

**JOINT LEGISLATIVE PUBLIC HEARINGS
ON THE 2022-2023 EXECUTIVE BUDGET PROPOSAL**

**Testimony before
The New York State Senate Finance Committee
and
The New York State Assembly Ways and Means Committee on
the Public Protection Budget**

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Online Video Testimony**

Quality Public Defense Protects Individuals, Families, and Communities.

Thank you for the opportunity to testify concerning the State's budget for State Fiscal Year 2022-2023 as it relates to the New York State Defenders Association (NYSDA) and matters affecting justice, public defense, and community safety. What you do in this budget regarding public defense will affect much more than NYSDA. It will affect thousands of people—lawyers and other professionals—who provide the many services needed to ensure justice in the legal system. It will affect the tens of thousands of people who cannot afford to hire an attorney to defend their liberty interests in criminal and family court. Ultimately, it will affect people in all communities across the state.

Justice Entwines with Other Foundational Issues.

In enacting this year's budget, I urge you to consider how state funding of separate entities and services affects more than each entity or service in a vacuum. Results from public defense funding or lack thereof depend in part on what else is funded—or is not. And I am not referring just to parity between prosecutorial and defense agencies, though that has been a concern for at least 50 years. Ensuring liberty and justice for all requires recognizing the myriad ways that the criminal and family legal systems, the mental and physical health systems, and many others are entwined.

For example, lawyers may seek to devise pretrial release plans; arrange access to community-based medical health, mental health, and other services; provide recommendations for probation conditions tailored to clients' needs; and/or advocate for other concrete ways to help clients successfully navigate the criminal legal system. This benefits not only the clients but families and society in general. Failures lead to expensive (re)incarceration and other costs, and, in some instances, harm to individuals. But suppose public defense lawyers cannot access professional services, from social workers to mitigation specialists, to help with this client-centered representation. In that case, either the lawyers do the non-legal work themselves, or the work is not done. The former means higher costs, as lawyers are generally more expensive than many other professionals, and do not have the expertise to do the work. The latter means clients receive low-quality representation and suffer poor outcomes—which leads to societal costs.

We understand the need to adequately fund pretrial agencies and hope that such funding result in programs that assist people, rather than over-supervising them. Public defenders must be part of county-level discussions about the type of pretrial services that would meet the twin goals of helping clients and enhancing public safety. A failure to also adequately fund public defense at this stage will hamper success. And public defense funding will help keep communities safe.

My testimony will focus on public defense funding itself, but I will touch on overlaps; I ask that you keep the interdependent nature of many services in mind as you consider the allocation of state funds and work with the Governor to finalize the 2022-2023 budget. This testimony assumes a basic understanding of the right to counsel and the centrality of quality representation to proper functioning of the criminal and family court

systems. These rights are guaranteed through the state and federal constitutions, statutes, and caselaw, including *Hurrell-Harring v State of New York*.¹ Quality representation is a key to identifying, confronting, and remedying the racial and social injustice that, sadly, continues in these systems. Quality is not cheap, but it is cost effective and necessary. I now turn to what is needed to ensure quality public defense.

Funding for NYSDA's Public Defense Backup Center Must be Restored.

NYSDA's budget request for the Public Defense Backup Center is modest, particularly in light of the impact we have on improving representation across the state. We ask that our Backup Center base funding be restored to \$2,089,000, the same amount the State has provided since 2012. During budget crises over the past 9 years, we have not requested an increase in our base amount, nor are we requesting a general cost of living increase this year, though we are asking for additional funds to create a special unit that will complement and expand the services we already provide. As discussed in detail below, we are requesting \$900,000 in new funding for a statewide Defender Discovery & Forensic Support Unit. This request does include a small amount of funding for existing Backup Center staff.

NYSDA has been operating the state-funded Public Defense Backup Center since 1981. Every year, Backup Center staff provide an array of services to public defense lawyers across the state. Our assistance to defenders inures to the benefit of the attorneys and their clients, but also to counties that would otherwise have to individually fund research, consultation, training, and other capabilities that our centralized operation offers.² NYSDA's work complements but differs from the oversight and funding functions of the New York State Office of Indigent Legal Services (ILS), authorized by Executive Law article 30. Given the unique nature of public defense services, in which defense lawyers paid with government funds must zealously represent clients against government adversaries in government courts, our status as a nonprofit entity helps provide necessary independence.³

¹ The Court of Appeals issued a decision in *Hurrell-Harring* (15 NY3d 8 [2010]), that focused on counsel at arraignment and allowed the lawsuit regarding inadequate public defense services to go forward against the State. As noted on their website, the New York State Office of Indigent Legal Services oversees the implementation of the later settlement in that case, affecting five counties. www.ils.ny.gov/node/166/announcements-and-news-hurrell-harring-settlement.

² Whether the funding is from local tax dollars or from state aid to localities, it is better spent for direct costs of public defense and for types of support less well-suited to centralization.

³ See, e.g., New York State Office of Indigent Legal Services, [Standards for Establishing and Administering Assigned Counsel Programs](#), Standard 2.3.

