Recommendations Regarding the Chief Administrator's Implementation of Caseload Standards for New York City

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INTRODUCTION.

At the core of the public defense crisis that envelops this state and nation is the well-known but rarely redressed reality that individual lawyers who provide mandated representation are forced to represent too many clients. Case overload diminishes the time available for the professional services that lawyers are obliged to perform for every client. Too often lawyers lack the time to meet, come to know, and be trusted by clients. Stolen by excessive caseloads is the time to adequately investigate facts, thoroughly examine legal authority, and competently build a theory for defending each client. What time gives lawyers is the ability to provide quality representation – in all its aspects – to people who deserve to be counseled, represented, and treated with dignity.

Enforcing appropriate caseload levels is key to ensuring the provision of public defense services that meet constitutional, statutory, and professional standards. Statutorily required implementation by the Chief Administrator of the Courts of compliance with caseload standards in New York City is an important step toward much-needed improvement of public defense services. On March 9, 2010, that implementation was initiated by issuance of a new section 127.7 of the Rules of the Chief Administrator of the Courts (hereinafter, Chief Administrator's Rules). (Attached as Appendix A.)

The New York State Defenders Association (NYSDA) lauds the involvement of all three branches of state government in the current statutory effort to ensure justice for the many public defense clients whose cases arise in the City of New York. As part of NYSDA's contractual duty to the State to "review, assess and analyze the public defense system" and make specific recommendations to the Executive, Legislature, and Judiciary, we offer the following analysis of caseload limit implementation. We hope it contributes to the vitally important process of fulfilling the statutory mandate to fully implement caseload standards in New York City by April 1, 2014. We also hope that our work, and that of all who participate in this process, contributes to an understanding of what must be done to extend fairness statewide.

1. CASELOAD LIMITS ARE NECESSARY AND MUST INCLUDE THE CONCEPT OF WORKLOAD.

Legislation passed in 2009 requires the Chief Administrator of the Courts to promulgate rules regarding compliance with public defense caseload standards.[1] Only New York City is covered by the language of the bill as it is the only jurisdiction in the state that has a population that

[1]Laws of 2009, Ch 56, Part ZZ:

"Section 1. The chief administrator of the courts shall promulgate rules regarding compliance with caseload standards for attorneys and law offices providing representation to indigent clients in criminal matters pursuant to article 18-B of the county law in cities with a population of over one million with caseload standards deemed reasonable by the chief administrator of the courts. Such rules shall provide for a 4-year phased plan of implementation, beginning on April 1, 2010 and resulting in ongoing compliance after March 31, 2014. The plan for compliance with caseload standards shall allow for adjustment each year, and shall consider, on an ongoing basis, the future projections of caseload, as well as the number of attorneys available to accept cases. The chief administrator may request funds necessary to assist in meeting the prescribed standards as part of the annual budget request of the office of court administration. However, nothing in this section shall be deemed to require the legislature to approve such request, nor create a liability requiring the state to provide the funding necessary to ensure compliance with the standards set by such rules. Section 2. This act shall take effect immediately."

exceeds one million and has implemented a public defense caseload standard.[2] That standard is currently unenforced and regularly exceeded by providers.[3]

The new addition to the Chief Administrator's Rules issued in March 2010 provides workload standards that will serve as non-binding guidelines between April 1, 2010 and March 31, 2014, and requires annual review of New York City public defense caseloads. The statute requires that the Chief Administrator's plan for compliance with caseload standards shall allow for adjustment each year. On April 1, 2014, compliance with any rules set by the Chief Administrator pursuant to the statute becomes mandatory. Between now and then, NYSDA will continue to review, assess, and analyze developments with regard to caseload caps in New York City, and stands ready to assist the Chief Administrator, all those who provide public defense representation in New York City, and all others, including the Legislature and State Executive, who must play a role in attaining manageable caseloads for all public defense lawyers.

Implementation of compliance with caseload standards in New York is long overdue. National and state public defense standards universally call for limits on caseloads.[4] Excessive caseloads prevent attorneys from providing ethical, efficient, and effective representation.[5] When

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[2] The caseload standard can be found at Appellate Division, First Department Indigent Defense Organization Oversight Committee (IDOOC), *General Requirements for all Organized Providers of Defense Services to Indigent Defendants* (hereinafter, IDOOC *Requirements*)(1996, amended 1997), Requirements V.A and V.B.2.

[3] *See, eg,* IDOOC, *Report of the Indigent Defense Organization Oversight Committee to the Appellate Division First Department for Fiscal Years 2006-2007*, pp 1-3.

[4] *See, eg*:

- American Bar Association, *Ten Principles of a Public Defense Delivery System* (hereinafter ABA *Ten Principles*) (2002), Principle 5;
- ABA, *Standards for Criminal Justice Providing Defense Services* (hereinafter ABA, *Providing Defense Services*) (3rd ed. 1990), Standard 5-5.3(b) ["Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations."];
- National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (hereinafter NSC *Guidelines*) (1976), Guideline 1.3;
- National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (hereinafter NAC *Standards*) (1973), Standard 13.12;
- New York State Bar Association, *Standards for Providing Mandated Representation* (hereinafter NY State Bar *Standards*) (2005), Standards G-1 and G-2; and
- New York State Defenders Association, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (hereinafter NYSDA *Standards*) (2004), Standard IV. Links to national and state standards are available at http://www.nysda.org/html/defense_services.html#Standards.

[5] *See* ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441, May 13, 2006 - Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation, http://www.abanet.org/cpr/06_441.pdf; American Council of Chief Defenders (hereinafter ACCD), National Legal Aid and Defender Association (hereinafter NLADA), Ethics Opinion 03-01 (2003), http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf.

While the new rule issued by the Chief Administrator says that for institutional providers the numerical limits exist only as to averages of the caseloads of staff attorneys, and explicitly states that offices may assign a given lawyer cases in excess of that numerical limit, the rule cannot abrogate the professional obligation of public defense lawyers to avoid excessive caseloads.

public defense lawyers have too many cases, clients languish in jail pretrial without talking to a lawyer,[6] enter guilty pleas before receiving sufficient legal advice,[7] receive trials at which their defenses are not adequately presented, and even endure wrongful convictions.[8]

The need for enforceable caseload limits across New York State is well-documented.[9] Effective implementation of enforceable limits in New York City will increase justice and may, depending on its design, serve as a model for implementing standards in the rest of the state.

No simple formula or magic numbers exist to determine what constitutes "excessive" caseloads.[10] The goal in developing caseload standards and implementing compliance with them must be to ensure that public defense lawyers have the time necessary to properly and professionally represent every one of their clients. Therefore, in implementing "caseload standards" as the statute requires, emphasis must be on limiting the "load" lawyers must carry. The new rule recognizes this by using the word "workload," which signifies that the implemented limits must meaningfully address caseload impact on work capacity and must positively affect attorney performance.

Some existing standards and authorities refer to "caseloads" and evaluate attorneys' workloads by the number of cases handled annually (or, in some instances, at a given time), but a growing body of experience calls for assessing "workload." Different "weights" are assigned to

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[6] *See, eg,* 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* (hereinafter *Spangenberg Report*) (2006), p 150. http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf. ["One thing we learned from our site work is that attorney-client contact is a serious problem in New York City, particularly for in-custody clients."]

[7] *See, eg, Spangenberg Report,* p 153. ["While the effects of collateral consequences exist throughout the state, they are enormous in New York City, given the high percentage of cases that are resolved at arraignment and the fact that defense counsel spends merely minutes with a defendant before a guilty plea is entered at arraignment. Also, the fact that, on a daily basis, defense counsel in the criminal courts of New York City spend very little time with many of their clients at arraignment raises serious ethical concerns for counsel as well as questions regarding effective assistance of counsel."]

[8] *See, eg,* Mosteller, Robert P., "Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice," 75 Missouri L Rev __ (forthcoming 2010), UNC Legal Studies Research Paper No. 1522052), pp 1-2. (Available at SSRN: http://ssrn.com/abstract=1522052.) ["(T)he essential point that excellent defense services are important in protecting the innocent has been recognized with admittedly varying levels of intensity by quite different observers…. Attorney General Janet Reno stated the point very directly: 'In the end, a good lawyer is the best defense against wrongful conviction.' Judge Richard Posner recognized this point from a quite different theoretical perspective: 'The total suffering of the innocent will not be reduced unless the courts both invalidate statutes that impose severe punishments and insist on generous funding of criminal defense lawyers'…. Finally, Professor William Stuntz states that '*Gideon* and the reasonable doubt rule are essential to any adversarial system that takes accuracy seriously.'" (Footnotes omitted).]

