

**REPORT OF THE INDIGENT DEFENSE ORGANIZATION
OVERSIGHT COMMITTEE TO THE APPELLATE DIVISION
FIRST DEPARTMENT FOR FISCAL YEARS 2006-2007**

I. Introduction and Summary of IDOOC History

The first Report of the Indigent Defense Oversight Committee (the “Committee”) issued in 1996 provides background information regarding the formation of the Committee, The Rules of the Appellate Division, First Department relating to the Committee (22 NYCRR Part 613), and the process by which the Court promulgated the standards entitled “General Requirements for All Organized Providers of Defense Services to Indigent Defendants.”

Since the Committee began its monitoring functions in 1996, it has regularly collected and examined detailed information from the First Department’s institutional providers of defense services to the indigent. In addition, the Committee has issued periodic reports addressing the degree to which those institutional providers have complied with the standards promulgated by the First Department in 1996 (amended in 1997). It has been the Committee's practice to collect data from each provider through a lengthy questionnaire.

In this past reporting cycle, the Committee extensively revamped its questionnaire, soliciting most information in short form questions and charts. All of the providers were able to submit their responses to the questionnaire electronically. The new format resulted in more uniform responses and an increase in available data. It also allowed Committee members to more effectively identify issues that needed to be addressed at the site visits. To produce the detailed evaluations, two Committee members visited each provider office and followed up, as necessary, with additional inquiries.

II. Summary of Conclusions

As this Committee has previously noted, the problem of excessive caseloads has been a central theme of every report the Committee has issued. Indeed, as we observed in our report for the FY 04-05 reporting cycle, “[a]fter a decade of monitoring indigent defense in the First Department, it has become clear to the Committee that indigent defense providers – and, in particular, the Legal Aid Society – cope continuously with limited resources for expanding caseloads.”

The news for FY 06-07 is no better. Indeed, if anything, it is significantly worse. The Legal Aid Society continued to operate under a contract that required it to handle a potentially limitless increase in work for a fixed amount of money, and various prosecutorial initiatives drove home that the potential for a limitless increase in work was anything but abstract. By FY 07, the collective caseload of Legal Aid’s trial units had soared to nearly 50% above the First Department’s maximum caseload. Moreover, by virtue of a combination of changes in how their

contracts were administered and an increase in arrests on more serious charges, the Bronx Defenders and the New York County Defender Services likewise carried caseloads that were substantially in excess of the First Department's maximum.

As a result, this report brings the grim news that during FY 06-07 all but one of the First Department's indigent defense organizations (with the exception being by far the smallest of those organizations) struggled under caseloads that the First Department has declared to be excessive. Press reports of a crisis in indigent defense are thus anything but overstated. *See generally* Citing Workload, Public Lawyers Reject New Cases, NY Times, Nov. 9, 2008 (describing the devastating impact of excessive caseloads in other states and referencing the problems in New York City).

Anecdotal self-reporting indicates that attorneys are not able to investigate as many of their cases as they feel they should, have little time to develop new and creative approaches to their cases, rarely write substantive motions and trial briefs and for the most part do not have the time or support to pursue collateral issues. In some of the offices, continuous representation of one client by one attorney is the exception rather than the rule even though the First Department Standards list continuity of representation as an evaluation criterion. *See* General Requirements For All Organized Providers of Defense Services To Indigent Defendants VIII, B (d) p. 38.

Moreover, the statistics that the Committee began to collect with this reporting cycle confirm that anecdotal evidence. Those statistics show, for example, that in each of FY 06 and FY 07 Legal Aid disposed of more than 90% of all violations and more than 58% of all misdemeanors at arraignment. And the numbers were not much better for the First Department's other overburdened institutional providers. Those organizations collectively disposed of more than 50% of all misdemeanors at arraignment in each of FY 06 and FY 07, and their arraignment dispositions on violations exceeded 70% and 50% for FY 06 and 07, respectively.

In general, the site visits for each of the trial offices revealed dedicated lawyers working hard to represent their clients. Overall, the lawyers we met – both in the trial ranks and in management – appeared to be creative and resourceful and committed to the work they do. However, given the continuously growing caseloads and staggering percentage of guilty pleas entered at arraignment, it is hard to imagine that each indigent person charged with a crime or offense is receiving sufficient legal counseling. This is of particular concern given the dire and growing collateral consequences to convictions for crimes and violations. *See generally* Zeidman, Perspective: Time to End Violation Pleas, NYLJ, April 1, 2008 at 2, col. 3.