NYSDA's Public Defense Backup Center	
Executive Budget Appropriation 2022-2023	\$1,030,000
Amount Needed to Restore the Backup Center's Funding to 2021-2022 Level	\$1,059,000
Statewide Defender Discovery & Forensic Support Unit *new project*	\$900,000
Total	\$2,989,000

The Backup Center Provides Training, Resources, and Consultation.

Base funding is needed for us to continue our free and low-cost, relevant, well-received continuing legal education (CLE) training. These programs serve trial and appellate attorneys in both criminal and family practices, improving the quality of public defense services across the state. During the pandemic we have provided training remotely; in 2021, we provided training to more than 5,000 participants. We hope to continue using webinars to reach defenders throughout the state who are unable to attend in-person events while once again providing in-person training and also offering hybrid in-person/web-based training. Some training is most effective when conducted in person, like our well-known week-long Basic Trial Skills Program that has been on hiatus during the pandemic; in-person training will require greater expenditures for venues, travel costs, etc.

Sufficient funding will also allow us to continue our print and electronic publications that provide timely information to defenders on legal, scientific, and other developments affecting their practice. In 2021, we published 20 issues of our e-newsletter, provided new and updated resource guides, and frequently updated the resources and links on our website.

Restored funding is critical so that NYSDA's experienced legal staff can continue providing direct defender services to attorneys in the field. In 2021, our legal staff provided case consultation, legal research, and legal assistance to over 1,000 public defense attorneys and others. These services have given solo practitioners and members of small firms the legal support they need to continue accepting assigned cases without an increase in statutorily-set fees. When assigned counsel fees do go up, our centralized resources will still be vital to attorneys facing new and unique issues or particularly difficult cases. Further, where conflicts exist, attorneys can turn to NYSDA for confidential, conflict-free assistance. Finally, NYSDA is well-situated to guide defenders as they face challenges arising from statutory reforms, as is discussed further below; legislation intended to improve justice only achieves its goal when implemented effectively.

Technical Assistance, Including Case Management Software, Increases Efficiency.

Backup Center services include technical assistance to defense programs and Chief Defenders. The primary example is our [Public Defense Case Management System](#) (PDCMS). Currently installed in 93 programs in 52 counties, PDCMS allows offices to meet ILS and other state reporting requirements as well as efficiently perform conflict checks and case-management tasks.

As I described at last year's budget hearing, our PDCMS team added new functionality to help defenders effectively implement statutory reforms. PDCMS allows defenders to support clients' successful pretrial release by generating text or email reminders about upcoming court appearances. NYSDA added functionality to help providers handle expanded discovery materials as those materials are disclosed. This is crucial, given that the State appropriated \$40 million last year to help prosecutors fulfill their discovery obligations but *no money* to help defenders handle the often massive amounts of information that must be analyzed to determine whether and how it may be important in a client's case. The proposed Executive Budget again provides funding specifically to help prosecutors with discovery but none for public defense; NYSDA needs funding to provide similar expertise to the defender community.

Domestic Violence Survivors Justice Act Attorney Support Project Is a Collaboration.

The Domestic Violence Survivors Justice Act (DVSJA) of 2019 was passed to assist survivors of domestic violence who become entangled in the criminal justice system. NYSDA provided training on DVSJA after its passage and participated in the DVSJA Statewide Task Force, but needed to do more. The DVSJA Attorney Support Project, launched just a year ago, is a collaboration of NYSDA, the Task Force, and the Brooklyn Law School's Survivors Justice Project. Attorneys who need assistance contact the Backup Center, where they receive information and, in some instances, referral to other attorneys who have developed DVSJA expertise. Sufficient Backup Center funding will ensure that this essential project can continue.

Family Defense is a Vital Aspect of the Backup Center's Work.

Nearly all of the Backup Center services described above include services for public defense lawyers representing eligible people in parental roles in Family Court. Our publications include information about new caselaw and other developments relating to family defense. One of our staff attorneys is an experienced family defender who provides consultation, research, and other assistance. Many NYSDA CLE presentations focus on family defense. In addition to offering training and information on procedural and substantive family law, in the last year we have increased focus on ways that defenders can confront systemic racism in the publicly funded systems that separate families. An example of that was a day-long CLE webinar called "Litigating in Color" presented in collaboration with the Black Public Defender Association and the National Legal Aid and Defender Association, made possible in part by a grant from The New York Bar Foundation. Sufficient state funding of the Backup Center will allow us to continue our support for public defenders working in this neglected field to achieve more equitable outcomes for clients and their families.

NYSDA thanks the Legislature for last year's first-time inclusion of funding for family defense in the ILS Aid to Localities budget. And we urge you to appropriate the \$9 million dollars for family defense that ILS has requested this year. It is certainly a feasible amount given Governor Kathy Hochul's statement that New York State "is in a strong financial position" this year. While that amount is in no way a cure for the severe under-resourcing of family defense, this increased appropriation would show the State's

commitment to working toward a real solution. Families and family defenders need support.

The Backup Center Works with Regional Immigration Assistance Centers.