[9] *See, eg,* Commission on the Future of Indigent Defense Services. *Final Report to the Chief Judge of the State of New York* (hereinafter *Kaye Commission Report*) (2006), http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf; *Spangenberg Report.*

[10] "Creating mathematical-like formulas that weigh various types of charges in an effort to empirically fix the amount of attorney time needed to handle a particular case is an inadequate solution…. Caseload caps are the start." Steven Zeidman, *Indigent Defense: Caseload Standards*, New York Law Journal, March 24, 2010. http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202446663975&font_colorredFreefont_Indigent_Defense_Caseload_Standards&slreturn=1&hbxlogin=1&slreturn=1&loginloop=oo&slreturn=1.

different types of cases, proceedings, and dispositions.[11] "Workload" is used in the "General Requirements for all Organized Providers of Defense Services to Indigent Defendants" promulgated by the Appellate Division, First Department Indigent Defense Organization Oversight Committee (IDOOC).[12]

Any numerical limits instituted should act as ceilings above which caseloads can never go, not as requirements that every office or every attorney must meet. The limits must be subject to adjustment whenever factors exist to warrant it. The need to provide for adjustments is recognized by the legislation authorizing the Chief Administrator's new rule[13] as well as by the authorities discussed below.

2. ANY NUMERICAL CASELOAD STANDARDS MUST BE INDIVIDUALIZED FOR EACH OFFICE OR JURISDICTION.

The standard promulgated by IDOOC states: "Lawyers and other professionals employed by defense organizations should maintain manageable workloads in order to permit them to render quality representation to each individual client." Numerical limits – "presumptive norm caseload maximums" – appear as specific guidelines under evaluation criteria for the standard. The commentary recognizes that "[n]o single numerical formula can be valid for measuring workloads for all times and for all places." That commentary adds that defense organizations can show, "based on changes and differences in their practice or their operating methods, that different measurements are appropriate."[14]

Many factors affect the number of cases in which an office or attorney can provide competent representation.[15] These include differences in court practice; distances and travel

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[11] *See, eg,* Bureau of Justice Assistance, US Department of Justice, Indigent Defense Series #4, *Keeping Defender Workloads Manageable* (The Spangenberg Group, 2001), p 3 et seq. (www.ncjrs.org/pdffiles1/bja/185632.pdf); *see also* NLADA, *Case Weighting Systems: A Handbook for Budget Preparation* (1985).

[12] IDOOC *Requirements*, Requirement V.B.2. Note that the IDOOC workload requirements use as evaluation criteria whether an institutional provider has "a system for weighting and assigning cases in order to apportion workload equitably among lawyers" [emphasis added] as well as whether "there are established limits on the number of cases in each category assigned to each lawyer." Requirement V.B.1 and 2.

[13] Laws of 2009, Ch 56, Part ZZ, Section 1. ["The plan for compliance with caseload standards shall allow for adjustment each year….] The new Chief Administrator's rule at least implicitly acknowledges the need to adjust caseload limits in light of changing circumstances, although the list in subsection (b) of factors that can affect what caseload is manageable are listed as considerations for the Chief Administrator to use in annual reviews of public defense caseloads rather than as factors for revising the numerical limits set out in subsection (a).

[14] IDOOC *Requirements,* commentary to Requirement V.B.2.

[15] *See, eg, NAC Standards,* Standard 13.12, Commentary, p 27. [The standards were adopted "with the caveat that particular local conditions – such as travel time – may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction."]; NY State Bar *Standards*, Standard G-2 ["Because different localities have different procedures and policies and because travel requirements may differ from county to county, reasonable statewide numerical workload limits are impossible to establish. Therefore, each institutional provider and assigned counsel plan shall develop local numerical workload standards. Among the factors that shall be considered in establishing maximum workloads are (a) the types of cases being handled; (b) the qualifications and experience of the attorney; (c) the workload and resources of the prosecutor or other attorney(s) handling such cases for the government; (d) the distance between court(s) and attorney offices; (e) the time needed to interview clients and witnesses, taking into consideration the

options for getting between offices, courts, incarceration facilities, and other locations; prosecution policies; staff experience; and resources available. The Chief Administrator of the Courts recognized a multiplicity of factors when establishing a caseload number for Attorneys for Children[16] as well as in subsection (b) of the new rule.[17] Such variances exist not just between New York City and other areas of the state but within the City itself – among boroughs, offices, and the communities served.

One example of different court practices within New York City is the pilot project set up in 2004 that created a new Criminal Division of the Supreme Court, Bronx County.[18] This merger of the Criminal Court and the Criminal Term of the Supreme Court is currently in litigation,[19] but it has certainly created unique circumstances for Bronx public defense practitioners for the last five years.

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travel time and the location of confidential interview facilities; (f) any other factors relevant to the local practice or the types of cases being handled; and (g) existing national and other recognized workload standards…."]; NYSDA *Standards,* Standard IV.B ["Local geographical, procedural, policy, and other differences make statewide numerical workload limits difficult to establish. Therefore, each plan or program should establish local numerical workload standards. Among factors that should be considered in establishing workload formulas are the types of cases being handled, workload and resources of the prosecutor or other attorney(s) handling the case for the government, distance between court(s) and public defense program or attorney offices, time needed to interview clients and witnesses (distance to jails, location of confidential interview facilities, etc.), and existing national and other workload standards."]; IDOOC *Requirements,* Requirement V.C, Commentary on V.B.2 ["No single numerical formula can be valid for measuring workloads for all times and for all places….Defense organizations are not precluded from demonstrating, based on changes and differences in their practice or their operating methods, that different measure are appropriate."].

[16] That rule provides that the number of children represented at any given time by an attorney appointed pursuant to Family Court Act § 249 is not to exceed 150, but this is subject to adjustment based on factors such as: the categories of cases that comprise the workload of the office; the level of activity required at different phases; the weighting of different categories and phases of cases; availability and use of support staff; the representation of multiple children in a case; local court practice, including the duration of a case; and other relevant considerations. 22 NYCRR § 127.5 (2010).

[17] "[T]he Chief Administrator may consider: (1) differences among categories of cases that comprise the workload of the defense organization; (2) the level of activity required at different phases of the proceeding; (3) local court practice, including the duration of a case; and (4) any other factor the Chief Administrator deems relevant." Chief Administrator's Rules, § 127.7(b).

The rule setting workload for Attorneys for Children mentions some factors not included in the new rule, such as weighting different case categories and phases and availability and use of support staff. It must be assumed that these factors, which greatly affect the reasonableness of caseloads, have not been rejected with regard to New York City public defense criminal matters but are included in the final catch-all phrase of any other factor deemed relevant.

[18] The merger is discussed in, *eg*, Judith S. Kaye, *State of the Judiciary* (2004), pp 7-8, http://www.nycourts.gov/ctapps/SOJ04.PDF and Daniel Wise, *Key Legislators Question Bronx Court Merger Plan*, New York Law Journal, April 9, 2004, at 1, col. 5. http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=900005418194 [subscription required].

[19] *See People v Correa*, 2010 NY Slip Op. 01533 (1st Dept, 2/23/10). [Merger found unconstitutional]. The case has been appealed to the Court of Appeals. *See* Daniel Wise, *News in Brief*, nylj.com, March 16, 2010. http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202446242741&News_In_Brief. *See also* Daniel Wise, *City Bar Report Cites "Serious Problems" With Bronx Merger*, New York Law Journal, June 11, 2009, at 1, col. 5. http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202431378200&font_colorredFreefont_City_Bar_Report_Cites_Serious_Problems_With_Bronx_Merger. *But see People v Fernandez*, 2010 NY Slip Op 1977 (2nd Dept 3/9/10).

Another difference impacting public defense was even recognized in the recent Request for Proposals to provide public defense services issued by the City. The RFP called for proposals to provide specialized services needed in particular catchment areas to fulfill needs endemic to specific populations.[20] Many other factors exist that must be considered when determining caseload limits for New York City, as discussed further at Section 4, *infra*.

Given the many things that affect the reasonableness of a caseload, setting and implementing compliance with caseload standards requires the consideration of input about existing needs and practices. Presumably, information and comments from all existing New York City providers, including institutional supervisors and line attorneys and assigned counsel lawyers, were sought and considered prior to issuance of the new rule.[21] We hope that the Chief Administrator will obtain and consider additional information from public defense providers and otherwise monitor new developments requiring adjustments to § 127.7 over the next four years.

3. THERE ARE BOTH ADVANTAGES AND DRAWBACKS TO USING EXISTING NUMERICAL STANDARDS UNTIL MORE PRECISE ONES CAN BE DEVELOPED.

Because of the numerous factors that affect how many cases an office or attorney can handle, some public defense standards avoid national or statewide numerical limits. The 1976 National Study Commission on Defense Services avoided any reference to precise numbers.[22] Similarly, the NYSDA standards provide no numerical limits, stating that:

> *Local geographical, procedural, policy, and other differences make statewide numerical workload limits difficult to establish. Therefore, each plan or program should establish local numerical workload standards….*[23]

Similarly, the American Prosecutors Research Institute (APRI) found in 2002, after three years of collecting information, that it was impossible to develop national caseload and workload standards. Among the issues APRI noted was that aggravated felonies took significantly longer

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[20] The City of New York, Mayor's Office of the Criminal Justice Coordinator, *Request for Proposals: Indigent Criminal Defense Services*, (2/3/10) p 3. http://www.nylj.com/nylawyer/adgifs/decisions/021010RFP.pdf.

