A Determination of Caseload Standards pursuant to § IV of the *Hurrell-Harring v. The State of New York* Settlement

December 8, 2016

Submitted by the New York State Office of Indigent Legal Services in accordance with Section IV of the *Hurrell-Harring v. The State of New York* Stipulation and Settlement.

Introduction

In his famously enduring book about the *Gideon* case, Anthony Lewis looked far ahead, across the breadth of America, with words of hope and challenge that still resonate strongly today:

> **It will be an enormous social task to bring to life the dream of *Gideon v. Wainwright*—the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense….There is a long road to travel before every criminal court in the United States reaches the goal that appears on the façade of the Supreme Court building: *Equal Justice Under Law*.**[1]

With these prescient words, Lewis laid down a challenge which, as every authoritative national assessment has proven, this nation has failed to fulfill. There is not one equal standard of justice in the United States today. Rather there are two: one for those who can afford to retain counsel, and another, unequal, for those who cannot afford to hire a lawyer to defend them. Those dismal national assessments, cited in the body of this report, are mirrored in the 2006 *Final Report to the Chief Judge of the State of New York*. That report, commonly referred to as the Kaye Commission Report, issued a devastating critique in its stark conclusion that "New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused."[2]

As we demonstrate in Section IV of this report, New York has made strides forward during the ten years that have elapsed since the Kaye Commission Report was issued. Yet the indictment persists; it has not been refuted. With the caseload limits the New York State Office of Indigent Legal Services (ILS) issues today, we begin a new chapter in the evolving history of equal justice for all in the State of New York.[3] For the first time, the State will have pledged its resources to enable lawyers to expend the time needed to provide the "adequate defense" that Lewis described and that the Constitution and professional ethics demand.

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[1] Lewis, Anthony, *Gideon's Trumpet,* Random House (1964), Ch. 13, pp. 5-6.

[2] Commission on the Future of Indigent Defense Services, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, June 2006, at 15. This report is available at: http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

[3] These caseload standards are issued pursuant to § IV of the Settlement Agreement in the case of *Hurrell-Harring v. The State of New York* ("Settlement") and are applicable to the providers of legally mandated criminal defense representation in the counties of Onondaga, Ontario, Schuyler, Suffolk and Washington.

I. The National Advisory Commission's 1973 Standards

Over 40 years ago, in 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) recommended that the annual maximum caseloads "of a public defense office should not exceed" 400 non-traffic misdemeanors, 150 felonies, 25 appeals, 200 juvenile cases, and 200 mental health cases.[4] Since the NAC proposed these standards, "[n]o other national caseload numbers, whether expressed as maximum numbers or in some different fashion have ever been recommended."[5] Unsurprisingly then, many providers of mandated representation, related associations, and government bodies across the nation – lacking any other concrete measure – have relied on these outdated recommendations, now commonly referred to as the "NAC standards," as a basis for measuring caseloads.[6] However, as Norman Lefstein notes in his book, *Securing Reasonable Caseloads*, "the commentary accompanying these blackletter recommendations" which explains the origin and intended limitations of the standards "shows that continued reliance on these numbers…is unjustified."[7]

The NAC standards were not a product of empirical research or any rigorous data collection.[8] Instead, the NAC based its recommendations on numbers that emerged after a National Legal Aid and Defender Association committee meeting where defenders "considered the matter of

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[4] National Advisory Commission on Criminal Justice Standards and Goals: The Defense, Ch. 13, Standard 13.12 (1973) (hereinafter, "NAC Standards" and "NAC"), black letter available at http://www.nlada.net/sites/default/files/nac_standardsforthedefense_1973.pdf. NAC was federally created and funded to create national standards and goals for "crime reduction and prevention at state and local levels." *See* http://www.nlada.org/defender-standards/national-advisory-commission. It was comprised of "elected officials, law enforcement officers, corrections officials, community leaders, prosecutors, judges, and defense attorneys." Bureau of Justice Assistance (BJA), U.S. Department of Justice, Indigent Defense Series #4, *Keeping Defender Workloads Manageable* (2001), at 8. In 1973, NAC published a report on the Courts including, in chapter 13, standards for "The Defense." http://www.nlada.org/defender-standards/national-advisory-commission.

[5] Norman Lefstein, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE, American Bar Association Standing Committee on Legal and Indigent Defendants (2011), at 43 (hereinafter "SECURING REASONABLE CASELOADS").