The Committee is mindful that this report is being issued at a time when New York City is facing grave fiscal difficulties. However, the need to provide adequate funding so that indigent people charged with crimes are effectively represented should remain a priority for our criminal justice system, as well as for society at large.

III. Detailed Findings¹

A. The Trial Offices

1. LAS: NEW YORK AND BRONX COUNTY CRIMINAL DEFENSE DIVISIONS

(a) Overview

The Legal Aid Society (LAS) is the largest provider of public defense services in New York City, and LAS's Criminal Defense Division (CDD), which has trial offices in New York and the Bronx, continues to play a unique role in the provision of criminal defense services to New York City's indigent. As in prior reporting periods, LAS's contract with the City during FY 06-07 required its CDD to handle *all* non-conflict cases, which is a level of work that typically exceeds 88% of cases arraigned, and the contract penalizes LAS if less than 88% of all indigent defense cases are handled.

This Committee has repeatedly urged that LAS's contract be restructured so that LAS is not required to handle an unlimited number of cases for a fixed amount of funding, and the statistics reported for FY 06-07 do nothing to change the Committee's position. To the contrary, a spike in arrests in Bronx County that began in 2007 highlights the difficulties posed by the fixed funding contract between LAS and the City. Predictably, that spike in arrests led to increases in LAS's already excessive caseloads and a need for already overburdened attorneys to take on additional eight-hour arraignment shifts. As a result, by FY 07 the percentage of attorneys with caseloads significantly exceeding the First Department's maximum had risen to 77% in the Bronx, and LAS's trial units as a whole had a collective caseload that was nearly 50% above the First Department's maximum.

Simply put, LAS remains – because its contract with the City requires it to remain – seriously out of compliance with the First Department's caseload maximum. Accordingly, we again urge that LAS's contract be restructured. The terms of the City's contracts with its indigent defense providers should not disregard the First Department's caseload maximum, but should instead be designed to enable compliance with that maximum.

(b) Compliance with First Department Performance Standards

(i) Professional Independence

LAS's governing structure – which provides for direct reporting to an independent Board of Directors on all operational and policy matters – satisfies the First Department's standards for

¹ This section of our report provides detailed findings with respect to each provider's compliance with nine of the ten criteria specified in the First Department's standards. With respect to the 10th criterion – compliance with standards of professional responsibility – we note that each provider is in compliance with this criterion, and no significant issues have arisen with respect to this criterion since the issuance of our prior reports.

promoting professional independence. LAS reports that it experienced no threats to its professional independence during the FY 2006-07 period. As evidence of their professional independence, LAS notes that they continue to sue New York City when appropriate to effectively represent criminal defense clients. As an example, LAS cites the writs of habeas corpus they have brought against the City on behalf of large groups of clients to enforce the 24-hour arrest-to-arraignment requirement.

Nonetheless, as we have noted in past reports, the financial terms of the contract between LAS and New York City pose a threat to the Society's financial stability, which in turn threatens their professional independence. LAS's contract with New York City continues to require LAS to handle all non-conflict cases for a fixed amount of funding. There is no provision to limit intake of cases when an office's caseload exceeds the First Department standards, but there is a penalty provision that reduces LAS funding when LAS handles less than 88% of the indigent non-conflict cases. By tying funding to an unpredictable and fluctuating number of cases, the City has, among other things, made it extremely difficult for LAS to make staffing and hiring decisions.

(ii) Qualifications of Lawyers

The Society's hiring criteria and certification practices meet the First Department's performance standards. LAS affirmatively works to create a diverse legal staff. Its hiring practices are effective in attracting legal staff committed to zealous advocacy, many coming from some of the most prestigious law schools in the country. However, a significant number of trial attorneys employed during the FY 06-07 reporting period lacked the experience required by the First Department standards because they were hired during the two-year period. LAS reported that twenty-five of its misdemeanor attorneys in New York County and seven in the Bronx, were recent law graduates and consequently lacked the experience sufficient to meet the First Department's performance standards. Similarly, eleven New York CDD attorneys and eight Bronx County CDD attorneys certified by LAS to handle felony cases had not had the requisite trial or hearing experience within the two-year reporting period to meet First Department criteria.