Attorneys representing clients born outside the United States must ensure that potential immigration consequences of criminal or family legal matters are addressed, not ignored. NYSDA works with the Regional Immigration Assistance Centers (RIACs) funded by ILS to help lawyers meet their professional obligations and provide client-centered representation to their immigrant clients. Whether by co-sponsoring CLE events, installing and supporting a RIAC-specific case management system, or referring inquiries that have immigration-related components to the appropriate RIAC, the Backup Center seeks to ensure that defenders know of and receive RIAC assistance.

See NYSDA's Annual Report to the Membership for Details.

Our [2021 Annual Report](#) provides more information about all the Backup Center's current services, particularly on pages four through ten.

NYSDA Seeks Funding for a Statewide Defender Discovery & Forensic Support Unit.

The discovery law reforms of 2019, which “repealed the blindfold law” that had impeded proper defense representation for decades, have created many opportunities for defenders to properly advise clients and prepare for trial. As with any dramatic change, some challenges have arisen. These are of two main types. One is the enormous increase of information, in a variety of forms (video and audio recordings, paper or electronic text, and more), that defenders must peruse, evaluate, and use. The other is resistance by prosecutors and law enforcement to many of the new provisions, which has required development of strategies and litigation in response.

NYSDA has provided training, direct defender services, and technical assistance to help defenders with implementation of this reform. Continuing and increased efforts are needed, which NYSDA can only provide with increased funding. The Division of Criminal Justice Services (DCJS) November 2021 report, *Implementation of 2020 Discovery Law Changes*, makes clear that law enforcement agencies, district attorneys, and forensic labs have needed funding for increased staffing, training, and technology. As I noted earlier, the State has provided \$40 million each year to meet those needs. Additional funding has also been provided to the New York State Prosecutors Training Institute for its Digital Evidence Management System. Public defenders and their clients cannot continue to be left behind. Aid to Localities funding distributed by ILS was not intended to fill this new need. We need this additional funding to assist defenders with the implementation of discovery reform to achieve the more equitable outcomes the Legislature envisioned.

The discovery that defenders are receiving includes complex digital and forensic information as well as other technical evidence and law enforcement disciplinary records. Family court cases also involve a host of forensic and complex medical information. However, a majority of public defense offices and assigned counsel

attorneys do not have any in-house expertise or specialists to address this scientific paradigm shift and influx of discovery. Moreover, unlike the State's dedicated funding for district attorney offices, law enforcement, and forensic labs, the State has not provided dedicated funds to assist public defender offices who carry the Constitutional obligation to provide clients with quality representation.

Therefore, we request \$900,000 in state funding for a dedicated statewide Defender Discovery & Forensic Support Unit. The unit would make available forensic science and discovery expertise, providing high-quality technical support to the public defense community. The reasons given above for state support of the Backup Center – the efficiencies of centralization, preservation of the independence of the defense function, etc. – apply here. Also, please note that this unit would provide assistance for family defenders as well as those handling criminal matters. This would be one step in addressing the serious lack of resources available to family defenders.

Staffing for the unit would include a Project Director, Senior Staff Attorney, Investigator, Mental Health and Substance Use Disorder Specialist, Law Enforcement Discipline Database Administrator, and a Training & Meetings Coordinator. Costs for regional convenings of defenders, discovery specialists, and forensic experts are also included. A more detailed description and budget are attached.

VDP Helps Attorneys Address Issues Arising from Clients' Military Service.

We greatly appreciate the Legislature's support for NYSDA's [Veterans Defense Program](#) (VDP) and ask that it continue. VDP staff provide training, support, and legal assistance to promote trauma-informed, client-centered representation of veterans and service members whose invisible war wounds underlie their involvement in the criminal and family court systems. This assistance facilitates a treatment-oriented mitigation approach to help give veterans who have lost their way a second chance. In 2021, the VDP provided legal and technical assistance and peer-to-peer mentoring to 242 veterans. And over the past five years, the VDP has helped hundreds of justice-involved veterans to be diverted into treatment and probation, avoiding hundreds of years of incarceration, which has saved the State an estimated \$93 million dollars. An overview of VDP's work can be found in NYSDA's annual report, mentioned above; a new report specific to VDP's activities will be available soon. Separate written testimony in support of our VDP budget request will be submitted to the Human Services joint committee. We are grateful to the Legislature for its support of the VDP. We are asking for \$720,000 in the 2022-2023 SFY Budget, the same amount that was appropriated last year.

NYSDA Supports Other Funding for Public Defense and Related Functions.

Assigned Counsel Fees Must Rise.

Hearing that the State "is in a strong financial position" creates optimism that this year's budget can begin to replace deeply eroded services. The proposed Executive Budget, the Governor said, will (among other things) rebuild our healthcare and teacher workforces, create well-paying middle-class jobs, and secure public safety and protect communities. Her Briefing Book also says that her budget "affirms New York State's

progressive values within the criminal justice system.” But missing from the proposed budget are appropriations needed to truly secure the right to counsel, due process of law, presumption of innocence, and other core values of our legal system. The most notable absence is any increase in the amount paid to assigned counsel.