[6] "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." New York State Defenders Association, *Recommendations to the Chief Judge Regarding the Chief Administrator's Implementation of Caseload Standards for New York City* (March 2010), at 7; "A number of state standards, as well as recent ethics opinions from both the ACCD and the American Bar Association, accept the NAC standards." American Council of Chief Defenders (ACCD), Statement on Caseloads and Workloads, 3 (August 24, 2007); "NAC standards have served as a benchmark for other entities [referencing the ABA]. . . . [a]dditionally some state organizations such as the Washington Defender Association, have adopted the NAC standards or standards similar to them. . . . In the absence of guidelines created for a particular jurisdiction, NAC standards are an effective tool to help public defenders plan and discuss the resource needs with policymakers and budget committees." BJA, *Keeping Defender Workloads Manageable*, supra, at 8.

[7] Lefstein, SECURING REASONABLE CASELOADS, supra, at 44.

[8] "From the NAC Commentary, it is clear that no empirical study in support of its recommended caseload limits was ever undertaken." Id. at 44-45.

caseloads."[9] No documentation exists memorializing the committee's process for producing these numbers. Notably, along with the proposed numbers, the committee also "explicitly acknowledged the 'dangers of proposing any national guidelines,' because of local differences in a range of factors that could impact time needed to represent similar cases in different jurisdictions"[10] – a limitation that NAC echoed in issuing its recommendations.[11] NAC also warned that, in general, these standards should not be applied at the individual attorney level but rather to the public defender's office as a whole.[12] Despite these stated limitations, the NAC standards have been applied (or, much more often, misapplied) in various public defense settings for the last forty-three years.

Even if the NAC standards were a sound caseload measure in 1973, because the practice of criminal defense has changed so dramatically since, there is no question that the NAC standards are outmoded in today's public defense world. What might have been considered quality defense work in 1973 is no longer applicable for several reasons, including increased criminal and civil penalties as well as the expanded use of forensic techniques and technology.

Perhaps the most apparent shift over the last four decades has been the major advances that have taken place in forensic analysis and technology. While some developments have made the practice more efficient, as in the areas of research and writing, overall the availability of new forensic analytical techniques and technology has led to a more complex and time-consuming defense function.[13] Law enforcement investigation techniques are distinctly different. There is a growing reliance on forensic expert analysis in a number of fields, including drugs, hair and fiber, DNA, cell phone use, internet and social media, and videotapes. Criminal defense attorneys must now have the time and the expertise to review these types of evidence as well as challenge its admissibility. Indeed, with the advent of new technology, forensic evidence that was long thought to be the "gold standard," e.g., fingerprints, bite marks, and handwriting evidence, has been called into question.[14] Nevertheless, criminal prosecutions continue to rely on

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[9] *See* Id. at 45, n. 97, quoting the Commentary to NAC Standard 13.12.

[10] Public Policy Research Institute, *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission* (2014), at 7, quoting NAC Standards, at 277.

[11] Lefstein, SECURING REASONABLE CASELOADS, supra, at 45.

[12] Id.

[13] Further, as the ACCD notes, often purported "efficiencies" are "offset by the tendency of courts to provide attorneys with less time to produce legal pleadings" and can "result[] in a decrease in the funding available to hire support staff." ACCD, Statement on Caseloads and Workloads, supra, at 6.

[14] Two recent reports that have identified significant problems with the forensic expert evidence that has been admitted in criminal cases over the years are: The National Research Council of the National Academies' 2009 report, "*Strengthening Forensic Science in the United States: A Path Forward*," available at: https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf, and the President's Council of Advisors on Science and Technology 2016 report to the President, "*Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*," available at: https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

this "junk science"[15] and defense attorneys must have the time and resources to contest its use in court or, where it is admitted, be able to explain to jurors and judges its limitations. Further with the now pervasive use of cameras, video, and audio recording, defense investigations must include tracking down, procuring, and reviewing such evidence.[16] It is clear that "the practice of criminal…law has become far more complicated and time-consuming[.]"[17]

Additionally, the intersection of criminal law and immigration law now dominates cases involving noncitizen clients. Not only has immigration law become more complex, but detention and deportation of those with criminal convictions have increased to record numbers in recent years.[18] *Padilla v. Kentucky* recognizes that criminal defense attorneys have an affirmative duty to inform noncitizen clients about any potential immigration consequences of their criminal case.[19] Understanding the complicated and ever-changing body of immigration law to fulfill a lawyer's ethical duty demands more time on the part of the defense.