(iii) Training

The Legal Aid Society, as the largest institutional provider in New York City, has a unique responsibility for training the City's young criminal defense attorneys. It takes this responsibility very seriously and again during this reporting period provided extensive training for its attorneys. The training and CLE provided by LAS's trial divisions fully complied with the First Department's performance standards during the FY 06-07 reporting period.

LAS provided intensive training for all new attorneys. New hires attended a concentrated four to five week New Attorney Training Program at the LAS Headquarters. During the FY 06-

07 reporting period, twenty attorneys participated in this intensive training program. During their first year in practice, attorneys also received follow-up training in their borough offices. Attorneys who had been hired during the FY 2005-06 year received training in their borough that was a combination of lecture, workshop/skills training, shadowing, mentoring and close supervision within each complex of twenty-four attorneys.

After their first year, LAS attorneys were able to choose among an array of in-house and outside CLE Programs. LAS is an accredited NYS Continuing Legal Education Provider and offered a robust selection of courses in both the Bronx and New York County CDD offices during the FY 06-07 reporting period. The topics included a variety of programs in areas such as new developments in substantive law, advocacy skills, forensics, and collateral consequences of conviction. LAS attorneys in the Bronx and Manhattan offices had access to programs in both offices as well as the programs offered in the Central LAS office and programs available on video.

In addition, the Society augmented its own training through the use of outside providers. During the reporting period, many LAS attorneys participated, at LAS expense, in programs offered by the Association of the Bar of the City of New York, the New York County Lawyers' Association, the National Institute for Trial Advocacy, the New York State Bar Association, the National Association of Criminal Defense Attorneys, and the New York State Defenders Association.

(iv) Supervision

Supervision continues to pose significant challenges for LAS. The number of attorneys and supervisors fluctuated during the reporting period, but it is clear that the supervisor/staff attorney ratio, while improved in comparison to the last reporting period, was still outside the First Department standard of 1:10. As of June 30, 2007, LAS had 234 full-time equivalent staff trial attorneys and 21.8 supervisory trial attorneys.

LAS acknowledged two direct consequences of the shortage of supervisory attorneys. First, during the two years preceding this reporting period, four of the supervisors had not conducted the number of hearings or trials required under First Department standards, in large part because of the other burdens of their positions, including a contractual requirement to have supervisors in arraignment. It is unfortunate that all supervisors were not able to conduct the number of hearings and trials defined by the First Department standards. Their presence in the courtroom not only keeps their own skills sharp, but it allows them to act as role models for less experienced attorneys. The shortage of supervisors also made it difficult to complete timely performance reviews of legal staff. Timely reviews prevent attorneys from repeating less than optimal behavior and help them to maximize their potential.

It is critical that a sufficient number of experienced supervisors are available to provide ongoing, intensive supervision for new attorneys as well as to provide advice and oversight for more seasoned attorneys.

(v) Workloads

In our last report, in the course of describing LAS's heavy workload, we stated that "our Committee is deeply concerned about the ability of those [trial] divisions to provide adequate representation when they are so seriously overburdened." Unfortunately, our concern is even greater in this reporting period.

As LAS notes, its caseload difficulties are a direct result of its contractual obligation to handle all non-conflict cases for a fixed amount of funding. "There is no provision to limit intake of cases when an office's caseload exceeds the First Department standards and a penalty provision provides for a reduction of funding if we handle less than 88% of the indigent non-conflict cases."

As a result of that open-ended contractual obligation, LAS caseload levels for trial division attorneys once again significantly exceeded the First Department's maximum. Those caseloads exceeded the LAS's internal standards as well and were the basis for union grievances. Moreover, because the caseload crisis was even worse in Kings County, CDD attorneys from New York and Bronx Counties were shifted to the Second Department, thereby exacerbating overloads in the First Department. *See* IDOOC FY 04-05 Report, p.7, n. 8 (noting the triage occurring in the First and Second Departments).