New York State maintains its county-by-county system for providing mandated representation even as the State has increased public defense funding in recognition of its responsibility to ensure Constitutional representation. In some counties, virtually all public defense services are provided by assigned counsel programs through which private lawyers are paid to represent financially eligible clients. Regardless of the primary method of providing counsel, all counties need private lawyers to accept assignment in multiple-defendant cases and other situations where a conflict of interest requires separate attorneys. For these reasons and more, vibrant assigned counsel programs are vital to justice. Yet, statutorily-set compensation for lawyers who accept assignments remains at the level set in 2003.⁴ The unsustainability of that stagnation grows more marked as rising inflation takes its toll. Lawyers cannot keep their practices open with fees that barely cover overhead, much less pay a living income.

This has negative results far beyond the quandary faced by lawyers who want to continue to do assigned work. When too many attorneys stop, counties lack the ability to handle the cases generated by police and prosecution and the family regulatory system and cannot adequately plan for or meet their public defense obligations, which are ultimately the State’s obligations. A reduction in the number of experienced, skilled lawyers available for difficult cases leads to delays and errors that become the basis for dismissals or reversals; these are expensive, and damage trust in the system. Such cascading consequences harm not only the people in need of quality representation and their families but also others who have an interest in a just resolution of those cases and the public as a whole.

NYSDA has repeatedly joined many other organizations in urging that this problem be solved not only for now but for the future.⁵ We have urged that, minimally, state rates should be comparable to those paid to federal assigned counsel lawyers. Today we again respectfully request that County Law 722-b be amended to increase the rates to \$150/hour for felony and family court representation and \$120/hour for misdemeanor representation for both in-court and out-of-court work. Further, we urge you to link future rates to an annual cost of living increase index or establish a commission to revise rates on a yearly basis. Finally, it is critical that the State assume the fiscal responsibility for this increase. A carefully-drafted amendment of the statute would help counties, public defense lawyers, their clients, the legal system, and the community as a whole.

⁴ The long wait for a fee increase and reasons why that increase is vital now are discussed in a Jan. 10, 2022, *New York Daily News* [op-ed](#) by Senator Jamaal Bailey.

⁵ Attached to this testimony is a joint memorandum by the Chief Defenders Association of New York, the New York State Association of Criminal Defense Lawyers, and NYSDA regarding this important issue.

The Indigent Parolee Representation Program Needs to Continue, with Changes.

Created in 1978, the Indigent Parolee Representation Program (IPP) reimburses localities—especially those where prisons are located—for expenses incurred in providing counsel in parole-related proceedings. This program is a recognition that statewide parole policies have local impact. In the late 1980s, funding for the program was around \$1.6 million. However, that funding decreased in the 1990s and has been funded by the Legislature at the same amount (\$600,000) for the past 9 years. Because the funding is so low, counties that seek reimbursement for parole representation receive 30% of the amount that they bill the State. Although both the Executive and the Legislature have recognized the myriad of problems with our current parole system, and efforts are being made to address those issues through Less is More and other proposals, the proposed Executive Budget does not include any funding for this program once again. We ask that it be restored, and preferably increased to cover actual costs.

	SFY 2021-2022 Final Appropriation	SFY 2022-2023 Executive Proposed Appropriation	NYSDA Supports
Indigent Parolee Representation Program	\$600,000	\$0	At least \$600,000

NYSDA Supports the Office of Indigent Legal Services Aid to Localities Request.

NYSDA supports the Aid to Localities budget appropriations for ILS, and appreciates the Governor’s (and, in advance, the Legislature’s) commitment to continuing the Justice Equality Act expansion of the *Hurrell-Harring* settlement statewide. NYSDA also urges the Legislature to add \$6.5 million in additional funding for improving parental representation. The proposed Executive Budget does pick up the \$2.5 million for representation of parents in the family legal system that was added by the Legislature last year to start addressing this long-neglected area of public defense. It is welcome, but not nearly enough to fix family defense, as described above. The ILS request for a total of \$9 million for family defense will not fix family defense, but will continue to show the State’s commitment to this area of public defense representation that is just as important as criminal defense representation and has as many family and societal impacts. That request should be fulfilled.

	SFY 2021-2022 Final Appropriation	SFY 2022-2023 Executive Proposed Appropriation	NYSDA Supports
Indigent Legal Services Office (Aid to Localities)	\$307,310,000	\$357,310,000	\$363,810,000

Aid to Defense Should Continue.

Another program that recognizes the effect of statewide criminal legal policies on localities, Aid to Defense (ATD) was created as a counterpart to Aid to Prosecution to offset some of the increased costs of certain law enforcement initiatives. Calculation of the funding needed to ensure full implementation of the *Hurrell-Harring* expansion statewide was based on the assumption that other public defense funding in the State Budget would remain level. Unfortunately, beginning in the 2019-2020 SFY, the appropriation for Aid to Defense decreased by \$441,000, from \$8,099,000 to \$7,658,000. In contrast, Aid to Prosecution has been funded at \$12.5 million since 2017. Aid to Defense must be restored to at least its prior level of \$8,099,000.

	SFY 2021-2022 Final Appropriation	SFY 2022-2023 Executive Proposed Appropriation	NYSDA Supports
Aid to Defense	\$7,658,000	\$7,658,000	At least \$8,099,000

The Commission on Prosecutorial Conduct Should be Funded to Begin its Work.