[21] The Office of Court Administration (OCA) sought input from providers and others when preparing to fulfill the requirements of section 249-b to the Family Court Act, requiring promulgation of court rules prescribing workload standards for law guardians (now called Attorneys for Children) discussed above in text at note 16. OCA solicited input from law guardian contractors and other interested parties about appropriate methodologies for caseload study, met with each of the three institutional offices in New York City and with offices outside the City, hosted a full-day session with representatives of institutional offices and panel law guardians and others before retaining the National Center for State Courts (NCSC) as a consultant. *Preliminary Report of the Chief Administrative Judge Pursuant to Chapter 626 of the Laws of 2007* (hereafter Chief Administrative Judge's *Preliminary Report*) (2007), p 5. http://www.courts.state.ny.us/ip/gfs/LawGuardianDoc2007.pdf. In studying law guardian caseloads, NCSC found significant variations in assignment practices around the state and the existence of distinct service delivery models functioning within totally different professional and structural environments. They also found differences in: attorney experience levels; the availability of support staff and technology; deployment of staff; and court and practice culture. *Id.* at pp 8-11.

We understand that NCSC was also retained in connection with the New York City caseload standards; while we have not seen any NCSC report, we expect that NCSC will have found similar diversity with regard to criminal public defense practice in New York City.

[22] NSC *Guidelines*, Guidelines 5.1, 5.3.

[23] NYSDA *Standards*, Standard IV.B.

on average than less serious felonies, and that basing standards "solely on current factors without controlling for the number of aggravated cases and the percentage of cases disposed at trial (and other local factors), will over-provide attorneys in some offices and under-provide in others." This, APRI noted, would "not result in a golden mean at the national level."[24]

The American Bar Association's *Standards for Criminal Justice, Providing Defense Services* do not include numbers in the blackletter standards approved in 1990, but the commentary to those standards, like the commentary to the IDOOC standard, refers to the limits promulgated by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1973.[25] The body that promulgated the NAC standards was not a public defense body; as noted in the NAC report, its members included prosecutors, judges, police chiefs, and others. [26]

a. The primary if not sole source of numerical standards today is the set of caseload limits promulgated by the National Advisory Commission (NAC) in 1973.

The NAC caseload limits have been described approvingly as "resilient."[27] However, it is important when using those limits to note the National Advisory Commission accepted the numbers arrived at by the defender committee of NLADA[28] only with "the caveat that particular local conditions – such as travel time – may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction."[29]

The durability of the NAC standards rests largely on the absence of any other numbers, and the desire for an easy measure. Funders and others often find numbers easier to deal with than the complex ethical considerations that are actually at issue.

The numerical caseload limits used as specific guidelines in the evaluation criteria for the IDOOC caseload standard are the same as the NAC standards. The two numerical limits incorporated into the new section of the Chief Administrator's Rules are also the same. As described below, the Chief Administrator will need to regularly re-examine the caseload standard established by the new rule in light of the many variables that affect public defense practice across New York City.

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[24] American Prosecutors Research Institute, *How Many Cases Should a Prosecutor Handle? Results of the National Workload Assessment Project* (2002), pp 29-30.

[25] ABA, *Providing Defense Services,* Commentary to 5-5.3, pp 72-73, citing NAC *Standards*, Standard 13.12.

[26] NAC *Standards,* Foreword.

[27] ABA, *Providing Defense Services,* Commentary to 5-5.3, p 72.

[28] The numerical limits came about during one NLADA conference. They have been said to be a product of the Delphi Method, "nothing more than a 'strong educated guess' about the numerical issue in question by a group of persons experienced in an area" that nonetheless rests on "sound scientific principles." NLADA, *Indigent Defense Caseloads and Common Sense: An Update* (1992), p 7. The Delphi Method is described by Business Directory.Com as follows: "Collaborative estimating or forecasting technique that combines independent analysis with maximum use of feedback, for building consensus among experts who interact anonymously. The topic under discussion is circulated (in a series of rounds) among participating experts who comment on it and modify the opinion(s) reached up to that point ... and so on until some degree of mutual agreement is reached." http://www.businessdictionary.com/definition/delphi-method.html. No documentation of the process used in establishing the NAC numbers is available for comparison.

[29] NAC *Standards,* Commentary to Standard 13.12, p 27.

b. Many changes since 1973 have affected the validity of the NAC standards.

Thirty-seven years have passed since the NAC numerical caseload standards were issued. Critics assert that changes in public defense practice have rendered the standards obsolete. Arguments are made that the numbers are now too high – or too low.

In support of the latter argument, advances in technology are noted. Surely, word processing, electronic legal research capabilities, and improvements in communication (teleconferencing and email, for example) have made attorneys and offices more efficient.[30] But the counterargument is that the same technological advances along with other changes in law, procedure, forensic science, and other relevant areas, have made legal representation far more complex. This increased complexity is so great that the NAC numbers should be lowered. [31] Factors contributing to the complexity include the following.

i. The ever-growing use of forensic evidence, increasing bases on which to challenge it, and particularly the development of DNA technology increase defense workloads.

Last year, the National Academy of Sciences issued a report that sparked a long-overdue, ongoing reevaluation of forensic evidence.[32] The findings and conclusions of that report "have been steadily sinking into the collective consciousness of the legal and scientific communities" ever since.[33] Yet, in some instances, lawyers have "accepted without question reports from

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[30] ACCD, *Statement on Caseloads and Workloads* (2007), p 6. http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf. ["The addition of electronic legal research and modern computer equipment and communications has increased efficiency and reduced the time it takes to prepare complex legal motions and memoranda. It should be noted however, that efficiencies associated with computer technology have sometimes been offset by the tendency of courts to provide attorneys with less time to produce legal pleadings; and, in some locations, the availability of computers has resulted in a decrease in the funding available to hire support staff."]

[31] The discussion in this section of the many elements of public defense work that have increased in complexity since the 1973 promulgation of the NAC standards, like those standards themselves, is general. As has already been noted, caseload standards should be established at the local level, so that factors affecting the ability to handle a given number of cases, including the complexity of cases being handled, can be evaluated. *See, eg,* Elizabeth Neeley, *Lancaster County Public Defender Workload Assessment* (Public Policy Center, University of Nebraska 2008) p 1. ["However, simply because more cases come before a legal office is not, in and of itself, evidence that attorneys' caseloads are too large. What needs to be determined is whether the caseload is appropriate in light of the complexity of the caseload."] The increasing complexity of public defense in general indicates that in the absence of a rigorous study of local caseloads, increasing caseload limits from those established in 1973 would be a grievous error.

[32] Committee on Identifying the Needs of the Forensic Sciences Community; Committee on Applied; and Theoretical Statistics, National Research Council of the National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009). http://www.nap.edu/catalog.php?record_id=12589.

[33] Ken Strutin, *Strengthening Forensic Science: The Next Wave of Scholarship*, Law Library Resource Exchange, Nov. 23, 2010. http://www.llrx.com/features/forensicscience.htm. *See also* Ken Strutin, *Shift in Legal Thinking on Forensic Evidence?* New York Law Journal, Jan. 19, 2010, at 5, col. 1. http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202438837164&A_Shift_in_Legal_Thinking_on_Forensic_Evidence&slreturn=1&hbxlogin=1&hbxlogin=1. *See also* Brad Reagan, *CSI Myths: The Shaky Science Behind Forensics*, Popular Mechanics (August 2009). http://www.popularmechanics.com/technology/military_law/4325774.html.

prosecutors' medical and forensic experts that were ripe for challenge."[34] Long-established types of evidence are now suspect: "many kinds of forensic testimony – involving handwriting identification, fingerprint evidence and ballistics, for example – are enormously persuasive to a typical jury, [but] they do not meet the basic requirements of good science."[35] Defense lawyers need time (and resources) to rebut such evidence presented by the prosecution. Conversely, social science evidence about the unreliability of eyewitness identification[36] and confessions[37] is also growing; public defense lawyers must not be deterred by their caseloads from making the effort needed to persuasively proffer this and other forensic evidence useful to the defense. And new types of unvetted scientific evidence cropping up in headlines today will be offered in courts – by the prosecution or defense – tomorrow. Learning about this host of forensic issues can be critical to providing competent representation – and requires a great deal of time.

While some forensic evidence issues may arise only rarely, others are quite common. In the last year for which data was available (2008), there were 40,214 felony and 100,769 misdemeanor drug arrests in New York State; 28,764 and 79,975 of those respectively were in New York City.[38] As many as 30 percent of parolees may be tested for drugs,[39] which may lead to parole revocation proceedings. Meanwhile, revelations continue to appear about error and even fraud in police and other forensic laboratories,[40] so that closely examining forensic evidence in cases involving drugs should be routine. This increases the amount of time needed in many cases that at one time might have been thought of as "simple."