Collateral consequences go beyond immigration and can potentially arise in all areas of a client's life. They are scattered throughout municipal, state, and federal law requiring defense counsel to devote sufficient time to research the law, and if necessary, consult with "others with greater knowledge in specialized areas."[20]

Perhaps the most striking change in the four decades since NAC issued its caseloads standards has been the "historically unprecedented and internationally unique" increase in incarceration in the United States.[21] Our "tough on crime" policies have resulted in incarceration being imposed

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[15] *See* Sheck, Barry, et. al. *Actual Innocence: When Justice Goes Wrong and How to Make it Right*. Reprint Ed., New American Library, 2003, Ch. 7, "Junk Science"; *see also* The Marshall Project's curated collection of links to stories and editorials about misplaced reliance on forensic evidence, available at: https://www.themarshallproject.org/records/1115-junk-science#.bXPSbFeco.

[16] In fact, it was a private defense attorney's ability to procure an exculpatory store surveillance video on behalf of his client in a high profile case that led New Orleans Public Defender, Derwyn Bunton, to the conclusion that his office was overburdened with such high caseloads that they could not possibly have achieved the same results. *See* Center for Investigative Reporting, Reveal, Audio Podcast, *If You Can't Afford a Lawyer*, available at: https://www.revealnews.org/episodes/if-you-cant-afford-a-lawyer/.

[17] National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009), at 66.

[18] *See* NY Times, *More Deportations follow Minor Crimes, Records Show*, April 6, 2014, available at: http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html.

[19] 599 U.S. 356 (2010).

[20] ABA Standards of Criminal Justice: Defense Function, Standard 4-5.4 (4th ed., 2015). Notably, this standard not only requires that defense counsel identify and advise their client of relevant collateral consequences, but also that defense counsel consider using the existence of these consequences during the plea process. The New York State Bar Association Standards also highlight this obligation. *See* NYSBA 2015 Revised Standards for Providing Mandated Representation, § I-7(e): duty to provide client full information concerning collateral consequences.

[21] National Research Council of the National Academies, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014), at 2, available at: https://www.nap.edu/catalog/18613/the-growth-of-

more often and for significantly longer periods of time following a conviction. The National Research Council examined this issue and found,

> In 1973, after 50 years of stability, the rate of incarceration in the United States began a sustained period of growth. In 1972, 161 U.S. residents were incarcerated in prisons and jails per 100,000 population; by 2007, that rate had more than quintupled to a peak of 767 per 100,000. . . .[T]he incarceration rate, including those in jail, was 707 per 100,000 in 2012, more than four times the rate in 1972. In absolute numbers, the prison and jail population had grown to 2.23 million people, yielding a rate of incarceration that was by far the highest in the world.[22]

While it is no longer reasonable to rely on the NAC standards to determine appropriate caseload standards, it is of course necessary to have some measure of what maximum caseloads should be for providers of mandated representation. This is because, as public criminal defense providers' caseloads have grown dramatically, so too has the awareness that it is essential to limit the number of assigned cases to ensure constitutionally "competent and diligent" representation.[23] As described below, the work of public criminal defense providers is essential to promoting justice, fairness, and racial equality in our communities. But, it is indisputable that to do this work well takes time.

II. The Critical Need for Public Defense Attorneys Who Have Sufficient Time to Deliver Quality Representation

> I have a great respect for public defenders. But what if the public defender has 100 cases? What if the public defender is only a public defender in name? You've heard talk about my record as a criminal defense attorney. Let me tell you something: if I had 100 cases, I'd have to plead 'em all guilty.
>
> - *Gerry Spence*[24]

incarceration-in-the-united-states-exploring-causes.

[22] Id. at 33 (footnote omitted).

[23] *See* American Bar Association (ABA), Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441 (May 13, 2016), Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation; *See also* National Legal Aid and Defender Association's 1976 Statement, "No defender office or defender attorney shall accept a workload which, by reason of excessive size thereof, threatens to deny due process of law or places the office or attorney in imminent danger of violating any ethical cannons…" Lefstein, SECURING REASONABLE CASELOADS, supra, at 32 (*quoting* PERFORMANCE GUIDELINES FOR CRIMINAL DEF. REPRESENTATION (4th printing) (National Legal Aid and Defender Ass'n 2006).

[24] *The Plight of the Public Defender*, Address to the Trial Lawyers College, Dubois, Wyoming (2014).