Individuals who have been wrongly prosecuted and even wrongly convicted have been the driving force behind creation of the Commission on Prosecutorial Conduct. Many public defenders in the criminal arena joined in the call for that Commission. NYSDA supports funding this new body so that it can begin its work.

State Funding Related to Public Defense Helps Guarantee True Justice for All.

I again thank you for your time, and for your attention to the details of how public defense and other state-funded functions interact to affect people’s lives, local communities, and our State. Providing quality public defense in the family and criminal legal systems is a Constitutional requirement and more. Well-resourced, client-centered representation helps balance the scales of justice and prevent governmental overreach. Given sufficient capacity, public defense lawyers protect their clients from wrongful or overly-broad accusations. They help their clients navigate the confusing requirements of the family regulatory system or supervision in the criminal legal system. They identify and challenge implicit and explicit racial and other biases at every level of the legal system. They give people who cannot afford to hire a lawyer “the guiding hand of counsel at every step in the proceedings,”⁶ to ensure justice for *all*.

New York’s system for providing public defense is complicated. I have set out here some of the ways in which state funding on public defense affects and is affected by other governmental spending. On behalf of public defense lawyers and their clients, I ask you to fill the gaps in the proposed Executive Budget. To do our work, NYSDA needs the full amount of funding we have requested. There is no fat in our base budget, unchanged for nearly a decade now. The new dedicated statewide Defender Discovery & Forensic Support Unit will help ensure that the long-overdue reforms you passed in recent years are being fully and consistently implemented. We ask both houses of the Legislature to demonstrate their commitment to public defense and justice by making

⁶ *Hurrell-Harring, supra* note 1, at 20.

the appropriations discussed here. NYSDA looks forward to working with you all, and the Governor, on these and related issues this budget season and throughout the session.



NYSDA's Public Defense Backup Center

Request \$900,000 in 2022-2023 SFY to Establish NYSDA's Statewide Defense Discovery & Forensic Support Unit to Provide Direct Support to Public Defenders

The State is at a pivotal moment in preventing future injustices in the criminal and family court systems. The enactment of the new discovery law in 2019 and the repeal of Civil Rights Law 50-a in 2020 were monumental legislative achievements. To ensure that these achievements meet their goals, and to ensure fairness and justice, public defenders must have sufficient resources to receive, organize, and interpret discovery materials. Developments in the area of forensic science have implications in both criminal and family court cases.

NYSDA is uniquely positioned to establish a statewide Defender Discovery & Forensic Support Unit for public defenders. Under a state grant since 1981, the Public Defense Backup Center has executed the State's public defense support obligation required by the Sixth Amendment and the New York State Constitution, which guarantee New Yorkers the right to effective public defense regardless of their ability to pay. The Backup Center provides legal consultations and research help, resources, and training programs to the public defense community of approximately 6,000 public defenders, legal aid society lawyers, and assigned counsel attorneys in over 130 county-based programs.

The proposed statewide Defender Discovery & Forensic Support Unit will provide enhanced comprehensive assistance to the state's public defense community through individual case consultations, training, publications, critical analysis, and expert resource lists. These services are an important way to address the significant race and wealth-based disparities in the criminal and family court systems. This support will ultimately make communities safer, bolster the administration of justice, keep families together, and lead to decarceration by preventing wrongful convictions and over-convictions caused by poor forensic practices.

\$900,000 Request for a new Statewide Defender Discovery & Forensic Support Unit

To put the requested State funding of \$900,000 for a statewide Defender Discovery & Forensic Unit in context, the State has appropriated *\$40 million* annually to support prosecutors, law enforcement, and municipalities implementing the discovery reform law. In contrast, *no funds* have been allocated to public defense offices or assigned counsel lawyers for discovery implementation or forensic support, which leaves many offices and attorneys without the tools needed to review the flood of discovery and complex forensic and technical evidence. There is also disparity in access to forensic expertise since prosecutors and law enforcement have access to state- and locally-funded forensic labs and in-house expertise. The resources available for family defenders is limited at best. While Department of Social Services' and Child Protective Services' offices have in-house and external resources, such as child advocacy centers, family defenders receive very limited State funding to represent parents who are facing allegations of neglect or abuse and possible termination of parental rights.

Contact: Susan C. Bryant, Executive Director, at sbryant@nysda.org or 518-465-3524 x26.

The Need for Forensic Consultations, Training, and Other Support

Criminal Procedure Law article 245 outlines the types of discovery that prosecutors must disclose, including scientific and forensic reports, expert opinion evidence, and digital evidence. With the recent discovery reform, defenders are now finally getting reports and underlying documentation for scientific tests, such as DNA comparisons, but they do not have the experience and training to digest and evaluate the material, nor do they have ready access to qualified experts. For clients to have quality and fair representation, defenders need training, resource guides, forensic consultations, and experts to review the data, and assess its reliability, so they can effectively represent their low-income clients who have constitutional and statutory rights to zealous advocacy.