An examination of LAS caseload data for the FY 06-07 reporting period presents a grim picture of the problem. The percentage of attorneys with caseloads above the First Department maximum steadily increased, rising from 30% to 49% in New York County, and from 48% to a staggering 77% in the Bronx. Moreover, the extent to which those offices collectively exceeded the First Department's maximum was equally profound. LAS's First Department trial units carried a collective caseload that was 40% above the First Department maximum in FY 06 and 49% above the maximum in FY 07.

In FY 06, the total case assignments for the New York and Bronx trial offices were 106,476. The number of assignments in FY 07 jumped to 112,849, representing an increase of 6,373 cases. And while that caseload crisis was driven in part by New York City's "quality of life" arrests and prosecutions, the escalating caseloads included increases not only in misdemeanors, violations and other offenses, but in homicide and felony cases as well.

Due to those increased arrests, LAS staff was forced both to handle higher caseloads and to cover a larger number of arraignment shifts that courts scheduled on an emergency basis. In January 2007, for example, in anticipation of increased arrests, two and one-half arraignment

shifts were added to the Bronx arraignment schedule. The Bronx-CDD was assigned responsibility for covering *all* of the additional shifts. As a result, the already overloaded attorneys in that office not only had to absorb additional cases, but also bore the burden of serving additional eight-hour shifts in the Arraignment Part.

The Committee thus finds it anything but surprising that a troublingly high percentage of the cases assigned to LAS, among others, are disposed of at arraignment. To the contrary, as noted above, it is hard to imagine that the caseload pressures documented in this report would *not* have caused those overburdened providers to hurriedly resolve charges at arraignment.

(vi) Evaluation, Performance and Discipline

During the FY 06-07 reporting period, LAS significantly improved the formal procedures in place for evaluating, promoting and disciplining attorneys. The systems in place exceeded the standards specified by the First Department's guidelines. Under LAS's revamped evaluation procedures, all attorneys are scheduled to receive detailed written evaluations by their supervisors annually and supervisors receive written evaluations every six months. The new performance evaluation form and twice yearly evaluation schedule was first implemented late in 2006, and 2007 was the first year that supervisors were given both a mid-year and an annual evaluation. The Committee notes, however, that rising caseloads and the supervisory ratio may make it difficult for supervisors to complete all of those reviews in a timely fashion.

(vii) Support Services

Inadequate numbers of support service staff, including investigators and social workers, continued to affect the quality of representation during the FY 06-07 reporting period. During site visits to the Bronx and Manhattan CDD offices, staff attorneys were quick to compliment the available investigative services and also praised the social work services, but they stressed that the office could use more. The need for additional resources in these areas is supported by the fact that LAS reports that attorneys employed the use of experts, investigators, or social workers in only 25% or less of their cases during the FY 06-07 reporting period.

(viii) Case Management and Quality Control

The Criminal Defense Division maintains a comprehensive, city-wide computer case management system, designed and customized in-house to address its needs. The system was recently upgraded, but its interface infrastructure remains essentially unchanged from the original 1991 version. LAS reports that the New York City Criminal Justice Coordinator's office is working with LAS to upgrade the case management system. Supervisors can use the system to obtain and monitor current and accurate attorney case assignments and individual caseloads.

During FY 06-07, LAS for the most part relied on individual attorneys to track their case obligations and to arrange for coverage of cases when they were unavailable. The computerized case management system printed daily calendars. These calendars provided back-up to the attorneys and were monitored closely by supervisors.

Bronx-CDD reports that it is committed to providing clients with continuity of representation, although there were exceptions to that rule during the FY 06-07 reporting period. During that period, Bronx-CDD had four permanent arraignment attorneys. Those attorneys generally handled cases that were resolved at the arraignment, but when one of their cases was not completed at arraignment, it was reassigned. Bronx-CDD also had three and one-half FTE attorneys who specialized in the following areas: mental health, juvenile offenders and domestic violence. Cases in those categories were reassigned to those attorneys after the arraignment. Finally, the supervisors and the Attorney-in-Charge made reassignments to alleviate high caseloads. Given the increasing caseloads in Bronx-CDD, this practice may result in troubling decreases in continuity of representation.

(ix) Reporting Obligations

The LAS trial divisions met all reporting obligations to the City and this Committee during the FY 06-07 reporting period.