The advent of forensic DNA evidence, perhaps more than any other type of forensic evidence, has changed defense practice dramatically. Scientific and technological advances with regard to DNA and its forensic applications are announced with great frequency. Whenever biological evidence is available, public defense lawyers must be prepared to use it or challenge it on a client's behalf.[41]

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[34] Mary Sue Backus and Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L J 1031, 1035 (2006), citing Frederic N. Tulsky, *The High Cost of a Bad Defense*, Mercury News (San Jose, Cal.), Jan. 24, 2006, at 3A. [Article deals with both retained and public defense lawyers.]

[35] Jennifer L. Mnookin, *Clueless "Science,"* In The News: Forensic Psychology, Criminology, and Psychology – law [blog], 2/19/09. http://forensicpsychologist.blogspot.com/2009/02/clueless-science.html.

[36] *See, eg, People v Lee*, 96 NY2d 157(2001); *People v Abney,* 13 NY3d 251 (2009).

[37] *See, eg,* Court Issues Acquittal in False Confession Case, *Public Defense Backup Center REPORT*, Vol XX, No 5 (Nov-Dec 2005), p 4. http://www.nysda.org/05_NovemberDecemberReport.pdf.

[38] Division of Criminal Justice Services, Computerized Criminal History System (as of 11/09).

[39] *See* Brendan J. Lyons, *Journey to a violent death - Was parolee slain in Albany allowed to fail 7 drug tests as part of unstated policy?,* Albany Times Union, Feb. 28, 2010, at A1. http://www.timesunion.com/AspStories/storyprint.asp?StoryID=906169.

[40] *See, eg,* Office of the State Inspector General of the State of New York, *Final Report* (Dec. 22, 2009). http://www.ig.state.ny.us/pdfs/Erie%20County%20Department%20of%20Central%20Police%20Services%20Forensic%20Laboratory%20Report.pdf. [Chemist of the Erie County Department of Central Police Services Forensic Laboratory failed to perform a required chemical screening test during drug testing, then falsely reported that she had in fact performed the test. The Inspector General recommended additional retesting of the chemist's work "to ensure that no individual has been prejudiced by a false positive result for a controlled substance."]

[41] *See, eg,* Michael Bobelian, *DNA's Dirty Little Secret*, Washington Monthly, March/April 2010. http://www.washingtonmonthly.com/features/2010/1003.bobelian.html. [In some cases "where the DNA is often incomplete or degraded and there are few other clues to go on, the reliability of DNA evidence plummets—a fact that jurors weighing such cases are almost never told. As a result, DNA, a tool renowned for exonerating the innocent, may actually be putting a growing number of them behind bars."]

ii. The growing number of clients who require interpreting services imposes additional time requirements on attorneys.

New York's unparalleled linguistic diversity, which makes providing interpreting services exceedingly challenging for the judiciary,[42] presents increasing work for public defense lawyers as well. Attorneys in offices that deal with more non-English speaking clients and/or witnesses will need more time for interviews as well as in proceedings to ensure proper understanding by the lawyer, the client, and any witnesses as to what is being communicated. Additionally, the lawyer will need to investigate any police, prosecution, or other relevant communications involving clients and/or witnesses whose English proficiency is limited. For example, translations of taped conversations alleged to be between clients and informants need to be scrutinized carefully.[43] A high percentage of cases involving non-English-speaking individuals – or even one big case in which a language barrier must be surmounted – can reduce the number of other cases a lawyer can handle.

iii. Dramatic rise in the number and severity of collateral consequences stemming from criminal cases increases the work counsel must do.

Advising clients about the implications of criminal charges has become more difficult, and more time-consuming to do well, since 1973. Far-reaching consequences can result not only from convictions but even from proceedings that do not result in convictions, for example in cases involving clients who are not United States citizens.

Some so-called collateral consequences are fiscal – a welter of fines, forfeiture, restitution, and court costs can leave clients deep in debt when they are discharged from a sentence. Because they are scattered throughout different sections of the law, just finding all these provisions can be difficult; even harder is determining whether and how they all apply to a particular client. But their effect on the ability of imprisoned clients to transition back to society can be great, and professional standards require that the effort to discern them be made.[44] And at the other end of the case, clients may need information or assistance from trial counsel to obtain documentation such as Certificates of Relief from Disabilities or Certificates of Good Conduct to ameliorate some collateral consequences that impede their reentry into society.

Other consequences can be even more difficult to identify, such as potential loss of eligibility for public housing and other government benefits, educational grants, drivers licenses, and certain business and professional opportunities for the client or, in the case of housing, even the client's family.[45] These consequences have an impact on clients' lives and may affect case

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[42] *See* NYS Unified Court System, *Court Interpreting in New York: A Plan of Action* (2006) pp 1, 6. http://www.nycourts.gov/courtinterpreter/pdfs/action_plan_040506.pdf. [From 2000 to 2006, 69 new Court Interpreter positions were created, approximately two-thirds of them in New York City.]

[43] Joel Cohen, *When "Zealousness" Collides With Reputation for Honesty, Integrity*, nylj.com, 1/16/09. http://www.law.com/jsp/nylj/PubArticleNY.jsp?hubtype=FeaturedContent&id=1202427490507.

[44] *See* NY State Bar, *Re-entry and Reintegration: The Road to Public Safety: Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings* (2006), p 170. [Noting also a "pioneering effort to consolidate these financial penalties in one place," citing Center for Community Alternatives, *Sentencing for Dollars* (2004) (available at http://www.communityalternatives.org/pdf/sentencing_4_dollars.pdf).]

[45] *See, eg,* ACCD, *Statement on Caseloads and Workloads*, p 8, citing Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 BC L Rev 255, 258 (2004).

developments as well. What might otherwise appear to be unreasonable plea decisions by clients may be based on fears about collateral consequences. To meaningfully advise a client, counsel must know if there is a legal basis for such fears.[46]

In 1973 it may have been sound advice to tell some clients that so-called minor convictions "wouldn't matter" to their futures; information about these convictions was unlikely to be known to employers or prospective employers and others. Now, however, Internet availability of criminal records and the proliferation of background checks has increased the likelihood that the existence of even low-level offenses will lead to unemployability and other consequences. Depending on clients' ambitions and prospects, single aberrant or minor offenses can become major if a conviction will prevent them from obtaining a particular license or being hired for a particular job. Consider the recent case of a soldier whose conviction at 20 years old for possession of an unlicensed handgun – he had been working as a private investigator while going to college – barred him from service as a New York City police officer. With much effort and luck he was able to obtain a pardon to clear his path.[47] But many others who had also "turned their lives around" might not be so fortunate. Depending on the client, a "minor" case may have major ramifications that defense counsel must address before determining the best advice to give and the best way to proceed. That takes time.

One category of cases that will nearly always require more time because of so-called "collateral consequences" is sex offense prosecutions. Individuals accused of criminalized sexual behavior from forcible rape to consensual sex among teenagers face serious consequences. These may include lifetime reporting requirements, potential civil commitment at the end of a prison term, restrictions on housing locations, and listing on sex offender registries (which may result in these individuals having their photograph and address posted on the Internet). "When the NAC standards were first promulgated, there was no sex offender registry. Now a registry exists in every state,"[48] as is true of the other measures as well. While there is growing scrutiny of the counterproductive nature of some draconian measures leveled at sex offenders,[49] the cases of clients facing sex charges will for the foreseeable future need more time than equal-grade felonies of a less inflammatory type.

Yet another major category of cases in which collateral consequences may be unusually severe are those involving clients who are not citizens of the United States. Immigration consequences may result not only from conviction of certain types of offenses but also from statements or other actions short of a guilty plea.[50]

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[46] *See, eg,* ACCD, *Statement on Caseloads and Workloads*, pp 8 and 9. ["When the collateral consequences of conviction are more severe, they can be more important to the clients than possible incarceration, and clients are more likely to go to trial and sentencing preparation can become more difficult and time-consuming."]

[47] Press Release, *Governor Paterson Pardons Army Specialist* (12/29/09). http://www.state.ny.us/governor/press/press_12290901.html.

[48] ACCD, *Statement on Caseloads and Workloads*, p 9.

[49] John Frank, *Have sex-offender laws made children safer?*, St. Petersburg Times, Feb. 24, 2010. http://www.tampabay.com/news/politics/stateroundup/five-years-after-jessica-lunsfords-killing-legislators-rethink-sex/1075251. ["'Across the country, studies are not showing that changes in sex crime rates can be attributed to those policies,' said Dr. Jill Levenson, a professor at Lynn University who studies sex offenders."]

[50] *See generally* Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4th Edition) (NYSDA Immigrant Defense Project 2006).

iv. Specialty courts, in which greater judicial oversight requires more court appearances, increase the time spent on each case transferred to such courts.