Quality criminal defense is the foundation of our criminal justice system.[25] Public defense lawyers promote "fundamental societal values" and protect the constitutional rights of people arrested for a crime, often at a time when the government is wielding its immense resources to deprive them of their liberty.[26] In this sense, "[p]ublic defenders are on the front lines of a battle for the country's very sense of justice."[27]

Well-resourced public defense attorneys are also absolutely essential to reduce the very real risk of wrongful convictions of innocent persons. A special task force convened by the New York State Bar Association to examine wrongful convictions identified six root causes of these miscarriages of justice. Not surprisingly, poor defense lawyering was one of them.[28] Poor defense lawyering can also lead to another, equally unacceptable but too often hidden, miscarriage of justice: unfair and excessive punishment.[29] Without sufficient time, defense attorneys are unable to fully investigate the circumstances of the offense and the background and personal circumstances of the client. Yet this information is essential to ensuring both that the client is not wrongly convicted, and that the sentence imposed accurately represents the client's true legal and moral culpability for the crime. This is another important reason why a well-resourced public defense system is critical to diminishing our nation and state's over-reliance on incarceration.[30]

Well-resourced public defense is also critical to ameliorating the racial divide in our communities.[31] People of color are arrested, prosecuted, convicted, and incarcerated for crime at

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[25] Justice Hugo Black emphasized this point in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), stating: "Our state and national constitutions and the laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

[26] Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, LAWS & CONTEMPORARY PROBLEMS (Winter 1995), at 81.

[27] Jonathan Rapping, *Redefining Success as a Public Defender: A Rallying Cry for Those Most Committed to Gideon's Promise*, THE CHAMPION, June 2012, available at: https://www.nacdl.org/Champion.aspx?id=24995.

[28] New York State Bar Association Task Force on Wrongful Convictions Defense Practices Subcommittee, *Subcommittee Report and Final Proposals* (2010), at 121; *see also* Sheck, Barry, et. al. *Actual Innocence*, supra, ch. 9 "Sleeping Lawyers."

[29] Wrongful convictions and unfair punishment are related miscarriages of justice. *See* Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, supra, at 82 ("Providing competent counsel is the best means of ensuring the proper operation of the constitutional safeguards designed to protect the innocent and the less culpable from unfair punishment, including death.").

[30] Justice Policy Institute, *System Overload: The Costs of Under-Resourced Public Defense* (July 2011), at 21, available at: http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf (noting that poorly resourced public defense contributes to mass incarceration, and that a "general lack of advocacy at sentencing, coupled with a lack of investigation, throughout the process can lead to unnecessarily harsh sentences" and to sentencing errors.).

[31] *See* Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, supra, at 83 ("[A] failure to provide adequate assistance of counsel to accused indigents draws a line not only between rich and poor, but also between white and black.").

significantly higher rates than their white counterparts.[32] Because communities of color experience higher rates of poverty, these defendants are often represented by public defense attorneys. Thus, communities of color disproportionately suffer the adverse impact of our under-resourced public defense system.[33] A well-resourced public defense system is necessary to ensure the fair administration of justice for all people, regardless of their race and ethnicity.

Public defense lawyers need sufficient time in every client's case to protect their clients' constitutional rights, guard against miscarriages of justice, promote racial equality, and treat their clients with dignity. Professional standards guide defense attorneys on how to effectively represent their clients; a review of these standards compellingly shows that quality criminal defense representation is a time-intensive endeavor. These professional standards require defense attorneys to engage in the following tasks:[34]

- Effectively communicate with the client
- Learn of the client's background and personal circumstances
- Advocate for pre-trial release
- Investigate the facts of the case
- Know the law and engage in legal research where there are gaps in knowledge
- Determine the need for non-attorney supports and expert assistance, and obtain the needed support and assistance
- Develop a theory of the case and of sentencing
- Preserve the client's options
- Research, write, and file appropriate motions
- Identify and advise the client on the collateral consequences of a conviction and consider using the existence of such consequences during plea negotiations
- Where warranted, prepare for trial
- In the event of a conviction, whether by trial or guilty plea, prepare for sentencing
- In the event of a conviction, effectuate the client's right to appeal and, upon request, request the assignment of appellate counsel

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[32] *See* The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* (2000), at 2-3 (discussing "the cumulative impact of racial disparity through each decision point in the criminal justice system"), available at: http://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf.

[33] *See* Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, supra, at 83 ("[F]ailure to provide adequate assistance of counsel to accused indigents draws a line not only between rich and poor, but also between white and black.").

[34] This list is derived from a review of the following professional standards: New York State Bar Association, Committee to Ensure Quality Mandated Representation, *2015 Revised Standards for Providing Mandated Representation* (2015); American Bar Association (ABA) Standards of Criminal Justice: Defense Function (4th ed., 2015); National Legal Aid and Defender Organization, *Performance Guidelines for Criminal Defense Representation* (2006); and International Legal Foundation, *Measuring Justice: Defining and Evaluating Quality for Criminal Legal Aid Providers* (Nov. 2016). Though it does not represent an exhaustive list of defense attorney obligations, it does convey many of the core responsibilities.