2. THE BRONX DEFENDERS

(a) Overview

The Bronx Defenders (“BD”) has contracted with the City since 1997 to handle a fixed number of cases. As in past reporting periods, BD’s contract with the City during FY 06-07 required it to handle 12,500 cases per year. Unlike in past reporting periods, however, the Office of the Criminal Justice Coordinator insisted on strict compliance with the terms of that contract. As a result, BD’s workload increased substantially, yielding individual and collective caseloads that were significantly out of compliance with the First Department’s standards. Even if all violations and infractions are excluded, and even using a calculation that assumes a full caseload for supervisors (which is itself at odds with the First Department’s standards), BD’s collective caseload was 31% above the First Department’s standards in FY 06, and 35% above those standards in FY 07.

BD’s management and staff stress that BD is committed to providing high-quality representation, and they are confident that BD has done so. In addition, BD correctly notes that it has undertaken initiatives above and beyond what is required of a defender office. For example, BD has raised money to enable the establishment of a bail fund so that clients facing trespassing and other minor charges do not enter a hasty plea to avoid jail merely because of an

inability to post bail. Additionally, BD employs more than forty staff members who assess and address the collateral consequences facing their clients as a result of the criminal charges.

Nonetheless, BD has also acknowledged the obvious: increased caseloads significantly strain the organization's ability to consistently meet the goal of providing effective representation. In the Committee's view, BD has moved in a troubling direction during the FY 06-07 reporting period; it has joined the ranks of the most overburdened institutional providers of indigent defense in the City. Moreover, BD's contract with the City was recently renewed on identical terms, thereby enabling the City to insist that BD remain seriously overburdened throughout the next reporting period. Particularly given the logistical challenges that BD's attorneys are facing as a result of the layout of the newly completed courthouse in the Bronx, the Committee is very concerned about the impact that BD's significantly increased workload has had – and will have – on BD's ability to provide an appropriate level of representation to the Bronx's indigent population.

(b) Compliance with First Department Performance Standards

(i) Professional Independence

BD's governing structure satisfies the First Department's standards for ensuring professional independence, and BD reports that it experienced no threats to its professional independence during the FY 06-07 reporting period.

(ii) Qualification of Lawyers

Since its inception, BD has proven itself able to attract highly qualified attorneys, and that pattern continued during the FY 06-07 reporting period. Indeed, BD reports that it recently received more than 400 applications from across the country for four staff positions. That high level of interest is reflected in the quality of BD's staff. More than two-thirds of the staff attorneys employed by BD during the reporting period had at least two years of prior experience at the time they were hired, and nearly 40% had at least four years of prior experience. In addition, as a result of BD's ability to both recruit and retain experienced counsel, more than half of the trial attorneys on staff as of the end of the reporting period had at least five years of criminal defense experience.

BD reports that in an effort to recruit attorneys of color, BD participates in career fairs such as the Black Law Students Career Fair and The Equal Justice Works Career Fair. During FY 06, 25% of BD's staff attorneys were people of color, and that number rose to 37.5% in FY 07. In addition, throughout the reporting period, 25% of BD's supervisory attorneys were people of color. A substantial percentage of BD's attorneys were also fluent in languages other than

English. More than one-third were fluent in Spanish, and nearly one-third were fluent in other languages.

(iii) Training

BD provided each of its attorneys with the NY Defender Digest, all recent decisions by the New York criminal courts, and all United States Supreme Court decisions pertaining to criminal law. All BD attorneys also had online access to the New York Law Journal.

BD was a provisionally accredited provider of Continuing Legal Education, and conducted a series of mandatory training sessions during the reporting period which covered topics such as grand jury practice, *Crawford* issues and sex offender (SORA) training. In addition, because BD could not issue CLE certificates for in-house training, it paid for its attorneys to receive CLE credits from outside providers.

The CLE budget for FY 2006 was \$13,000, and actual expenditures were \$18,618; the budgeted and actual figures for FY 2007 were \$15,000 and \$26,633, respectively. The CLE programs attended by BD attorneys during the reporting period included: NYSDA Basic Trial Skills Program; NCDC Trial Skills Training; NCDC Advanced Cross Examination; NCDC Storytelling, Theories, Themes; and Center for Negotiation Strategy Training. In addition, all but one of BD's supervisors attended a supervisory CLE session during the reporting period that was devoted to techniques for giving constructive feedback.