In little more than a decade, New York State's court system "has implemented a range of problem-solving court models, including drug courts, domestic violence courts, community courts, mental health courts and sex offense courts."[51] A hallmark of these specialty courts is "close coordination between the court and outside groups, including prosecutors, defense attorneys, civil attorneys, law guardians, service providers, victim services organizations and law enforcement, as well as other courts."[52] Drug courts, which exist to help people overcome the addictions that fuel their involvement in the justice system, are cost effective when they reduce recidivism. However, the weight added to a public defense workload by the duration of the case and frequency of court appearances in these matters cannot be ignored when setting caseload limits.[53] Defense counsel has the same duties to drug court clients as to other clients, plus tasks unique to drug court, including appearance at "staffings" and the frequent court appearances required of clients.[54]

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[51] NYS Unified Court System, *Annual Report* (Report of the Chief Administrator of the Courts) (2008), p 8. http://www.courts.state.ny.us/reports/annual/pdfs/UCSAnnualReport2008.pdf.

[52] NYS Unified Court System, *Problem-Solving Courts* (brochure). http://www.courts.state.ny.us/courts/problem_solving/PSC-FLYER4Fold.pdf.

[53] *See Spangenberg Report*, p iii. ["Over the past decade, the climate of indigent defense in New York has changed significantly with the emergence of both collateral consequences and specialty court dockets that have increased the workload and responsibilities of providers. Unfortunately, while the collateral consequences of a conviction can in some cases be more damaging to a defendant than a criminal sentence, indigent defense attorneys are often unprepared or unable to inform the defendant of those collateral consequences. **In addition, with the creation of more and more specialty courts, the providers must allocate staff to handle additional dockets and cases that usually take longer to reach a disposition.**" (Emphasis added.)] *See also* National Association of Criminal Defense Lawyers (NACDL), *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform* (2009), p 36. http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/665b5fa31f96bc40852574260057a81f/$FILE/problem-solving_report_92809.pdf. ["The significant criticism for [a] hard-and-fast [caseload] standard for public defenders is that each case a public defender undertakes is different, and depending upon the circumstances, might take significantly more time than a traditional case. This is particularly a concern in the drug court context. **Individuals who enter drug court may require more time than a client in a traditional court. A client will likely be in the program not only for months, but years, and the client will require representation for that entire time."**(emphasis added).]

[54] *See, eg,* National Association of Drug Court Professionals, *Resolution Regarding Indigent Defense in Drug Courts* (approved by Board of Directors, April 19, 2002). http://www.nysda.org/html/drug_courts.html.

> ["… [T]he basic duties of counsel in conventional criminal proceedings are undiluted in drug court proceedings, including the ethical duties of zealous legal representation, the duty to confer with the client and keep the client informed of all options and of the progress of the case, the duty to fully investigate the case, conduct discovery, research the law, and prepare a defense."
>
> "… [C]ounsel in drug court has the additional duty, as contemplated under *Defining Drug Courts: The Key Components*, to serve as the client's counselor as well as advocate, to advise the client of all conditions, consequences, and alternatives prior to entry into drug court, and to work together with the prosecutor as a nonadversarial team toward the goal of the client's recovery, during the process of drug treatment and participation in drug court."
>
> "Drug courts should not usurp the vital functions of defense counsel in criminal cases, and defendants should not be required to waive the right to counsel in order to be admitted into drug court."
>
> "When exploring resources for drug courts, whether by grant or state or local appropriation, **consideration should be given to funding any increased indigent defense costs directly**

v. Other factors have also increased the complexity of public defense practice.

Since the publication of the NAC standards in 1973, defense counsel and their clients have faced a barrage of changes that increase the complexity of many cases. Increased criminalization of behavior and drastic changes in sentencing laws require more training, more attorney research time to ensure that clients receive accurate information, and more time to effectively explain complicated information to clients. Examples include the advent of determinate sentencing and post-release supervision for many cases[55] and incremental changes in the Rockefeller drug laws. Professional standards for representation at sentencing have evolved as well (and perhaps in response), with a growing expectation that, among other things, counsel should present a defense sentencing memorandum.[56]

Legislation, as well as prosecutorial policies, has increased the consequences and the complexity of cases involving repeat offenders and certain types of crimes. Examples include DWI[57] and sex offenses, especially those involving so-called sexually violent predators.[58]

The institution in 1998 of mandatory continuing legal education (MCLE) in New York was intended to ensure that attorneys, including public defense lawyers, master the increasing complexity of practice. (That result is contingent on lawyers taking the type of CLE courses that match the types of cases those lawyers handle). MCLE requires at a minimum that lawyers

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occasioned by participation in drug courts, including training on issues specific to drug court." (Emphasis added.)]

[55] Complicated calculations are required to ascertain the exact sentencing consequences of a conviction under the 1998 legislation denoted Jenna's Law. Along with the harsh nature of those consequences, the complexities of the law assured that it would "have a profound effect on the practice of criminal law in New York." Al O'Connor, *1998 Legislative Review*, Public Defense Backup Center REPORT (August 1998), p 4. Many issues regarding the law, particularly its post-release supervision provisions, have required attorney time since then. Perhaps the last major legal question regarding mandatory post-release supervision was resolved by a recent Court of Appeals case. *See* Joel Stashenko, *Ruling Could End Controversy About Post-Release Supervision*," nylj.com, 3/2/10. http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202444949220&Ruling_Could_End_Controversy_About_PostRelease_Supervision. Even if many legal issues have been settled, the law will remain a challenging factor in representing clients.

[56] *See* NYSDA *Standards,* Standard VIII.A.8.d. ["Counsel should present a defense sentencing memorandum unless counsel determines that not doing so would demonstratively benefit the client."]

[57] One treatise intended to "provide a complete reference to the statutes, case law and administrative rules and regulations pertaining to handling a DWI case in New York State" is **1218 pages** long – in small type – not counting the 62 appendices. *See* Peter Gerstenzang and Eric H. Sills, *Handling the DWI Case in New York* (2009-2010 edition). The 1989 edition was only **331 pages**. *See* World Cat Catalog OCLC # 22283625.

[58] *See, eg,* ACCD, *Statement on Caseloads and Workloads*, pp 6-7. ["…The prosecution of people charged with sex offenses has become more comprehensive, and the sentences for this category of crime have increased dramatically…. For example, a public defender attorney assigned to an office which handles sexually violent offender commitment proceedings will have to devote hundreds of hours just to become familiar with the literature regarding sexual deviance and the prediction of recidivism. These cases typically involve thousands of pages of discovery covering the client's entire life, and the jury is asked to consider psychological diagnoses and actuarial predictions of behavior. Similarly, because expert witnesses are a staple of sexually violent offender proceedings, the defender attorney working in this field must devote significant time to working with and preparing to examine expert witnesses on both sides of the case. The vast body of research and specialized knowledge in this area did not exist in 1973 when the NAC standards were formulated."

devote a dedicated block of time attending trainers[59] – time that cannot be spent representing clients.

vi. Public defense providers, whose duties to their clients are the same as all lawyers, have no control over most core changes affecting their practice.

When setting public defense caseload limits in light of current and changing practice, two facts should be kept in mind. One, public defense lawyers owe the same duty to each client that privately-paid lawyers do. Two, public defense lawyers have little or no ability to control the types of cases they will accept. This means that public defense lawyers cannot unilaterally adjust for the growing complexity of certain types of cases. Unlike a private firm, a public defense office cannot decline cases arising under complicated new legislation until its lawyers feel comfortable accepting such cases. Unlike a prosecutor's office, public defense lawyers lack the power to control caseloads by exercising discretion to dismiss cases. Public defense lawyers are not free to say, "I'll only represent you at trial if you pay an additional retainer" and they are not free to undermine by inadequate effort their clients' desire to hold the State to its burden of proving guilt beyond a reasonable doubt. Public defense providers need meaningful caseload limits when their practice changes due to outside forces. Otherwise, their only choices will be to provide deficient representation due to excessive caseloads, engage in litigation and administrative challenges to those caseloads, or quit public defense work altogether.

c. The interim use of the NAC numerical limits as ceilings constrained by caveats is a practical way to quickly implement compliance with caseload standards.

By passing the law requiring that compliance with caseload standards be implemented in New York City, the Legislature recognized that immediate steps are needed to curb perennially excessive caseloads. Such caseloads are not limited to New York City and are in large part to blame for the ongoing public defense crisis statewide. Ultimately, there must be a system that can put comprehensive measures into practice to prevent excessive caseloads. Meanwhile, effective measures must be taken quickly wherever possible to give public defense lawyers the time and resources per case necessary for quality representation.

The growing complexity of public defense work, noted above, contributes to the difficulty in establishing numerical caseload limits. The analysis needed to determine with certainty when a caseload has become excessive involves considering whether performance obligations are being fulfilled.[60] This, by definition, requires a determination of what those obligations are. As already noted, many factors can influence how long it takes to meet professional obligations. And it takes time to discern those factors and their effect on caseload limits for a given office or jurisdiction.[61]

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[59] *See, eg,* MCLE regulations posted on the Unified Court System website at http://www.nycourts.gov/attorneys/cle/regulationsandguidelines.pdf.

[60] *See, eg,* ABA, *Eight Guidelines of Public Defense Related to Excessive Workloads (*2009). http://www.abanet.org/legalservices/sclaid/defender/downloads/eight_guidelines_of_public_defense.pdf.