It bears emphasis that attorneys are professionally obligated to perform most of these tasks regardless of their workload or the defendant's desire to plead guilty.[35] Even cases that are disposed of by way of a guilty plea take time, as one experienced criminal defense lawyer reminded ILS:

> Even with a quickly resolved case with a guaranteed sentence, each case should be worked up as if there is no sentencing commitment. This means obtaining school, medical, and counseling records, family photographs, etc. The lawyer or a representative must attend all pre-sentencing interviews, challenge inaccurate and prejudicial information, and try to get the probation officers to put in or attach helpful information and documents… This of course takes time which should be factored in to the case time.[36]

Currently, New York's public defense system suffers from excessive attorney caseloads, resulting in public defense attorneys lacking the time needed to meet their professional and ethical responsibilities and to fully protect their clients' constitutional rights. The *Hurrell-Harring* Settlement provides a unique opportunity to address this problem in the five defendant counties, and to ensure that the public defenders, legal aid lawyers, and assigned lawyers in these counties have the time they need to truly do justice. Indeed, the State has already taken a significant first step toward addressing caseloads by allocating $10.4 million of interim funding in the FY 2016-2017 Budget to the five lawsuit counties in order to bring caseloads down to the current Indigent Legal Services Board (ILSB) standards.[37]

III. Recent Caseload Limit Reports that ILS Studied

ILS consulted several caseload standard studies that have been undertaken in recent years by responsible officials in a variety of jurisdictions. We paid the most intensive attention to four such studies: the 2014 *Attorney Workload Assessment* conducted by the Center for Court Innovation (CCI) and the Committee for Public Counsel Services (CPCS) of the public defenders employed by CPCS in Massachusetts; *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards* conducted by Rubin Brown LLP on behalf of the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants

[35] ABA Standards of Criminal Justice: Defense Function (4th ed., 2015), Standard 4-4.1(b) ("The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt."). *See also* ABA Standard 4-6.1(b) ("In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.").

[36] Email from James P. Harrington, Esq., dated November 9, 2016, on file with ILS.

[37] The ILSB standards and the FY 2016-2017 Budget allocation are further discussed in Section IV of this report.

(ABA SCLAID), also in 2014; the 2015 *Guidelines for Indigent Defense Caseloads*, a report produced by the Public Policy Research Institute at Texas A&M University for the Texas Indigent Defense Commission (TIDC); and *Indigent Defense Reforms in Brooklyn, New York: An Analysis of Mandatory Case Caps and Attorney Workload*, produced by CCI and the New York State Unified Court System, also in 2015.[38]

Careful study of the processes utilized and the issues encountered by the people who produced these studies, and consultation with them about specific challenges they confronted, was a very valuable exercise from which we learned a great deal. The chart which follows, **National Caseload Standards and Studies**, provides a link to the original 1973 national standards and to each study, including a summary of their recommended caseload limits. Please note that neither the Missouri nor the Brooklyn study proposed a specific maximum annual caseload limit: rather, they produced a report of hours that should, on average, be allocated by attorneys to particular categories of cases. For informational purposes, we converted those recommended hours into annual caseload limits, as explained in footnotes 3 and 4 in the chart. The Massachusetts study, at page 26, did publish proposed generic caseload limits for different practice areas which we have broken out by case type in our chart. However, citing "current resources and budgetary constraints" the authors did not argue for implementation of those caseload limits. Similarly, the Texas report merely observed, at page 37, that "the guidelines should prove to be a valuable tool for policymakers and practitioners alike." More recently, in its Legislative Appropriations Request for fiscal years 2018 and 2019, the Texas IDC requested full state funding for the costs of indigent defense representation, to be phased in over a six year period; but this request did not seek any increases in funding for the purpose of implementing the recommendations of the caseload study.

[38] For full citations and links to each of these reports, see p. 10.

National Caseload Standards and Recent Studies

National standards (1973) [1]

Case type	Standard
Felony	150
Misdemeanor	400
Juvenile	200
Mental Health Act	200
Appeals	25

Massachusetts (2014) [2]

Case type	Standard
District Court	
Bail only	759
Probation	201
Misdemeanor	99
Operating Under the Influence	84
Concurrent felonies 265	69
Concurrent felonies not 265	87
Superior Court	
Probation	181
Nonconcurrent felonies 265	22
Nonconcurrent felonies not 265	39

Missouri (2014) [3]

Case type	Standard
Murder/homicide	18
A/B felony	39
C/D felony	75
Sex felony	29
Misdemeanor	160
Juvenile	96
Appellate/PCR	19
Probation violation	191

Brooklyn (2015) [4]

Case type	Standard
Indicted violent felonies	28
Indicted non-violent felonies	54
Unindicted felonies	117
Misdemeanor	375
DWI	49
Probation	234
Youthful offender - misdemeanor	156
Youthful offender - felony	45

Texas (2015) [5]

Case type	Standard
Felony 1	77
Felony 2	105
Felony 3	144
State Jail Felony	174
Misdemeanor A	216
Misdemeanor B	236

(1) *National Advisory Commission on Criminal Justice Standards and Goals: The Defense*, 1973, available at: http://nlada.net/sites/default/files/nac_standardsforthedefense_1973.pdf, standard 13.12.