Each new criminal defense attorney was put on a training team for the first year of practice. After three weeks devoted exclusively to in-house training, new attorneys were then permitted to handle misdemeanor cases under close supervision, with weekly meetings held throughout the first year of practice. New attorneys also attended a week-long trial skills training session offsite. At the end of their first year, attorneys were provided with in-house training on felony practice.

(iv) Supervision

BD's staff/supervisor ratio was 4-to-1 for FY 06 and 5-to-1 for FY 07, and thus was well within the First Department's standards. As discussed below, however, each of BD's supervisors carried a full caseload – a circumstance that is at odds with the First Department's standards, and that necessarily limits the amount of time available for supervision, feedback and evaluation of younger attorneys.

(v) **Workloads**

Although BD has for some time operated under a contract that requires it to take on 12,500 cases per year, the number of cases that were actually taken on in past reporting periods tended to be lower. However, during the FY 06-07 reporting period, the Office of the Criminal Justice Coordinator reportedly began to demand strict compliance with the caseload specified in BD's contract with the City, and intake rose significantly. Specifically, BD took on 13-18% more misdemeanors (7,994 in FY 06 and 8,310 in FY 07 compared with 7,062 in FY 05) and 62-65% more felonies (2,687 in FY 06 and 2,734 in FY 07 compared with 1,661 in FY 05).

Despite that substantial rise in intake, staffing levels at BD remained relatively constant, resulting in caseloads that were significantly higher than the maximum specified in the First Department's standards. Calculated against the number of trial attorneys (which is the methodology contemplated by the First Department's standards), BD's collective caseload was 59% higher than the First Department maximum in FY 06, and 63% higher in FY 07. Calculated against the total number of criminal defense attorneys (which assumes a full caseload for supervisors in addition to their supervisory responsibilities, and which was the model followed by BD during the reporting period), BD's collective caseload was 31% higher than the First Department maximum in FY 06 and 35% higher in FY 07.

Not surprisingly, that significant increase in annual intake yielded pending case numbers that were equally troubling. As of February 15, 2007 – the random date for which the Committee requested a “snapshot” of pending caseloads – more than one-third of BD's attorneys had a pending caseload of more than 200 misdemeanor equivalents, and five attorneys had caseloads approaching or exceeding 300 misdemeanor equivalents. The “snapshot” data provided by BD also confirmed that supervisors were carrying full (and indeed heavy) caseloads.

The staff and supervisory attorneys we met with during the Committee's site visit confirmed the strain created by the caseload increases, but reported that a recent adjustment in arraignment shifts had (at least for the time being) brought the pending caseloads to what was perceived to be a more manageable level. At the same time, however, each of those attorneys noted that the design shortcomings of the newly opened Bronx Hall of Justice – which routinely cause attorneys to spend hours waiting for consultation with a single client – caused an “absolute impediment” to the practice of criminal defense that, particularly when combined with a high caseload, seriously undermined morale.

BD's Executive Director, for her part, stressed that caseload numbers do not tell the whole story – particularly when many of the cases involve relatively minor charges. BD's Executive Director also noted that BD has gathered data indicating that its case dispositions compare favorably to those obtained by other institutional providers in the Bronx. At the same time, however, BD's Executive Director readily acknowledged the strain imposed on both staff

and supervisory attorneys by BD's increased caseload, and agreed that the configuration of the new courthouse has significantly exacerbated that strain.

Given the potential severity of collateral consequences attendant on even the most minor of charges, the Committee does not believe that much, if any, comfort can be taken from the fact that the charges faced by many of BD's clients were seemingly minor. In addition, the Committee notes – with considerable concern – that the most significant portion of the increase in BD's caseload fell in the category of felonies.

Unless the First Department's caseload standards are declared to be no longer a reliable gauge for assessing when the quality of work is likely to be impacted by the quantity of work required – and the Committee is not prepared to make such a declaration – the situation at BD has trended in a very troubling direction. And even assuming it to be true that BD's dispositions compare favorably with those obtained by other institutional providers in the Bronx, the fact remains that those providers are (as the balance of this report documents) themselves significantly overburdened.