Criminal and family court cases can involve a wide array of forensics evidence: DNA; toxicology; ballistics; fingerprints; abusive head trauma/shaken baby syndrome; cellphone and computer evidence; accident reconstruction; DWI (alcohol and drugs); psychiatric/mental health; etc. Reviewing and digesting forensic evidence is essential to effective quality representation, but individual defenders cannot be expected to have expertise in all of these forensic disciplines. While some larger defense offices have an in-house forensic science unit, many small offices and individual assigned counsel attorneys do not have these resources. The Unit's focus will be on providing support to those attorneys. The Unit's staff will have expertise in a variety of forensic sciences and fundamental scientific principles, including error rates and quality assurance protocols; will track certifications and reports on the forensic labs operating in the state; and will be able to refer attorneys to qualified experts who can provide detailed consultations in individual cases.

The State can greatly reduce miscarriages of justice by funding the statewide Defender Discovery & Forensic Support Unit that will provide defenders with the scientific and technical support necessary to effectively interpret forensic evidence in their client's case.

National Reports Detail Problems with Forensic Disciplines, Cite Need for Reliable, Scientifically Valid Data

In 2009, the National Academy of Sciences (NAS) released its groundbreaking [report](#), *Strengthening Forensic Science in the United States: A Path Forward*. The report found that "with the exception of nuclear DNA analysis ... no forensic method has been rigorously shown able to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." The report concluded that substantial research is needed to validate basic premises and techniques, assess limitations, and discern the sources and magnitude of error in forensic disciplines.

Likewise, a 2016 [report](#) by the President's Council of Advisors on Science and Technology (PCAST), *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, and its [2017 addendum](#) focused on the validity of particular disciplines, including DNA mixture analysis, bitemarks, latent fingerprints, firearms identification, and footwear analysis. The 2016 report recommended unbiased

and independent scientific evaluations “to assess the foundational validity of current and newly developed forensic feature-comparison technologies.”

Since the release of those reports, there have been some improvements in forensic science, but there is significant work to be done within the scientific community. And within the legal community, progress has been slow, with many courts continuing to admit evidence and testimony that have been called into question by the reports and other research. Defense attorneys need to be able to evaluate the validity of forensic practices used in their cases, and challenge its admissibility, where appropriate.

Additionally, state and national standards require that defenders have training in the area of forensics and the ability to analyze whether a case requires expert consultations and investigation. *See, e.g.,* American Bar Association, [*Defense Function Standards*](#) and [*Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*](#); New York State Office of Indigent Legal Services, [*Standards for Parental Representation in State Intervention Matters*](#); New York State Bar Association, [*2021 Revised Standards for Providing Mandated Representation*](#). NYSDA has [*advised*](#) defense attorneys that, in light of the reports noted above, “in any case where so-called ‘forensic sciences’ are at issue, the defense should seek the assistance of an expert to determine whether the science involved is truly valid and to scrutinize whether proper procedures and best practices were followed in order to establish the reliability of the evidence.”

To meet their constitutional and ethical obligations, defense counsel must have access to resources such as those in this proposal. By centralizing these services, NYSDA can cost-effectively provide the support that defenders need and clients are entitled to. NYSDA’s Public Defense Backup Center has a proven track record of providing defenders and defense team members with high-quality training and consultation with experienced attorneys.

NYSDA has been able to provide some legal assistance to defenders on discovery best practices and forensics, but our base funding does not allow us to hire a team of subject matter experts who will be focused on this area of defense practice. A few areas where we currently offer assistance:

- **Training.** In 2021, we provided the following training programs related to forensics and science in criminal and family court cases: Medical Experts 101; Use of Experts in Domestic Violence Survivors Justice Act Cases; Working with Social Workers in Public Defense Practice; Attacking Historical Cell Site Analysis – Demystifying the “Science” of Cell Phone Tracking; 5th Annual Master Class in DWI Defense; and a three-part series on DNA Interpretations.
- **Expert referrals.** We provide expert referrals on request.
- **Resources.** In addition to the materials provided during our training programs, we added a Forensics Resources page on our website and we highlight forensic issues in our e-Newsletter, News Picks from NYSDA Staff.

Expanding Access to Treatment for Mental Health and Substance Use Disorders

The Unit would also help defenders whose clients may need services related to mental health or substance use disorders and/or forensic psychology expertise. Many public defense clients have limited access to therapeutic supportive services to address trauma, mental health conditions, and substance use disorders. The Unit will be able to help defenders connect with community-based treatment providers and can help build connections between defenders and the new crisis stabilization services that are being developed across the state. Access to services is critical and jails are not appropriate treatment providers. Expert consultations and testimony can also help defenders present sentencing mitigation to prosecutors and judges.

Technical Assistance and Best Practices

For the first time, New York's public defense attorneys are receiving most discovery automatically and early in the case. This gives attorneys the chance to evaluate the prosecution's evidence and review it with their clients, as well as to conduct independent investigations of their cases. In order to do so, attorneys need to efficiently organize the material they receive.

Public defense offices and assigned counsel programs have been developing procedures for managing and maintaining discovery materials, both print and electronic, but need help and can benefit from the sharing of best practices in use around the country. The statewide Defender Discovery & Forensic Support Unit will be able to meet this need, thereby maximizing the positive developments and outcomes we have already started to see since the discovery law took effect.

