

COMMENTS ON KAYE COMMISSION REPORT ON INDIGENT DEFENSE

New York City Bar Association

**Committee on Criminal Justice Operations
Committee on Criminal Advocacy**

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Introduction

This is a report prepared by a joint subcommittee of the New York City Bar Committees on Criminal Justice Operations and Criminal Advocacy. Assembled in September 2006, the subcommittee set as its goal a review of the Kaye Commission Report on Indigent Defense with a particular focus on how the proposal would impact criminal justice operations in New York City, and formulation of recommendations concerning the Statewide defender plan.

A number of the subcommittee members, as well as the members of the full Committees on Criminal Justice Operations and Criminal Advocacy, are associated with defender organizations operating in New York City or the Assigned Counsel Plans. Many are defense attorneys who take, almost exclusively, retained cases. Others are prosecutors and judges. All the members of both Committees, including members of the judiciary and law enforcement, are stakeholders in the operation of the criminal justice system in New York City, including the provision of indigent defense. They are City Bar members who have chosen to devote effort toward bettering criminal defense and advocacy, and their presence on these Committees should not detract from the conclusions the Committees have collectively reached.

Summary of Conclusions

As the Kaye Commission Report set forth in detail, areas of upstate New York struggle to provide indigent defense with woefully inadequate funding and little organized support. While these upstate regions would benefit from implementation of a Statewide defender plan, New York City does not require the same overhaul of its well-established indigent defense services. The creation of a Statewide Indigent Defense Commission and implementation of Statewide standards, on the other hand, could be a positive step that would help indigent defense providers improve their representation of clients, depending on what those standards are and whether any enforcement mechanism will ensure maintenance of standards.

Kaye Commission's Proposed Changes in New York City

The Kaye Commission, relying on a Statewide assessment of indigent defense services conducted by the Spangenberg Group, identified several areas of concern that affect indigent defense Statewide, including, the Spangenberg Group asserted, in New York City. These findings included the following areas of concern:

1. No clear standards regarding eligibility determination and procedures.
2. No Statewide standard that defines "adequate" indigent defense and there exists no mechanism to enforce any particular set of standards.
3. Money currently allocated within New York State for provision of constitutionally-mandated indigent defense is grossly inadequate, resulting in:
 - Excessive caseloads
 - Inability to hire full-time defenders
 - Lack of adequate support services
 - Lack of adequate training
 - Minimal client contact and investigation
4. Current method of providing indigent defense services in New York imposes a large unfunded mandate by the State upon its

counties, results in a very uneven distribution of services, and compromises the independence of defense provider.

5. A significant statewide disparity between the resources available to public defenders and those enjoyed by prosecutors.

6. A lack of more open discovery procedures and variations in discovery practices impedes the efficient expedition of cases, timely investigation by the defense, including locating witnesses, and prevents adequate defense preparation.

7. Defense providers are not providing the requisite counseling with respect to collateral issues that can affect critically a defendant's case, especially those regarding a defendant's immigration status. Insofar as minorities are disproportionately represented in the criminal justice system, this failure has particular implications for individuals in those communities.

8. Absence of a comprehensive data collection system to measure provision of indigent criminal defense services in New York, hampering ability of policy makers and administrators to make informed judgments and plan meaningful improvements in the administration of indigent defense services.

The Spangenberg Group's report, which in turn provided the underpinnings for the Kaye Commission's Report, presented separate findings concerning "Statewide," "Upstate," and "New York City" conditions. The findings particular to New York City included: (1) a significant increase in the volume of misdemeanor cases, without a corresponding increase in resources for defense services, leaving defense groups stretched thin. The need to advise defendants as to increasingly complex collateral

consequences to criminal convictions has also changed the demands on attorneys. And (2) The Legal Aid Society, which was contractually obligated to handle 86% of all non-conflict indigent defense cases in the arraignment shifts it staffs, lacked adequate training, support and administrative staff, and caseloads were overwhelming.

The Group also determined that the alternate providers had not received adequate funding. No increase in funding had, at that time, been forthcoming for several years. Competition among providers for inadequate city funds caused tension in the defense community. The Group concluded that an increase in State funding and a Statewide commission that included New York City would help to insure the independence of the defense function from funding sources.

Based on the Spangenberg report, the Commission recommended implementation of a Statewide defender system, entirely and adequately state-funded, in which those providing indigent defense services are employees of entities within the defender system or are participants in an assigned counsel plan that has been approved by the body established to administer the Statewide defender system.

