

LEGISLATIVE PUBLIC HEARINGS
ON THE 2014-2015 EXECUTIVE BUDGET PROPOSAL

Testimony before
The New York State Assembly Ways and Means Committee
and
The New York State Senate Finance Committee

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As in many past years, I have come to talk to you about two things. The first is funding for the New York State Defenders Association Public Defense Backup Center. The second concerns what New York State needs to do to ensure quality legal representation.

Summary of NYSDA's Budget Needs and Renewed Call for Reform

Once again, NYSDA needs increased state funding to perform public defense backup services. We informed the Executive that \$3,283,680 was needed to perform the State's backup function and received instead \$1,089,000, a 48% reduction from last year's appropriation. I am asking for *at least* restoration to the level of funding received in FY 2013, which requires the addition of \$1,000,000 to bring us to \$2,089,000.

I will not recount today the many functions that the Backup Center performs to help the State meet its Sixth Amendment responsibility. Nor will I reiterate the many things we need to do but cannot. We continue to make services available to 6000 public defense attorneys working in more than 120 institutional defense offices and assigned counsel plans in 62 counties and maintain the Public Defense Case Management System in 60 programs in 42 counties.

While I believe our 33-year record of providing services to public defense lawyers in your localities speaks for itself, I am pleased to report that the work of my staff and office was honored last year by the New York State Bar Association for "Outstanding Achievements in Promoting Standards of Excellence in Quality Mandated Representation."

I hope you will restore us once again to continue this work, and I welcome your questions about that work.

On the broader issue, I will not recount in detail the whole, sad history of New York State's continuing failure to fulfill the fifty-year-old promise of *Gideon v Wainwright*. We have been over all that before.

What follows are points intended to help you avoid repeating missed opportunities of the recent past and current reasons why you should proactively move toward a statewide public defense system that works for clients and does justice in every region.

Missed Opportunities

The Legislature created the Indigent Legal Services Fund (ILSF) in 2003. Stagnant assigned counsel fees had decimated the ranks of lawyers willing to provide mandated representation. Reports on this aspect of the ongoing public defense crisis abounded. Setting up a state-funded, statewide system would have resolved the crisis. Establishing dedicated revenue streams to provide a predictable, reliable, and growing source of funding for public defense services to supplement, not supplant, local spending was at least a positive step.

But flawed aspects of the 2003 legislation led many counties to consider and implement changes in public defense for the wrong reason. Counties used the new ILSF distributions to supplant regardless of the law. Local systemic changes were made not to improve the unacceptably low level of representation but to avoid the costs of the long-overdue assigned counsel fee increase. Time and money were wasted on hastily designed, severely underfunded "conflict offices" to

start handling cases that institutional providers could not take. Most if not all such conflict offices were illegal from inception; an Appellate Division decision¹ in 2009 made the illegality clear. By then, the chorus of voices – grassroots, grasstops, institutional, and individual – calling for real reform had grown too loud to ignore.

So the State took up the issue of public defense once again. Those who had long sought a full, systemic overhaul to reverse the downward spiral of public defense services saw the goal come within reach. But success was batted away by political shenanigans that paralyzed the Senate and distracted the State as a whole.

The Public Defense Act of 2009 bore 86 Assembly sponsors and had the commitment of all Democrats in the Senate Chamber and some Republicans. Passage was virtually assured and David Paterson, who had publicly declared support for the idea, was still Governor.

In the dust up known colloquially as the Senate Coup of 2009, the Independent Public Defense Commission sought by many failed to materialize.

After multifaceted efforts to salvage the momentum for reform, in June 2010 the Legislature created the Indigent Legal Services (ILS) Office. But New York State still needs an Independent Public Defense Commission heading a statewide, fully and adequately state-funded public defense system. Why?

The ILS Office, under the guidance of its Board, became responsible for distributing State funds to improve the quality of representation. It was also supposed to use its power as a State entity to collect data and information, evaluate the components of the existing public defense structure, and make recommendations about what system would be best. While not full reform, this was another positive step.

Structural and fiscal constraints limited progress. ILS grants and limited ILS Office guidance have brought about painfully slow, incremental improvements in some localities. The ILS Office has not and cannot overcome the downward pull of local budget pressures and politics inherent in our county-by-county system.