Case Management

NYSDA has taken steps to help public defenders by creating new functionality for our Public Defense Case Management System (PDCMS) that allows defender offices to connect their cases and the discovery they have received. The PDCMS is used by 93 programs in 52 counties around the state. With additional funding, we can continue to build upon those PDCMS improvements and provide further training on the new functionality so that defense offices can enhance the efficiency of their discovery process.

Law Enforcement Misconduct Database

NYSDA has is working with The Full Disclosure Project, a project of the National Association of Criminal Defense Lawyers. As noted on its [website](#), "The Full Disclosure Project aims to disrupt the culture of secrecy that systematically and pervasively shields law enforcement misconduct by changing police secrecy laws and empowering the defense community to track police misconduct."

With the repeal of 50-a and the new discovery law, law enforcement misconduct records have started to become available. Many of those records are not collected in one place, which makes it difficult to ensure that defenders are finding all of the information that is available. Using software from The Full Disclosure Project, NYSDA plans to host a law enforcement misconduct database that will allow us to organize misconduct records and related information, and make that information available to public defenders. In order to efficiently gather and enter the information, NYSDA needs to hire a database administrator.

Discovery Best Practices

Members of our Public Defense Backup Center have participated in state and national meetings regarding best practices for organizing, maintaining, and effectively and efficiently reviewing discovery. The statewide Defender Discovery & Forensic Support Unit staff will continue to participate in these ongoing discussions and share ideas and best practices with defenders around the state.

Statewide Defender Discovery & Forensic Support Unit Staffing

The Unit staff will have experience and expertise in the areas of forensics and discovery.

- The **Project Director** and a **Senior Staff Attorney** will provide defenders with case consultations and will create and distribute resource guides, issue regular updates on forensic developments, and assist with expert witness referrals.
- An **Investigator** will maintain an expert witness database, collecting CVs and transcripts and providing updates based on evaluations of the services of these experts, and provide assistance and referrals related to forensic digital evidence.
- A **Mental Health and Substance Use Disorder Specialist** will provide guidance and assistance to attorneys and defense staff members regarding forensic mental health issues, including referrals to appropriate psychiatric and psychological experts, mental health and substance use disorder treatment, and mitigation.
- A **Law Enforcement Discipline Database Administrator** will utilize the National Association of Criminal Defense Lawyers' Full Disclosure Project database to organize the extensive law enforcement disciplinary records that are beginning to be disclosed as part of discovery and Freedom of Information Law requests. Defenders will be able to contact the Database Administrator for information about particular law enforcement officers who are involved in their cases.
- A **Training & Meetings Coordinator** will organize Continuing Legal Education (CLE) and other training programs taught by state and national experts, as well as events that allow defenders from around the state to exchange ideas and best practices.

NEW YORK STATE DEFENDERS ASSOCIATION
2022-2023 SFY Statewide Defender Discovery & Forensic Support Unit Proposal

	Estimated Cost
Personnel	
Project Director	130,000
Senior Staff Attorney	120,000
Investigator	85,000
Mental Health & Substance Use Disorder Specialist	85,000
Law Enforcement Discipline Database Administrator	60,000
Training & Meetings Coordinator	60,000
Administrative Support (includes support for ongoing improvements in our Public Defense Case Management System & additional funding for existing staff's increased responsibilities)	65,000
Subtotal	\$ 605,000
Fringe Benefits	
	\$ 239,000
Non-Personal Expenses	
8 Regional training programs across New York: Western, Central, Southern Tier, Capital District, North Country, Hudson Valley, Long Island & NYC (Hybrid in-person/web programs typically range from \$4,000-\$12,000, depending on location and number of attendees)	37,000
Regional convenings of defenders and discovery specialists and forensic experts	7,000
Office & technology supplies	12,000
Subtotal	\$ 56,000
Total	\$ 900,000