The proposed Statewide defender office would consist of:

- An Indigent Defense Commission
- Chief Defender
- Regional Defenders
- Local Defender Offices
- Deputy Defender for Appeals
- Defender for Conflicts

Under the new Statewide system, county and New York City funding of defense services would be phased out over three years, and funding at an adequate level would be provided from the State's General Fund. Disparity between prosecution and defense services would also be eliminated. The Kaye Commission did not issue recommendations with regard to the budgeting process or mechanisms.

The Kaye Commission also did not address how a Statewide defender program would affect existing, well-established defense structures in New York City, which differ significantly from those found, or lacking, in upstate regions. This Subcommittee was assembled with the purpose of assessing whether the criminal justice needs of New York City, as well as its well-established defense structure, would be served by the proposed Statewide reforms.

The Current System

New York City's system of providing counsel to indigent defendants is overseen by the Mayor's Criminal Justice Coordinator. Following requests for proposals, funding has been extended to the primary defender, i.e., the Legal Aid Society, and a number of alternate providers, i.e., Brooklyn Defender Services, The Bronx Defender, New York County Defender Services, Queens Law Associates, the Staten Island Defender, the Center for Appellate Litigation, and Appellate Advocates. The Legal Aid Society historically receives supplemental funding from the City Council. Neighborhood Defender Services and the Office of the Appellate Defender, two other alternate defenders, are funded in large part directly by the City Council. Supplemented by members of the 18-b Assigned Counsel Panels in both the First and Second Departments of the Appellate Division, these institutional and private providers represent virtually all indigent criminal defendants in New York City.

The institutional providers have established, and place a priority on, programs to train and supervise staff attorneys; some provide continuing legal education seminars open to all members of the bar, as do the County and City bar associations. Each institution's funding is linked to either the number or percentage of cases in the City criminal justice system the group will take on. Additionally, many providers staff specialized "problem-solving" court parts, which are an important initiative of the Office of Court Administration and often piloted in New York City.

Responses to Statewide Defender Proposal

Subcommittee members interviewed players in, and close observers of, the criminal justice system in New York City. These included representatives of major trial and appellate defense institutions. Judges sitting in Criminal Court and in Supreme Court, Criminal Term, were interviewed, as well as lawyers involved with the specialized “problem-solving courts.” Feedback was solicited from assistant district attorneys and attorneys on the Assigned Counsel (18-b) Panels. All persons polled endorsed the concept of Statewide standards, depending on the final form of those standards, and whether they could be effectively enforced.

The structure, range, traditions and innovativeness of existing New York City defense organizations were appreciated by many. Implementation of the City defender system, however, on a day-to-day basis, is too often experienced as chaotic. Some trial attorneys reported heavy caseloads that left them struggling to keep straight the details of each client’s case; frantic running among simultaneous scheduling of matters in multiple courtrooms; protracted, numbing waits in courtrooms for appearances where little was accomplished; problematic discovery that hampered the ability to prepare a defense; little opportunity for meaningful consultation with clients about collateral consequences of pleas and convictions; and limited ability to help clients overwhelmed with multiple social problems. Their daily working lives were too often a frustrating clash of insufficient time to accomplish essential tasks and hours of wasted time waiting for cases to be called. To these attorneys, real change on many levels that improves working conditions and enhances their ability to represent clients is seen as essential.

Even so, all those interviewed feared the potential for more harm than good to the system of providing criminal defense in the city if there were a wholesale replacement with a Regional defender office and new local defenders. Moreover, the criminal bar in New York City, including many members of the 18-b panel, is regarded as providing a high level of representation by those outside that group, such as judges and district attorney representatives, despite the well-known difficulties described by some of those attorneys themselves.

In fact, there was widespread concern about dismantling the present

system of defense representation. The consensus was to “go slowly”—that while the present system could certainly benefit from an infusion of funding, an entirely new system might not address the current problems, and could well aggravate them. Concerns about new layers of bureaucracy were expressed, as well as the fear of political interference in the defense function, such as with particular cases or eligibility standards. These views were expressed not only by present indigent defense providers, but also by criminal court judges.

Special concerns about the proposed Deputy Appellate Defender’s office were also expressed. Of particular concern was the proposed subordination of the Chief Appellate Defender to the Chief Defender. The Kaye Commission report recommends that the Chief Defender be selected; the Chief Defender would then hire a Chief Appellate Defender, who would report back to him/her. This creates an inherent conflict. Appellate defenders must often consider or assert claims of ineffective assistance of trial counsel, frequently in conjunction with raising unpreserved appellate claims. Reporting back to the chief trial defender would create a conflict, and necessitate appellate counsel being relieved on too many cases. This level of relieving counsel would delay the progress of the appeals and also wreak havoc with funding. And, when it comes to the push and pull of funding between trial and appellate organizations, the greater resources will go to the trial organizations, thus hurting the appellate organizations.