(2) *Attorney Workload Assessment*, Center for Court Innovation, October 2014, https://www.publiccounsel.net/cfo/wp-content/uploads/sites/8/2014/12/Attorney-Workload-Assessment.pdf, adapted from Exhibit 17, omitting non-criminal court results. Standards assume a 1,662 hour year.

(3) *The Missouri Project*, Rubin Brown on behalf of the American Bar Association, June 2014, available at: http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf, adapted from Executive Summary. Standards derived by ILS assuming a 1,875 hour work year.

(4) *Indigent Defense Reforms in Brooklyn, New York*, Center for Court Innovation, April 2015, available at: http://www.courtinnovation.org/sites/default/files/documents/Case_Caps%20_NYC_0.pdf, adapted from Table 4.4. Standards derived by ILS assuming a 1,875 hour work year.

(5) *Guidelines for Indigent Defense Caseloads*, Public Policy Research Institute, January 2015, available at: http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf, figure 8-5. Standards assume a 2,087 hour year.

IV. A Brief History of Caseload Reform in New York

As set forth in Section I of this report, the standards established by the NAC in 1973, at the very outset of the decades-long explosive growth in law enforcement and criminal punishment in the United States, are outmoded, antiquated, and entirely ill-suited to the provision of adequate, ethical criminal defense representation in the year 2016. Only in recent years, since 2009, has New York made progress in reducing excessive caseloads. Yet the steps that New York has taken during the past seven years have laid a foundation that now makes real and meaningful progress achievable.

The New York City Caseload Caps (2010): In 2009, the state legislature enacted legislation directing the Chief Administrator of the Courts to "promulgate rules regarding compliance with caseload standards . . . in criminal matters pursuant to article 18-B of the county law" in New York City with "standards deemed reasonable by the chief administrator of the courts." The rule was to provide for a four-year phased plan of implementation.[39]

Pursuant to this authority, on April 1, 2010, the Unified Court System added to the Rules of the Chief Administrative Judge a new rule, Part 127.7, which established that attorneys appointed in criminal cases in New York City "shall not exceed 150 felony cases; or 400 misdemeanor cases; or a proportionate combination of felony and misdemeanor cases."[40] The new rule provided that the standard would not be binding until April 1, 2014.

The "Brooklyn Study," Indigent Defense Reforms in Brooklyn, New York, issued by CCI and the NYS Unified Court System in April, 2015,[41] demonstrated compliance by the providers in the Borough of Brooklyn (Kings County) with the caseload standards, with an average of 358 misdemeanor equivalent cases (or 134 felonies) per staff attorney during 2014.[42] Importantly, the report also found that the reduced caseloads and increased staff "led to critical enhancements in indigent defense representation."[43] It is also important to recognize that compliance by New York City providers with these caseload limits was made possible by new State funding, in the amount of $57,897,176 in FY 2016-2017.

Upstate Caseload Reduction Progress, 2012-2015: Since it began operations in 2011, ILS has committed itself to working with the 57 upstate county governments and their 138 providers to improve the quality of mandated legal representation. One of the principal ways to improve that quality is to reduce excessive caseloads. ILS has done this via its annual funding distributions to each county, and via competitive grant processes under which 25 counties have contracted to provide counsel at arraignment, and 47 counties have contracted to reduce caseloads in their

[39] *See* Part ZZ of Chapter 56 of Laws of 2009.

[40] Available at: http://www.nycourts.gov/RULES/chiefadmin/127.shtml#07.

[41] CCI, *Indigent Defense Reforms in Brooklyn, New York: An Analysis of Mandatory Case Caps and Attorney Workload* (2015).

[42] Id. at 14-15 and Table 3.2.

[43] Id., Executive Summary, at viii.

institutional defender programs and otherwise improve quality in their assigned counsel programs. The most recent annual ILS report, *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2015 Update* (issued November, 2016, and available at www.ils.ny.gov) demonstrates measureable improvement, evidenced by three indices. First, Full Time Equivalent (FTE) attorney staffing in the institutional provider offices increased from 654 in 2012 to 759 in 2015, a 16% increase. Second, non-attorney staff rose during the same period by 20%, from 297 to 358. Finally, the average weighted caseload per attorney in upstate institutional providers dropped from 719 in 2012 to 561 in 2015, a reduction of just under 22%.