[61] To avoid institutionalizing bad practice, it is not enough to determine the current amount of time being spent by attorneys on particular types of cases. Rather, it must be determined whether attorneys have sufficient time to perform professional tasks in a reasonable and satisfactory way, and if not, what must be done to allow that to happen. A Nebraska assessment (*see supra* note 31) included a survey based on the one

Lack of time and resources to evaluate local factors may well be a primary reason the NAC numerical standards endure. In any situation in which caseloads chronically and substantially exceed those numbers, enforcing the NAC or other reasonable numerical limits should improve public defense services even if caseloads remain higher than limits set after full, local analysis would allow. New York City providers need immediate caseload relief, and the Chief Administrator of the Courts faces a statutory timeline for implementing compliance with New York City caseload limits. Unsurprisingly, two numerical standards identical to the NAC and IDOOC limits have been placed in the Chief Administrator's new rule. We do not know if the choice of those numbers followed analysis of input from New York City providers and examination of the caveats set out in this discussion, or reflect a default to the NAC/IDOOC numbers to facilitate timely issuance of the rule. In either event, the Chief Administrator should ultimately require study-based workload standards system wide; the standards should be program specific and based on the unique circumstances, particular caseloads, and jurisdictional anomalies that each office – and each lawyer – faces.

4. SEVERAL FACTORS, INCLUDING SOME SPECIFIC TO NEW YORK CITY, SHOULD BE ADDRESSED IN IMPLEMENTING COMPLIANCE WITH CASELOAD STANDARDS THERE.

While New York City shares in many of the problems affecting public defense statewide, its size[62] and character also present unique public defense issues. The 2006 report to the Chief Judge by The Spangenberg Group on public defense in New York State set forth several major factors that had shaped public defense in the City in the prior ten-plus years. These included a shift in crime trends, changes in law enforcement practices, a proliferation of specialty courts, and major changes to the public defense system itself.[63] Further changes have occurred since that report, including adoption of a new public defense plan in 2009.[64] Implementation of caseload standards must take all such unique factors into account.

a. The innovations made possible by a multiplicity of public defense providers should be encouraged; caseload standards should not increase existing caseloads.

For over 14 years, the City has contracted with a variety of public defense providers. Having an array of institutional providers allows productive experimentation and different approaches to unique issues or needs which lead to improvement in the efficiency and effectiveness of services. Offices may have varying pay scales and fringe packages, or may seek staff lawyers with different levels of experience, depending on their focus and manner of practice.[65] Lawyers in one

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used by NCSC for workload assessments and revised to reflect the local practice. *See, eg,* Neeley, *Lancaster County Public Defender Workload Assessment,* p 13.

[62] One measure of the size of New York City's public defense system is the data from the Office of the State Comptroller showing that in 2008 the City was responsible for $161,745,420 of the total $279,931,282 net local expenditures for public defense statewide. http://www.osc.state.ny.us/localgov/finreporting/ilsf/09ilsfdistribution.pdf.

[63] *Spangenberg Report*, p 121.

[64] *See* New York City Mayor's Office, Office of the Criminal Justice Coordinator, "Notice of Adoption of Rule," 12/29/09. ["Title 43 of the Rules of the City of New York is amended by adding a new chapter 13…." The chapter is entitled Indigent Defense Plan for the City of New York.]

[65] Note for example the different focuses revealed by the websites of two New York City public defense appellate offices. While both stress the high quality of their work, each highlights a different tactic. The Office

office may represent a higher percentage of clients in specialty courts requiring many appearances. Another office may invest lawyer time in not only the case assigned but other legal issues affecting a client's life. Such holistic representation[66] may decrease the number of cases a lawyer can handle but help prevent recidivism, which in the long term benefits the City both financially and in the quality of life it provides its residents and visitors.[67] Another way public defense programs may seek to improve the legal results their clients receive is to establish a special unit to examine and address systemic legal issues that repeatedly arise.[68] Diversity of practice leading to better representation should not be ignored or penalized by imposition of a one-size-fits-all numerical caseload standard.

Therefore, care should be taken in implementing any numerical standards so that no institutional provider experiences an increase in its existing caseload. Specifically, numerical caseload standards should act as ceilings to ensure quality representation,[69] never as floors in competitive bidding. The latter leads to universally-condemned low-bid contracts.[70]

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of the Appellate Defender points out that it "fills an important need in the criminal justice system by training new and relatively inexperienced lawyers in the practice of client-centered appellate advocacy." http://www.appellatedefender.org/. Appellate Advocates note that all the attorneys on staff are "experienced in both criminal and appellate law." http://www.appad.org/Home.aspx. Only examination of such differences and all other factors affecting the work in each office would reveal what caseload limits in each should be.

[66] The needs of offices offering holistic representation should be considered. These include the Neighborhood Defender Service of Harlem (hereinafter NDS) and The Bronx Defenders. *See* http://www.ndsny.org. ["A core aspect of our holistic approach to public defense is a commitment to search for the underlying issues that bring our clients into contact with the criminal justice system, and providing comprehensive social service support to avoid or minimize future problems."] *And see* http://www.bronxdefenders.org/?page=content&param=our_practice. ["The Bronx Defenders has led a movement in indigent defense toward an interdisciplinary, client-centered model of advocacy. Recognizing that people come into the justice system with a host of social, psychological, and economic problems, holistic representation addresses all of the interrelated issues that surround a client's life...." This leads to "better outcomes for the clients' lives, breaking the cycle of criminal involvement by addressing the fundamental issues that drove them into the system."]

[67] Institutional providers may seek outside funding for the additional services needed to provide holistic services (*see, eg, Spangenberg Report*, p 129. ["In addition to the money received from the city for (public) defense services, the alternate providers that adhere to the holistic model must get outside funding for the additional services they offer."] That should not justify ignoring or punishing the extra time needed to perform holistic work.

[68] For example, The Legal Aid Society's Criminal Defense Special Litigation Unit "provides legal representation and advocacy in the areas of criminal defense, sentencing, sex offender registration, forfeiture of property following an arrest and sealing of arrest records." http://www.legal-aid.org/en/whatwedo/lawreform.aspx and http://www.legal-aid.org/en/whatwedo/lawreform.aspx.

[69] *See, eg,* ACCD, *Statement on Caseloads and Workloads*, pp 1, 12.

[70] *See* NYSDA, *Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services* (2001), p 24, note 54.

> [The professional, ethical, and constitutional obligations inherent in providing defense services make the low-bid contracts used for procuring other types of services unacceptable in this context. See ABA, *Providing Defense Services* (3rd ed. 1990). Standard 5-3.1 says that while contracts for defense services may be a component of a legal representation plan, any such contracts must 'ensure quality legal representation' and should not be awarded 'primarily on the basis of cost.' In 1985, the ABA went on record opposing 'the awarding of governmental contracts for criminal defense services on the basis of cost alone, or through competitive bidding without reference to quality of representation' and urging jurisdictions that contract for defense services to do so in accordance with ABA standards

The City's recent RFP notes the importance of NYC maintaining "institutional flexibility to respond to emergent criminal justice trends." Individual institutional providers need flexibility too. However, that flexibility has limits. The exemption in the new preliminary rule allowing offices to assign to staff lawyers caseloads in excess of the numerical limits is inadequately constrained by the modifying language "to promote the effective representation of clients." This could be read to allow institutional "triage" – handing out assignments in a way that ensures time to provide high-quality representation in some types of cases to the detriment of others, perhaps by encouraging guilty pleas at arraignments as discussed *infra* at p 18 *et seq*. A clear statement will be needed in the final rule that institutional offices cannot assign caseloads that would put individual lawyers in jeopardy of violating their ethical obligations to their individual clients.[71]

b. General numerical standards for institutional providers should apply only as to the number of full-time-equivalent attorneys available to represent clients assigned to the office.

As the current IDOOC requirements recognize, public defense providers must adequately supervise lawyers and all office staff. Supervising attorneys' personal caseloads must not interfere with their office duties[72] – and their supervisory duties must not interfere with their ability to provide quality representation to their clients.

An office may deal with the complexity of public defense practice noted above by, for example, denominating a lawyer or unit of lawyers to become the in-house expert on new, particularly difficult, or very specialized legal issues or types of cases.[73] Such attorneys, whether designated as the exclusive or primary attorneys to handle such cases or directed to provide research and training for other office attorneys handling such cases, should not be counted as available for a full general caseload.

And certainly, lawyers on the staff of a public defense office whose primary or only duties are to manage or represent the office itself rather than to represent clients should not be counted

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and the National Legal Aid and Defender Association's 'Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services' (1984). NLADA's Guideline IV-3 specifically prohibits the awarding of a contract for defense services on the basis of cost alone.

And see *Smith v Arizona*, 681 P.2d 1374 (Sup. Ct. Ariz., 1984). (Low bid procedure violated defendant's right to due process and right to counsel guaranteed by Arizona and federal constitutions.)]