Local Examples of Dysfunction in the State's Public Defense Scheme

Events in Cortland County provide an example of how New York's statutory scheme for providing defense services continues to fail.

Back in late 2009, the Third Department found Cortland County's conflict defender office illegal. The office was abolished. That left assignment of private counsel as the only method for providing representation when the Public Defender had a conflict.

A year and a half later, the County asked the Office of Court Administration (OCA) about the long-established prohibition on having a county attorney serve as Assigned Counsel Administrator. OCA reaffirmed the prohibition. The County continued to press for possible ways around it, demonstrating disregard for or incomprehension of the need for public defense

¹ *Goehler v Cortland County*, 890 NYS2d 660 (3d Dept 11/25/2009)

independence. Despite clear evidence to the contrary, the Chair of the Cortland County Legislature recently maintained² that having the County Attorney deal with conflict cases was working smoothly and without complaint.

Other aspects of Cortland County's public defense "system" also indicate a lack of independence. Extremely politicized battles have marked selection of the Cortland County Public Defender in recent years. An editorial in the local paper two years ago noted that the selection process appeared to focus more on political and personal grounds than on the competence of whoever was selected.³ Public discussion of allegations against the former public defender – a special prosecutor found no misconduct – continued throughout much of 2012, amid assertions that the investigation had been politically motivated.

Fast forward to selection of a public defender for the current term. It is the subject of a pending lawsuit and opposing views on the legality of the process. **Throughout, the needs of clients have been unmentioned in news coverage of the controversy.** And during these years more than 10,000 clients have passed through Cortland County's public defense system seeking justice amid the chaos.

There are many discussions about specific County Rules of Order and the process for selecting county department heads. Lost in these discussions is any recognition of the uniqueness of the governmental function of public defense. Officials and the media alike fail to note the very first rule in the standards issued by the ILS Office. That standard requires counties to insure that public defense lawyers and programs "[d]emonstrate a commitment to quality representation of every client and are free from political and other influences that erode the ability to provide quality representation."⁴

Outside Cortland, other counties also provide examples of how the State's delegation of public defense services to localities impedes focus on the quality of representation. The *Finger Lakes Times* just published a short item on administration of Ontario County's assigned counsel program until a newly authorized conflict office gets up and running. Nothing is said about an intent to improve quality with these changes. The news item just notes that "County officials believe having a central office oversee criminal defense work for the poor will save money."⁵

That comment brings us full circle to what happened after passage in 2003 of the state legislation raising assigned counsel fees. Saving money, not providing quality services, was the focus of counties creating conflict offices.⁶

² *Cortland Standard*, Jan. 24, 2014.

³ *Cortland Standard*, Jan. 9, 2012.

⁴ <https://www.ils.ny.gov/files/Conflict%20Defender%20Standards%20and%20Criteria.pdf>

⁵ *Finger Lakes Times*, Jan. 26, 2014.

⁶ From 2003 to 2006, thirty-six counties and New York City made or at least considered changes in how public defense services were provided. The focus on cost during those considerations is demonstrated in the following press clips:

- "I believe that the Alternate Public Defender model can provide these legal services in a more economical manner and save the County taxpayers about \$1 million." [Albany] County Executive's Message on the 2004 Budget, at 6.

And giving lip service to quality is not enough.

News coverage of a recent proposed change in Monroe County noted that “County officials say the job can be done more cheaply than it is now without damaging the quality of legal representation for the poor.”⁷

This from a county that has for years refused to fund the Public Defender Office at a level that would relieve its dedicated, hardworking lawyers of excessive caseloads. In 2005, the then-Public Defender said, “When I go to the County Legislature or budget office, I need resources, look at my case load, they say we are sorry ... you’re doing a good job, keep it up, but we have no more money for you.”⁸ The Monroe County Public Defender’s City Court cases consistently remain at or above 1000 per attorney,⁹ much more than double national standards that themselves are too high. I responded to a press inquiry about the proposed changes in Monroe with an understatement that applies across the state: “There’s always a risk [to] quality of services when the municipality is allowing cost containment to drive decision making.”