NYSACDL
NEW YORK STATE ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS



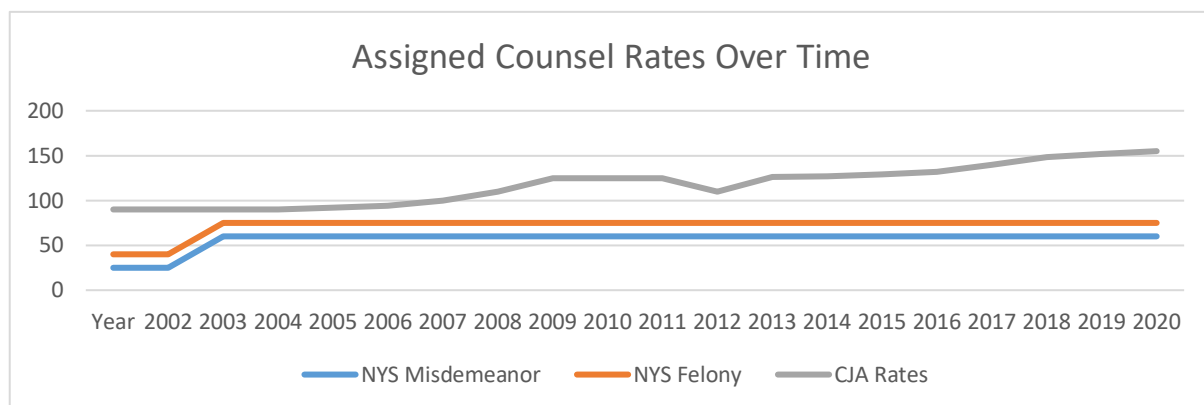
MEMORANDUM IN SUPPORT

Statement of Support for an Increase in Assigned Counsel Fees

The New York State Constitution, the United States Constitution, and the landmark Supreme Court decision of *Gideon v. Wainwright* mandate competent counsel in criminal matters, regardless of one's ability to pay. There is a comparable right to quality counsel in certain family court proceedings. However, without attorneys willing and able to take up the defense of indigent persons, the entire criminal and family court systems would collapse. Across New York State, we have an abundance of experienced and knowledgeable criminal and family court defense attorneys unwilling to accept assignments to represent people who are eligible for counsel due to the excessively low Assigned Counsel rates set by Article 18-b of the County Law.

Currently, Article 18-b sets compensation rates paid to attorneys for Assigned Counsel work at \$60 per hour for misdemeanor matters and \$75 per hour for felony, family court representation, and other matters. Statutory maximums of \$2,400.00 per misdemeanor case and \$4,400.00 for felonies, family court cases, and other matters also limit Assigned Counsel attorney fees. The only possible way to receive payment in excess of these caps is to petition the court and demonstrate extraordinary circumstances.

Assigned Counsel rates have been raised only once in the last 35 years and have remained unchanged since 2004. In contrast, since 2002 the federal government, pursuant to the Criminal Justice Act, has increased rates for federal assigned defense counsel frequently and substantially. Federal assigned counsel rates have increased 13 times over that time span with a 72% increase in rates, from \$90 per hour to \$155 per hour. (See graph below). Federal law includes an annual cost of living adjustment and further sets maximum limits for case charges far above those for the State. The cases adjudicated within the State system are no less complicated or perilous for our clients than federal cases. They should not be treated so dissimilarly in terms of compensation.



Pursuant to the settlement of the *Hurrell-Harring* lawsuit, the New York State Office of Indigent Legal Services was given a mandate to ensure that counties improve the quality of Assigned Counsel Programs across the State. Recruitment and training of qualified assigned counsel and retention of those trained is a necessary element to maintaining a strong and capable defense bar. However, much like the situation that led to the rate increase in 2004, Assigned Counsel Panels are trending towards, or already in, a crisis. The caseloads of Assigned Counsel Panel attorneys are increasing exponentially, while the number of attorneys willing and able to accept assignments is decreasing alarmingly fast. For example, the Onondaga County Assigned Counsel Program has seen a 13% reduction in their panel since 2005. Onondaga County expects, without a change in rates, the decline to continue in years to come. Assigned Counsel Programs across the State are finding it more difficult to retain quality attorneys in their programs while keeping caseloads manageable.

New York can improve the quality of representation simply by increasing the rates, as a rate increase will lead to greater numbers of qualified attorneys able to accept assignments and an associated decrease in caseloads. With the cost of living increasing, and the time and effort it takes to defend criminal or family court clients growing, the inequity of extremely low rates will intensify unabated. Against the backdrop where District Attorney and Judicial salaries have risen sharply since 2004, the inequities are even starker.

We urge you to no longer ignore the growing issue of insufficient compensation for assigned counsel attorneys. The Covid-19 pandemic has resulted in an increase in the workload of assigned counsel due to a backlog of pending cases and, the economic challenges resulting from the pandemic have led to an increase in the number of people financially eligible for assigned counsel. Without a significant increase in the rates, Assigned Counsel Providers from across the state will soon be unable to meet their constitutionally and statutorily mandated duty to provide competent counsel in all criminal and family court cases. The obvious effect of this failure will be increased rates of conviction, conviction of innocent persons, increased incarceration rates, temporary and permanent separation of families, court backlog, and a lack of access to justice for those we represent. The costs of this failure, in both terms of human and monetary capital, will be far greater than simply raising the rates to match cost of living and inflation increases seen over the past 18 years.

Accordingly, we respectfully request that Section 722-b of County Law 18-b be amended as follows:

- increase Assigned Counsel rates for 2022 to \$120 per hour for misdemeanors and \$150 per hour for felonies and other matters, for both in-court and out-of-court work.
- add a provision that ensures an automatic annual cost of living rate increase.
- payment for the increase in rates should be an expense absorbed by the State; with the counties continuing to pay their current share while the State pays the difference.
- the statutory maximum amounts should be eliminated in order to encourage adequate time expenditure on individual cases.

It is difficult to imagine a system that devotes over \$3 billion per year for the Department of Corrections and Community Supervision, which has resulted in the disproportionate mass incarceration of marginalized members of the community, yet turns its back on funding the

fundamental right of those individuals to receive effective assistance of counsel. If properly resourced, public defenders and assigned counsel attorneys could do more for public safety than any other institution. We are in the best position to assess the needs of the clients we serve, and connect them with much needed services, not cages. Moreover, our family defenders will be better equipped to help keep families together, reducing the adverse childhood experiences the trauma of removal creates. Given the time that has passed since the last increase and the challenges ahead for providers, we believe this increase is both equitable and urgently needed for the continued provision of quality representation to all public defense clients within our State.

Questions? Contact:

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