[71] See the ethical opinions cited in note 5, *supra.*

[72] IDOOC, *Requirements*, Requirement V.B.2(c). ["Individual supervising lawyers' personal caseloads should not exceed 10% of the maximum caseload, unless the ratio of staff lawyers to supervising lawyers is less than 10:1, in which case supervising lawyers' caseloads may be proportionally higher (*eg*, 20% of the maximum caseload if the staff lawyer to supervising lawyer ratio is 5:1)."] *See also* NSC *Guidelines*, Guideline 4.1. ["Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers."]

[73] NSC *Guidelines,* Guideline 4.1. ["Defender organizations should analyze their operations for opportunities to achieve more effective representation, increased cost effectiveness and improved client and staff satisfaction through specialization. **The decision to specialize legal and supporting staff functions should be made whenever the use of specialization would result in substantial improvements in the quality of defender services** and cost savings in light of the program's management and coordination requirements….." (Emphasis added).]

when calculating an office caseload. This is true whether such lawyers are acting as general counsel, managing attorneys, or in other administrative roles.

c. The existence and amount of support services available to each attorney must also be considered.

The number of cases in which a lawyer can provide quality representation depends in part on the level of support readily available.[74] Caseload limits should be adjusted to reflect the presence or absence of investigators, paralegals, and general support staff, and the amount of time needed to obtain the services of experts with whom to consult as well as to call as expert witnesses.[75]

d. That high numbers of cases are disposed of at arraignment is not a valid basis to consider in setting caseload limits.

Last year, the National Association of Criminal Defense Lawyers (NACDL) published a national study of the way misdemeanor charges are resolved. Among the findings was that in New York City, a high number of cases were disposed of at arraignment, mostly by guilty plea.[76] As NACDL noted, such quick dispositions are often a product of systemic coercion, not efficiency, reflecting a constitutional failure. Therefore, any suggestion that a high number of guilty pleas at arraignment justifies setting a higher caseload limit, either in general or for attorneys staffing arraignment parts, should be rejected. Public defense lawyers must be encouraged to take, not dissuaded from taking, the time needed to ensure that each guilty plea is in the best interest of the client, not the best interest of the lawyer's caseload or other systemic need. [77]

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[74] As discussed in note 16, *supra,* the availability and use of support staff is specifically recognized in 22 NYCRR § 127.5 as a factor affecting reasonable caseload limits, and the omission of such factor in the new rule should not be viewed as a rejection of the principle.

[75] *See, eg,* ACCD, *Statement on Caseloads and Workloads*, p 1. [Noting that the NAC caseload limits "reflect the maximum caseloads for full-time defense attorneys, **practicing with adequate support staff,** who are providing representation in cases of average complexity in each case type specified." (Emphasis added.)]

[76] NACDL, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* (2009), pp 8 and 31. ["According to Professor Adele Bernhard, 'In 2000 in New York City, assigned counsel lawyers handled 177,965 new defendants in the Bronx and Manhattan. 124,177 of those cases were disposed of at the first appearance — most by a plea of guilty entered after no more than a 10-minute consultation with their lawyers.' Similarly, Professor Steven Zeidman, who directs the defender clinic at the CUNY School of Law, reported that 'somewhere in the vicinity of two-thirds of all misdemeanor cases are "disposed of" at the accused's very first court appearance.'"] Note that this is higher than the 50% rate found by The Spangenberg Group in its 2006 report. *Spangenberg Report,* p 144**.** *And see Kaye Commission Report*, Steven Zeidman, "Additional Commentary," p 2.

[77] Law, as well as state and national performance standards, require that individuals have an opportunity to consult with counsel before pleading guilty. *See, eg, People v Marincic*, 2 NY2d 181 (1957). If such "consultation" consists of no more than a rote recitation of the rights being waived, it is meaningless. "To aid the defendant in reaching a decision, defense counsel, **after appropriate investigation,** should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. **Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.**" [Emphasis added.] ABA, *Standards for Criminal Justice Pleas of Guilty,* 3d edition (hereafter ABA *Pleas of Guilty*) (Black-letter 1997, Commentary 1999), Standard 14-3.2(b). *See also People v Droz*, 39 NY 2d 457, 462 (1976). ["(I)t is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense…."].

Many public defense clients are pressured to plead guilty by their inability to pay bail. Their lawyers should be able to reassure those clients that the lawyers are not part of the systemic pressure, but have the time and willingness to zealously represent them, including making appropriate applications to reduce bail or secure release on recognizance. Assumptions that attorneys will close a high percentage of cases at arraignment erode the attorney-client relationship and make lawyers complicit in the system's elicitation of wrongful guilty pleas. The assumption should be that lawyers will oppose systemic pressure for early pleas.[78]

The way New York City has structured its public defense contracts for some time already puts pressure on at least some institutional defenders to process cases quickly. As The Spangenberg Group found in 2006, Legal Aid was required by contract to take a fixed percentage of all non-conflict public defense cases in the arraignment shifts that it staffed.[79] The percentage of cases required to be covered had increased from earlier contracts, and a greater number of cases were assigned than had been expected when the most recent contract was

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A person "should not be required to enter a plea if counsel makes a reasonable request for additional time to represent [that person's] interests." ABA, *Pleas of Guilty,* Standard 14-1.3. [The Commentary notes that "it is seldom possible to engage in effective negotiations minutes before the defendant is called upon to plead." Allowing additional time "will also provide the time necessary for legal and factual investigation and for client-counsel discussions as to what plea would be most appropriate." *Id,* Commentary, p 27.]

While the NYSDA standards recognize that it may sometimes be in the best interest of a client to forego an independent investigation of the case, the standards say counsel should develop a plea negotiation strategy "based on knowledge of the facts and law of the particular case" and should consider, when "prosecutorial or judicial policies purport to preclude consideration of the facts and law of individual cases in plea negotiation… ways to challenge such policies." NYSDA *Standards,* Standard VIII.A.6 and 7. In other words, public defense lawyers must try "to shield the client from improper overt or veiled pressure to plead" and "[u]nder no circumstances should counsel *add* undue pressure…. [emphasis in original]." NLADA, *Performance Guidelines for Criminal Defense Representation* (hereafter NLADA *Performance Guidelines*) (1994), Commentary to Standard 6.1, p 73.

[78] *See id.* (NYSDA *Standards,* Standard VIII.A.6 and 7 and NLADA *Performance Guidelines*). *See also Kaye Commission Report*, Steven Zeidman, "Additional Commentary," pp 2-3. ["(W)hy not recommend bold steps, as did the Broward County, Florida Public Defender? In a letter to all judges of the Criminal Court, he wrote that he had 'forbidden his attorneys from advising indigent criminal defendants to plead guilty at arraignment unless they've had "meaningful contact" with their clients in advance.' He reasoned that his lawyers were ethically and legally constrained from pleading clients guilty without having established an attorney-client relationship and having investigated the circumstances of the charges. Notably, his actions seem to have the support of the local prosecutor. In addition to simply being the right thing to do, his actions brought his office into conformity with the extant American Bar Association Standards, which state that '[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.' In fact, the standards recently promulgated by the New York State Bar Association contain similar cautions against pleas at arraignments unless or until adequate factual and legal investigation has taken place…." (Footnotes omitted.)]

[79] The "staffing" of arraignment parts is itself problematic if clients who do <u>not</u> plead guilty at that appearance are represented by a different lawyer going forward. Such lack of continuous or "vertical" representation is a violation of national and state standards. *See, eg,* ABA, *Ten Principles,* Principle 7 ["The same attorney continuously represents the client until completion of the case."]; NY State Bar *Standards*, Standard I-5 ["Providers of mandated representation shall ensure that the same counsel will represent the client continuously from the inception of the representation until the initiation of the appellate proceeding, if any…"]; NYSDA *Standards*, Standard V.A.4 ["Counsel initially provided should continue to represent a defendant throughout trial court proceedings absent some reason why a change in counsel would benefit the client."]

signed. Yet, Legal Aid had actually been exceeding the required percentage. This is not surprising given that the contract called for financial penalties for failure to meet the target percentage, contained no mechanism for increasing funding or staffing, and prohibited withdrawal due to case overload (a violation of national standards).[80] With all this, no wonder from 50% to nearly 60% of misdemeanor cases arraigned in New York City are disposed of by guilty pleas.[81]

The City's continuing failure to provide sufficient resources for the number of cases has led to continuing violations of the IDOOC caseload standard.[82] (Legal Aid is not the only institutional provider with caseload problems; other institutional providers have exceeded the number of cases for which they have contracted.[83]) This is in part the basis for the Legislature requiring the Chief Administrator to implement compliance with caseload standards in the City. The high number of guilty pleas at arraignment – a development that may in part reflect public defense lawyers' need to cope with the caseloads resulting from the City's longstanding underfunding of public defense – should not be condoned in any new standards by inclusion of higher caseload limits based on this troubling arraignment practice.[84]

e. The caseloads of assigned counsel attorneys should be included in implementation of caseload limits.

There should be no question that private attorneys who accept assignment to provide public defense representation should be included in implementation of caseload limits. Existing state and national public defense standards assume this.[85] The Chief Administrator's new rule appears to as well.[86] Prior to the statutory increase of assigned counsel fees effective in 2004, the dwindling number of lawyers willing to accept assignments drove the caseloads of other lawyers

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[80] *Spangenberg Report,* p 130, citing ABA standards.