Piecemeal Reform is Not Enough

History shows that cost containment, not quality, drives local decisions about public defense. Creation of the ILS Office and Board – that half-loaf of reform from 2010 – has not changed this reality. Nothing short of full state funding and oversight can do that. And the half-loaf has turned out to be more like a slice due to political and fiscal constraints.

Among those constraints are sweeps of the ILSF; these erode the funding needed to address the problems identified by the ILS Board and Office as priorities. Growth of the ILSF constituted a key component in the 2003 vision for improving public defense in New York State. It has not grown, but instead, has been swept. Sweeps – most recently, a sweep of \$5,500,000 last October

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- “[Rensselaer County] has created a Conflict Defender Office. *** [County Executive] Jimino estimates this new position will save taxpayers an estimated \$500,000.” County Creates New Position, Bennington Banner, December 20, 2003. “[A Rensselaer County] budget proposal calls for hiring a special appellate counsel to further reduce the cost of assigned counsel and save the county some \$100,000 and the elimination of seven currently vacant positions that will result in savings of more than \$300,000.” Jimino Sees 6% Hike In 2005 County Budget, Indenews.com, Oct. 22, 2004.
 - “Legislators are at odds over the legality and wisdom of a move to create a second St. Lawrence County public defender’s office. Lawmakers at Monday’s Operations Committee meeting are expected to discuss an opinion by County Attorney William F. Maginn that the so-called ‘conflict defender’s office,’ which is being created to save money on assigned counsel fees, is allowed by state law.” Lawmakers Disagree On Legality of Second Public Defender’s Office, Watertown Daily Times, Mar. 14, 2004.
 - “Schenectady County legislators on Tuesday established an alternate public defender’s office for poor defendants, following the lead of other counties that have set up the offices to avoid paying a sharp increase in mandated hourly fees for court-appointed defense lawyers. *** The county [Schenectady] estimates the new office will save approximately \$100,000 in fees now paid to outside lawyers for criminal cases.” Public Defending Expanded, The Albany Times Union, May 12, 2004.

⁷ Democrat and Chronicle, Dec. 1, 2013.

⁸ Transcript, Hearing held by Commission on the Future of Indigent Defense Services (Rochester, NY, Mar. 11, 2005), p. 5, at <http://www.nycourts.gov/ip/indigentdefense-commission/rochester.pdf>

⁹ See, e.g., Monroe County Public Defender Office, Annual Report, (2008), p. 14; (2012), p. 11. At <http://www2.monroecounty.gov/defender-index.php>.

– have helped keep unacceptably low the amount of State funds used to pay for this state responsibility.

The good news is that the Executive Budget does not propose a specific sweep from the ILSF for the 2014-2015 SFY. The bad news is that so long as public defense services can be treated as just another political and fiscal football by the State and localities, the quality of representation will continue its downward trend.

Don't Wait for the Courts to do Your Job

Because the Legislature and Executive have demonstrated a lack of political will to fix public defense services, public defense clients have turned to the third branch of government. The *Hurrell-Harring* lawsuit against the State and five counties over public defense deficiencies is scheduled for trial later this year.

Hurrell-Harring was filed against New York State in 2007. The State has fought it at every turn. **In the meantime, well over 245,000 cases have been referred for public defense representation in the five counties whose public defense deficiencies led to the lawsuit.** Hundreds of thousands of people – in the five counties and across the state – have been deprived of their right to conflict-free counsel at critical stages, to adequately-resourced representation, and to justice.

Why is the State wasting tax dollars denying or ignoring the obvious? And why is the Legislature waiting to let a court tell New York what to do?

There are no good reasons to wait, and many good reasons to act now.

The fiftieth anniversary of *Gideon* unleashed a great deal of publicity about the indefensible condition of public defense nationwide and here in New York State. NYSDA established a blog to capture some of those stories and urge fulfillment of *Gideon*'s promise in the anniversary year that will end on March 18, 2014.¹⁰ On that blog we posted varied points supporting the need for reform including:

- many wrongful convictions could have been avoided with quality public defense representation – beginning with Clarence Gideon's own case (3/19/13);
- Chief Judge Jonathan Lippman acknowledged on Law Day that *Gideon*'s goal has not been reached: "we must resolve to build upon the progress we have made to ensure that all persons accused of a crime in New York, regardless of means, receive competent legal representation," (5/1/13); and
- well-known State leaders and editorial boards call for reform, specifically settlement of the *Hurrell-Harring* suit (e.g., 9/27/13, 10/7/13, 12/30/13).