367 Misdemeanor Equivalent Caseload Limit Set by the Indigent Legal Services Board (ILSB) (2014): In September, 2014, the ILSB voted to establish a caseload limit of 367 weighted new case assignments (or 138 felonies) in any calendar year in institutional provider programs in the 57 upstate counties, contingent on the appropriation of state funds for that purpose. In reaching the result of 367 rather than 400 weighted cases, the Board was guided by the knowledge that the original NAC standard recognized that supervisory resources should be factored in as well. In 1996, the Indigent Defense Organization Oversight Committee (IDOOC) in the First Judicial Department stipulated that the caseload of a supervisor who oversees the work of ten attorneys should be no more than 10% of a full caseload. "Taken together, these standards suggest that when an office's staffing and cases are combined the average caseload per attorney should not exceed 367 misdemeanors, 138 felonies, or 23 appellate cases[.]"[44]

The *Hurrell-Harring* Settlement Agreement (October 21, 2014): As has been widely reported, this historic settlement broke new ground via the State of New York's commitment to fund a variety of important reforms, including caseload relief, in the five counties of Onondaga, Ontario, Schuyler, Suffolk and Washington. The Settlement agreement received final judicial approval and became effective on March 11, 2015. By operation of § IV, the Settlement pledges the State to fund caseload relief in those counties, to be determined by ILS; and in no event may the caseload limits set by ILS exceed the 1973 NAC standards.

State Funding of the 367 Misdemeanor Equivalent Caseload Limit Under the Settlement (April 1, 2016): The FY 2016-2017 state budget includes an appropriation of $10,401,387 in caseload relief funding - enough to enable every lawsuit county to comply with the ILSB 367 weighted caseload limit.

We recount this brief history of caseload relief progress in New York because it shows that there are, and have been, a variety of ways to make progress in reducing historically excessive caseloads that make effective representation next to impossible. We also recount these steps because they demonstrate the contributions of so many individuals and entities to improving the quality of mandated representation in New York: the Judiciary, the State Legislature, Governors Paterson and Cuomo, New York City and county governments, the New York Civil Liberties Union, public defense providers, ILS and the ILS Board have all helped set the table, as it were.

[44] *An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York [for 2012]: A Report of the Office of Indigent Legal Services* (November, 2013) at 3-4, available at www.ils.ny.gov.

Had these steps not been taken, we would not now be at a moment of transformative advances, where significant further reductions in outmoded caseload standards are not only possible, but affordable and realizable.

V. Determination of the Appropriate Caseload Standards for Providers of Mandated Representation in the *Hurrell-Harring* Settlement Counties

Paragraph IV (B)(1) of the Settlement requires ILS, "in consultation with the Executive, OCA, the Five Counties, and any other persons or entities ILS deems appropriate," to determine the appropriate numerical caseload/workload standards for each provider of mandated representation in each County, for representation in both trial and appellate-level cases. Pursuant to the Second Amendment to the Settlement (February 9, 2016), ILS was to "retain a third-party expert to assist in determining the…standards as set forth in paragraph IV (B)(1)." ILS was required to provide the parties the recommendations of the third-party expert by November 15, 2016; and the parties were required to meet with ILS "to provide any comments on said recommendations" by November 22. Finally, ILS was to determine appropriate caseload levels by December 1, 2016.

After ILS issued an RFP and received responses thereto, a contract was executed between ILS and the RAND Corporation in June, 2016. The contract called for RAND to conduct a caseload study to assist ILS in the exercise of its responsibility under paragraph IV of the Settlement. The contract period runs from May 1 to December 31, 2016.

RAND delivered its recommendations in a draft report to ILS on November 18, 2016. Thereafter, ILS and the parties met on November 22 and the parties agreed to further amend the Settlement in a Fourth Amendment, which extended the time for ILS to make its caseload determinations by one week, to December 8; and provided for continued consultation between ILS and counsel for the plaintiffs and the State defendants "between November 22, 2016, and the date on which ILS makes its determinations as required by paragraph IV (B)(1)."

Despite a very truncated time frame due to unavoidable delays in the contracting process, the RAND study contributed meaningfully to our development of appropriate caseload standards pursuant to the Settlement. Over 140 practicing public defenders and assigned private attorneys participated in one or more components of the study. For the first time in the history of New York State outside of New York City, these lawyers had an opportunity to measure the time they currently expend on criminal cases; to comment upon the sufficiency of that time; and to consider what time it should take to provide high quality representation for their clients in assigned criminal cases at the trial and appellate levels. The RAND study left no doubt that the 1973 NAC standards are outdated and excessive. Moreover, the study made it clear that modern caseload standards, suitable for representation in the twenty-first century, must include more criminal case categories than the felony-misdemeanor-appeal triad of the NAC standards.