There is general concern about concentrating the running of indigent defense services in one Statewide political office. The present City system provides a range of models that can serve clients’ particular needs. A Statewide system would have an impetus toward uniformity that would hurt this valuable diversity of the different providers.

Every year the State budget is subject to political machinations and vicissitudes in Albany. There are likely to be periodic funding-flow problems with State funding. Cautionary examples mentioned often included disparity between upstate and City school funding, the unconscionable foot-dragging in raising 18-b rates, the legislature’s summary elimination of the City’s commuter tax for purely political reasons, and the legislative deadlock over

judicial pay increases. A Brennan Center study has aptly found that the legislature in Albany is the “most dysfunctional in the nation.” City defenders should be free from that.

Statewide standards, however, would be welcome, with a particular need for implementation and enforcement of such standards. Many of the concerns expressed by City defense lawyers could best be addressed through such Statewide standards.

Conclusions and Recommendations

- I. There should be a Statewide Commission with the power to set and enforce statewide standards, including within New York City.

This Statewide Commission , with the Chief Defender as a member, should be empowered to provide oversight, quality assurance, and support to all providers within the State, and to advocate for—and crucially to intervene for—increased funding and reform where necessary and appropriate. Such power would include jurisdiction over indigent defense services in New York City. The Commission should be empowered to enforce statewide standards in New York City by holding the City accountable if providers fail to meet those standards. Performance can be assessed through mandatory periodic reports. Should a defender fall short of its obligations, the Commission could demand that the City replace the provider, or increase its budget, depending on the nature of the failing.

Thus the enabling legislation for the Commission ought to be expanded beyond what is presently described in the Kaye Commission report, to include such supervisory powers and even confer the power to investigate the provision of indigent defense services throughout the State, hold hearings, issue fact-findings and, if necessary, press for increased funding and/or reform within and without New York City.

The Statewide Commission should be comprised of, and led by, attorneys with a thorough understanding of State criminal defense. Attorneys

without such experience, no matter how well-intentioned, are ill-suited to steer the commission in any meaningful direction. Moreover, the commission must be independent and free of political pressure.

The goal of a Statewide Commission and standards should be to raise the quality of representation where necessary, not lower the quality of representation elsewhere. Standards should protect defense providers by enhancing their ability to provide quality representation, and never be used to limit the quality of representation to the lowest common denominator. Standards should be framed so as to allow for a variety of styles of representation, and to shield entities who provide exceptional representation from having to lower their own standards.

II. The State's takeover of the direct provision of indigent services, in accordance with the Kaye Commission Report, should exclude New York City from its direct provision of services.

The situation in most, if not all, of the upstate regions is so dire that those areas would, either clearly or on balance, see an improvement by the Kaye Commission Report's recommended takeover of direct provision of indigent defense services. In New York City, however, more would be lost than gained.

New York City's provision of indigent defense should nonetheless be significantly improved by providing increased funding, providing solid safeguards against spikes in provider caseloads, eliminating the clear disparity between prosecution and defense funding, making year-to-year funding more predictable, and "baselining" the budgets of all indigent providers into the Mayor's Executive Budget.

These improvements could be effectuated with the advocacy and oversight powers of an invigorated Statewide Commission (including its Chief of Staff, i.e. the Chief Defender), which would provide Statewide quality assurance, and provide support to and advocacy for the providers. The legislature should legally empower the Statewide Commission to investigate

the provision of indigent defense services throughout the State, hold hearings and, if necessary, demand increased funding and/or reform within or without the City.

If, despite our recommendation, the State takes over the provision of indigent defense in New York City, then it must observe the following principles:

- (2) The funding for the City's indigent defense community should be maintained at no less a level than currently, and should in fact be increased.
- (2) No current indigent defense provider should be required to limit the scope of services it currently provides; variety and not uniformity should be prized in the provision of services. For example, trial-level providers of community-based or holistic representation should not be forced to give up those models. Appellate organizations that undertake ancillary proceedings for clients such as 440 motions and federal habeas petitions, etc., should not be forced to limit those services.
- (3) There must be a sufficient number of defense organizations and individual defense attorneys to ensure the provision of conflict-free representation to every criminal defendant, both at the trial level and on appeal. Thus, for example, any chief appellate defender should be independent from the chief trial-level defender. The offices should be free-standing.