Failure to ensure constitutional representation will have consequences. New York State should act – you should act – before a court acts for you.

¹⁰ <http://nysdablog.blogspot.com/>

Recently, a federal court in Washington State found that policymakers in two localities “have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused ...” public defense clients to be “systematically deprived of the assistance of counsel at critical stages of the prosecution” Meanwhile, our own Court of Appeals has already said that the complaint in *Hurrell-Harring* “contains numerous plain allegations that in specific cases counsel simply was not provided at critical stages of the proceedings,” specifically at first appearance, *i.e.*, arraignment.

And all this comes eight years after Chief Judge Kaye’s Commission on the Future of Indigent Defense Services declared that New York’s public defense system “... fails to satisfy the State’s constitutional and statutory obligations to protect the rights of the indigent accused.”

The ILS Office has observed that while “some counties have made recent progress in providing counsel at first appearance ... persons deemed eligible for indigent legal defense services continue to be arraigned without counsel at first appearance.” A Request for Proposals to address this was issued by the Office, awards were announced in August, but the total available funds will be only \$12 million (\$4 million per year for each of three years). Clearly, a big problem set out in the *Hurrell-Harring* complaint is not going to be fixed by September when the case is set for trial.

One of many factors that keep counties from making a lawyer available for every person being arraigned is caseloads. Institutional programs with excessive caseloads don’t have enough lawyers to cover every court. A Request for Proposals to address this has been issued by the Office, but the total here is again inadequate. Late last year, the ILS Office released a report about the preliminary cost of fixing the caseload problem. The report says that, conservatively, “New York would have had to spend an additional \$111,214,533” in 2012 for counties outside New York City to comply with maximum national caseload limits.¹¹

The report focuses on upstate because excessive caseloads in New York City were addressed in a statute you passed in 2009. Nothing in the Executive’s criticism of the Judiciary’s 2014-2015 Budget request¹² would justify targeting the part of that budget that “will allow the Judiciary to fund ... \$17 million to support implementation of the final phase of the statutorily required ... [NYC] caseload standards.”¹³ But what about upstate?

The ILS Office recognizes that upstate caseloads must also be addressed. The ILS Board authorized expenditure of \$4 million from the 2012-13 state appropriation to support initiatives to alleviate excessive caseloads outside the City.¹⁴ In January, the ILS Office announced preliminary approval of requests from 45 counties for such initiatives. But the available \$4 million – or \$12 million, over three years – does not begin to meet the need.

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<https://www.ils.ny.gov/files/Estimate%20of%20Upstate%20Cost%20Of%20Compliance%20Report%20Nov%202013.pdf>

¹² <http://publications.budget.ny.gov/eBudget1415/agencyPresentations/pdf/Commentary.pdf>

¹³ <http://publications.budget.ny.gov/eBudget1415/agencyPresentations/appropData/Judiciary.html>

¹⁴ <https://www.ils.ny.gov/content/upstate-quality-improvement-and-caseload-reduction>

This is another example of how piecemeal reform cannot bring the public defense “system” created by County Law article 18-B into compliance with constitutional and professional standards. Ultimately, statewide compliance will not come from the ILS Fund or the ILS Office and Board. It will not come from the other important but insufficient state programs created over the years. You should fully fund those programs again this fiscal year, including Aid to Defense, the Indigent Parolee Program, NYSDA, and related programs like Prisoners’ Legal Services of New York and loan forgiveness for public defense lawyers (and prosecutors). But you need to do more:

Call on the Governor to settle *Hurrell-Harring* in a way that will create a public defense system that brings measurable results to clients. Bring about the systemic overhaul that we should have had in 2010.

A well-designed, statewide, fully and adequately state-funded public defense system headed by a truly independent commission will fundamentally improve the representation of clients. It will curtail the waste inherent in the current jumble of local programs. It will bring critically needed mandate relief to fiscally strapped counties. It will allow independence of the public defense function and will begin to alleviate rapidly growing public distrust of our justice system.