[81] *See supra* note 76, citing data reported in NACDL, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* and in the *Spangenberg Report*. *See also* Unified Court System, *NYC Criminal Court Misdemeanor Cases Disposed the Same Day as Arraignment 2008 and 2009* (printed 3/8/10). [Guilty pleas were 58.6% of dispositions at arraignment in 2008 and 59.5% of dispositions at arraignment in 2009.]

[82] *See, eg,* IDOOC, *Report of the Indigent Defense Organization Oversight Committee to the Appellate Division First Department for Fiscal Years 2006-2007,* p 1.

[83] *See, eg, id.*, pp 14 and 16.

[84] Specifically, the recognition in the new rule of factors that can affect caseloads, such as "the level of activity required at different phases of the proceeding" should not be interpreted to allow a higher number of cases based on dispositional practices at arraignment.

[85] *See, eg,* NY State Bar *Standards*, Standard G.2; NLADA, *Standards for the Administration of Assigned Counsel Systems* (1989), Standard 4.1.2. ["Workloads of Attorneys

> (a)The Board, or at its direction the Administrator, shall develop standards relating to caseload/workload size limits for attorneys who desire to receive appointments from the Program, and procedures through which attorneys whose workloads have become excessive can be relieved of caseload responsibilities that they cannot competently meet.
>
> (b)The Administrator shall provide notice to attorneys eligible for assignments of the caseload/workload standards and procedures established by the Board, and of the attorneys' obligation not to accept more work than they can effectively handle.
>
> (c)The Administrator shall keep records of assignments made to individual attorneys in a manner that allows the Administrator to avoid assigning an excessive number of cases to any attorney."]

[86] The new rule refers to workloads of attorneys and law offices and separates out attorneys employed by an organization with regard to averaging institutional attorneys' caseloads within the organization as discussed *supra* note 5.

much too high.[87] While there is evidence that at the moment New York City is moving toward less reliance on assigned counsel,[88] it is unlikely that the City will end provision of public defense services by private counsel. Such a move would be unwise and contrary to long-standing national standards.[89] The participation of qualified private lawyers through administered assigned counsel programs contributes substantially to the quality of representation provided to public defense clients; in mixed systems (institutional public defense providers and properly-administered assigned counsel programs), assigned counsel act as a safety valve for public defense caseloads, and having the bar as a whole maintain an interest in the welfare of the public defense system is vital to its well-being.

Whatever the current situation, future developments could lead to the existence of excessive assigned counsel caseloads. As existing public defense standards require, and the new rule recognizes, assigned counsel should be included in the implemented caseload standards. Any assigned counsel caseload ceiling should be based on the percentage of time the lawyer devotes to public defense,[90] and implementation should include requirements that assigned counsel disclose not only their public defense caseload but also their private caseload.[91]

5. INITIAL IMPLEMENTATION SHOULD BE RECOGNIZED AS SUCH.

The importance of implementing caseload standards for New York City is matched only by the complexity of doing so. As noted at the beginning of this paper, implementation of caseload standards – and much deeper public defense reform – is needed not just in New York City but statewide. The efforts of the Chief Administrator of the Courts to meet the mandate of the statute should be undertaken with as broad a vision as possible.

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[87] *See, eg,* NYS Unified Court System, *Assigned Counsel Compensation in New York: A Growing Crisis* (2000). http://www.nycourts.gov/ip/nya2j/pdfs/assignedcounselcompensation.pdf. [Finding that "The large numbers of experienced attorneys who are no longer willing to take on assigned cases have been replaced, if at all, by far less experienced attorneys who are handling far larger caseloads."] *See also* Jane Fritsch and David Rohde, *For New York City's Poor, a Lawyer With 1,600 Clients*, New York Times, April 9, 2001. http://www.nytimes.com/2001/04/09/nyregion/09LEGA.html?pagewanted=all.

[88] John Eligon, *New Rules Trouble Some Defense Lawyers for the Poor*, New York Times, March 5, 2010. http://cityroom.blogs.nytimes.com/2010/03/05/new-rules-trouble-some-public-defender-groups.

[89] *See, eg,* ABA, *Ten Principles*, Principle 2 ["Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar…." (Footnotes omitted.)]; ABA, *Providing Defense Services* (3rd ed. 1992), Standard 5-1.2 (b) ["Every system should include the active and substantial participation of the private bar…."]; NAC *Standards*, Standard 13.5 ["Services of a full-time public defender organization, and a coordinated assigned counsel system involving substantial participation of the private bar, should be available in each jurisdiction…."]; and NY State Bar Special Committee to Ensure Quality of Mandated Representation, *Report and Recommendations Regarding the Final Report from Chief Judge Kaye's Commission on the Future of Indigent Defense Services* (2007), pp 17-19 [Substantial involvement of the private bar through properly administered assigned counsel programs is a desirable goal; significant private bar involvement can help ensure a high-quality system by: allowing a public defense system "to bring in as many independent, conflict-free" attorneys as necessary in multi-defendant and other multiple-conflict situations; providing a way to keep excellent private criminal defense lawyers in the public defense system as a resource and as a source of innovative ideas developed in cases for "adequately resourced retained clients;" providing stability and a way to maintain quality of service when public defense caseloads fluctuate, and providing "ambassadors" to bar associations and other groups to educate those groups about the needs of the system and public defense clients.]

[90] ACCD, *Statement on Caseloads and Workloads*, p 1.

[91] *See, eg,* Rev Code Wash 10.101.050.

"[A]ny standards must accommodate a workload that is not only growing but changing in nature over time and that varies from county to county in ways that are not fully reflected by merely comparing numbers of cases."[92] This is as true for the five counties comprising New York City as for the other 57 counties. It is as true for criminal defense attorneys as for lawyers representing children. To ensure that the caseload limitations set out in the new rule are meaningful, and fulfill the statutory mandate to allow for adjustments in the plan as needed, the Chief Administrator should re-commit to the principles set out in the compelling language above from the preliminary report on setting caseload standards for Attorneys for Children.[93]

Creating and enforcing workload standards is no doubt fraught with difficulties. NYSDA has long grappled with questions raised by that complexity, including the following, with regard to caseload control in New York City and statewide.

- How can the recognized complexities of certain types of cases be factored in?
- How can the laudable aspects of the variation among existing providers be preserved while preventing excessive caseloads for all public defense lawyers?
- What oversight mechanism(s) and procedure(s) will be used to enforce the standards?
- How can the independence of the defense function be preserved from judicial or executive interference in this process?
- How can the continual pressure to hold down costs be reconciled with the ethical and constitutional imperatives to hold down caseloads?
- And many more.

These and many other questions will undoubtedly be addressed between now and March 31, 2014. NYSDA commends the enactment of caseload standard legislation and the Court Administrator's prompt efforts to begin its implementation. No doubt everyone involved realizes that this promising beginning will ultimately be only as good as the results it produces. Therefore, we look forward to working with all concerned entities to bring about caseload relief in New York City, which we see as both a premonition and promotion of wider reform.

[92] Chief Administrative Judge's *Preliminary Report,* p 6.

[93] Following the preliminary report, the Court Administrator set one single statewide standard for Attorneys for Children, as discussed *supra* note 16, but the rule does provide for adjusting that number based on other factors and calls for review of the rule's effectiveness in no more than two years.

ADMINISTRATIVE ORDER OF THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby promulgate, effective April 1, 2010, a new section 127.7 of the Rules of the Chief Administrator of the Courts, relating to the workload of attorneys and law offices providing representation to indigent clients in criminal matters pursuant to Article 18-B of the County Law in New York City to read as follows:

§127.7 Workload of Attorneys and Law Offices Providing Representation to Indigent Clients in Criminal Matters in New York City

(a) The number of matters assigned in a calendar year to an attorney appointed to represent indigent clients in criminal matters pursuant to Article 18-B of the County Law in New York City shall not exceed 150 felony cases; or 400 misdemeanor cases; or a proportionate combination of felony and misdemeanor cases (at a ratio of 1:2.66). Where staff attorneys employed by an indigent defense organization within the City of New York are appointed to represent clients in criminal matters pursuant to Article 18-B of the County Law, these limits shall apply as an average per staff attorney within the organization, so that the organization may assign individual staff attorneys cases in excess of the limits to promote the effective representation of clients.

(b) The Chief Administrator of the Courts shall annually, at the time of the preparation and submission of the judiciary budget, review the workload of such organizations and attorneys, and shall take action to promote compliance with this rule. In undertaking such review, the Chief Administrator may consider: (1) differences among categories of cases that comprise the workload of the defense organization; (2) the level of activity required at different phases of the proceeding; (3) local court practice, including the duration of a case; and (4) any other factor the Chief Administrator deems relevant.

(c) These workload standards shall constitute non-binding guidelines between April 1, 2010 and March 31, 2014, and shall be binding effective April 1, 2014.

Chief Administrative Judge of the Courts

Dated: March 9, 2010

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