Our consultation with the providers of mandated representation and government officials in each of the five counties – Onondaga, Ontario, Schuyler, Suffolk and Washington – was of inestimable value in our development of appropriate caseload standards that would significantly elevate the quality of mandated representation in each locality. We are grateful to these individuals for their assistance.

Our criminal case categories are seven in number, and appear below with their respective maximum number of new case assignments per year, and minimum number of hours per case, on average:

Case Type	Maximum Annual Assignments	Minimum Average Hours
Violent Felonies[45]	50	37.5
Non-Violent Felonies	100	18.8
Misdemeanors and Violations	300	6.3
Post-Disposition (including Probation Revocation)	200	9.4
Parole Revocation	200	9.4
Appeals of Verdicts	12	156.3
Appeals of Guilty Pleas	35	53.6

These caseload standards assume that there is a total of 1,875 working hours per attorney per year. For institutional defenders, these standards shall apply as an average per staff attorney within the office, so that the leader of the office may assign individual attorneys to greater or fewer numbers of cases in order to promote the most effective representation of clients.

For assigned counsel programs, these standards state that the *average* number of hours per case may not go below specified minimum levels; recognizing that that individual cases may take more or less time. In other words, assigned private counsel are expected to devote, on average, at least the minimum number of hours set forth by these standards per case.

In developing these standards, we have carefully examined the resources that will be necessary to assure their effectiveness. This examination has included a careful review of caseloads, the types of cases attorneys handle, the qualifications and experience of attorneys, local conditions such as distances between courts and other institutions, necessary staffing, supervision, office

[45] "Violent felonies" are defined as: any violent felony as defined in Penal Law § 70.02 and any class A felony except those defined in Article 220 of the Penal Law (Class A "drug" felonies).

We include non-drug class A felonies because they constitute some of the most serious offenses which can result in life imprisonment (P.L. § 70.00(2)(a)), require incarceration after sentence (P.L. § 60.05), have pre-indictment plea bargaining limitations (Crim. Proc. L. §§ 180.50; 180.70), limit post-indictment plea agreements to no lower than a C violent felony (C.P.L. § 220.10(5)(d)(i)), and any "attempt" is classified - at a minimum - as a B violent felony (P.L. §§ 110.05; 70.02). We exclude class A drug felonies because recent changes to the sentencing laws pursuant to the 2009 Rockefeller Drug Reform created sentencing structures more akin to non-violent felonies in most cases (*see* P.L. § 70.71). This is also consistent with the New York State Division of Criminal Justice Services (DCJS) definition of "Violent felony." See DCJS, *New York State Violent Felony Processing, 2015 Annual Report* (2016) at 1, available at http://www.criminaljustice.ny.gov/crimnet/ojsa/nys-violent-felony-offense-processing-2015.pdf (A list of the included offenses can be found in Appendix A of the DCJS report).

space and the cost of onboarding new employees, and other factors. We believe we have accounted for all of the costs of implementing these standards effectively and efficiently.

Based upon our implementation experience and our consultations with county officials and providers, we believe that these new standards should be phased in over a two year period. Compliance by each of the eleven providers in the five counties with these standards will require significant effort. Existing staff and assigned counsel will require training in the optimal use of the additional time available for devoting more and more effective time to each client's case. Hiring high quality staff is a time-consuming and labor-intensive process. In addition, providers will need to secure new office space, and purchase office furniture and equipment. In fact, none of the institutional providers currently has the space that they need to house additional staff. Each county is going to have to explore its own best options. Another complexity arises from the necessity of obtaining county legislative approval for the expenditure of the state-funded caseload relief money to hire and support new staff. Finally, to require providers to meet an unrealistic deadline would have the unintended consequence of harming current clients, as the providers rush to recruit, hire and train new staff. Experience teaches that when hiring is rushed, mistakes are inevitable.

We estimate the further annual cost of implementing these caseload standards in the five counties to be $8,608,325, in addition to the $10,401,387 that was appropriated in the FY 2016-2017 state budget; for a total annual implementation cost of $19,009,712. Implementation of these standards in these counties marks an historic accomplishment: the achievement of fully funded caseload relief that is unprecedented in its provision of time and resources for public defenders and assigned counsel to represent their clients in accordance with established professional standards and ethical rules.