%	\$ 7,931	0.257%	\$ 7,712	0.261%	\$ 7,822	\$ 199,397	\$ 191,576
Rensselaer	0.496%	\$ 14,885	0.503%	\$ 15,076	0.499%	\$ 14,980	\$ 381,889	\$ 366,908
Rockland	1.311%	\$ 39,325	1.130%	\$ 33,895	1.220%	\$ 36,510	\$ 933,287	\$ 896,677
St. Lawrence	0.517%	\$ 15,510	0.517%	\$ 15,498	0.517%	\$ 15,504	\$ 395,242	\$ 379,738
Saratoga	0.383%	\$ 11,475	0.391%	\$ 11,726	0.387%	\$ 11,600	\$ 295,726	\$ 284,126
Schenectady	0.962%	\$ 28,862	0.945%	\$ 28,357	0.954%	\$ 28,610	\$ 729,334	\$ 700,725
Schoharie	0.097%	\$ 2,912	0.134%	\$ 4,026	0.116%	\$ 3,469	\$ 88,437	\$ 84,968
Schuyler	0.089%	\$ 2,666	0.088%	\$ 2,629	0.088%	\$ 2,648	\$ 67,500	\$ 64,852
Seneca	0.118%	\$ 3,528	0.136%	\$ 4,075	0.127%	\$ 3,801	\$ 96,905	\$ 93,104
Steuben	0.393%	\$ 11,788	0.386%	\$ 11,570	0.389%	\$ 11,679	\$ 297,722	\$ 286,043
Suffolk	3.645%	\$ 109,358	3.859%	\$ 115,774	3.752%	\$ 112,566	\$ 2,869,607	\$ 2,757,041
Sullivan	0.509%	\$ 15,279	0.496%	\$ 14,893	0.503%	\$ 15,086	\$ 384,590	\$ 369,504
Tioga	0.131%	\$ 3,930	0.128%	\$ 3,831	0.129%	\$ 3,881	\$ 98,933	\$ 95,052
Tompkins	0.551%	\$ 16,537	0.539%	\$ 16,157	0.545%	\$ 16,347	\$ 416,722	\$ 400,375
Ulster	0.774%	\$ 23,222	0.725%	\$ 21,735	0.749%	\$ 22,479	\$ 573,045	\$ 550,566
Warren	0.291%	\$ 8,744	0.285%	\$ 8,543	0.288%	\$ 8,643	\$ 220,343	\$ 211,699
Washington	0.173%	\$ 5,185	0.148%	\$ 4,437	0.160%	\$ 4,811	\$ 122,655	\$ 117,843
Wayne	0.430%	\$ 12,898	0.514%	\$ 15,418	0.472%	\$ 14,158	\$ 360,927	\$ 346,769
Westchester	5.773%	\$ 173,203	5.636%	\$ 169,070	5.705%	\$ 171,136	\$ 4,362,724	\$ 4,191,587
Wyoming	0.093%	\$ 2,779	0.094%	\$ 2,829	0.093%	\$ 2,804	\$ 71,487	\$ 68,683
Yates	0.088%	\$ 2,641	0.086%	\$ 2,567	0.087%	\$ 2,604	\$ 66,384	\$ 63,779
New York City	58.642%	\$ 1,759,271	58.012%	\$ 1,740,349	58.327%	\$ 1,749,810	\$ 44,607,361	\$ 42,857,551
Total	100%	\$ 3,000,000	100%	\$ 3,000,000	100%	\$ 3,000,000	\$ 76,478,074	\$ 73,478,074
Non-NYC Total	41.358%	\$ 1,240,729	41.988%	\$ 1,259,651	41.673%	\$ 1,250,190	\$ 31,870,713	\$ 30,620,523

Note 1 - "% of Total" - the net local expenditures of an individual county/city divided by the total of all net local expenditures, rounded to 3 decimal places - represents the proportionate share of the ILSF funds to be distributed - "Total" is sum of individual county/city shares

Note 2 - "Average %" - since each county's percentage share of statewide indigent legal service expenditures varies from year to year, the Comptroller has used an average of their 2006 and 2007 percentages to calculate the 2008 distribution - actual 3/31/09 distribution will be based on 2008 net local expenditures (see Comptroller's bulletin for more details)

Note 3 - \$76,478,074 is the estimated balance in the ILSF at 12/31/08 available for distribution to counties.

Based on information provided by OSC dated January 16, 2009; received January 23, 2009