(vi) Evaluation, Performance and Discipline

BD reports that new attorneys were formally reviewed both in writing and orally twice during their first year, that all attorneys received such review at least on an annual basis, and that contemporaneous feedback was given at all hearings and trials. BD further reports that where problems were identified, supervisors and staff met to discuss the problems and develop a plan – such as targeted mentoring or shadowing – to remedy the problems. When remediation efforts failed, or when serious wrongdoing was identified, BD's practice was to issue verbal and written reprimands, probation and, if necessary, termination.

As formulated, BD's plan provided an adequate mechanism for the evaluation, performance and discipline of its attorneys. However, given the heavy caseloads carried by BD's supervisors during the reporting period, the Committee is concerned about the degree to which it was possible to implement BD's supervisory plan.

(vii) Support Services

The support services provided to BD's attorneys were within the First Department's standards during the FY 06-07 reporting period. Each attorney was assigned a cubicle, with a dedicated computer, email account, telephone, and filing space. Several conference rooms were available for private conferences.

Team administrators were available to provide office supplies and clerical needs as required. In addition, due to the significant number of Spanish speakers on staff, there appeared to be no difficulty obtaining translation as needed.

BD maintained an adequate legal library, as well as an in-house database of motions and access to Westlaw for each attorney. In addition, as noted above, pertinent decisions were circulated to all attorneys.

Consistent with BD's longstanding emphasis on holistic representation, staff attorneys were assigned to teams of six, with each team having its own social worker and investigator. In addition, BD reports that all attorneys were trained with respect to client eligibility for diversionary programs and other alternatives to incarceration. We further note that the Bronx Defenders' Civil Action Project and Reentry Net clearinghouse appears to have greatly enhanced the quality of criminal defense representation BD provided to its clients by helping BD defense teams address the issues arising from the collateral consequences of their clients' criminal convictions.

(viii) Case Management and Quality Control

BD's system for case management and quality control during the reporting period complied with the First Department's standards. BD used a web-based case management system called PIKA, which maintained a complete list of all open and closed cases for each attorney, tracked upcoming court appearances for each case, and allowed for centralized access to any case information provided by the attorney or the team's social worker.

(ix) Reporting Obligations

BD met its reporting obligations to the City and to this Committee during the FY 06 and 07 reporting periods.

3. NEW YORK COUNTY DEFENDER SERVICES

(a) Overview

Like the Bronx Defenders, the New York County Defender Services (NYCDS) has contracted with the City of New York since 1997 to provide representation to indigent defendants in a fixed number of criminal cases. During FY 06-07, as in past reporting periods, NYCDS's contract with the City required it to provide representation in 16,000 criminal cases annually.

Since NYCDS's contract counts all cases equally, NYCDS's ability to remain in compliance with the First Department's caseload maximum turns on, among other things, the number of felonies and misdemeanors included in the 16,000 cases that NYCDS is contractually required to take on. During the FY 06-07 reporting period, the number of felonies and misdemeanors included in NYCDS's caseload increased. Moreover, NYCDS's total caseload increased as well, exceeding NYCDS's contractual maximum by 703 in FY 06 and by 2,841 (or nearly 18%) in FY 07. As a result of those increases, NYCDS's caseload was 30% above the First Department's maximum for both years of the FY 06-07 reporting period. Thus, like those of the Bronx Defenders, NYCDS's caseloads moved in a very troubling direction during this reporting period.

In addition, despite this Committee's prior criticism of NYCDS for failing to institute a sufficiently formalized system of supervision and review, that failure unfortunately persisted at NYCDS during the FY 06-07 reporting period.

(b) Compliance with First Department Performance Standards

(i) Professional Independence

NYCDS's governing structure satisfies the First Department's standards for ensuring professional independence, and NYCDS reports that it experienced no threats to its professional independence during the FY 06-07 reporting period.

(ii) Qualifications of Lawyers

NYCDS has a very experienced attorney staff. During the FY 06-07 reporting period, almost 50% of the staff attorneys had at least twenty years of experience (16 of 33), and 88% of the staff attorneys had at least ten years of experience (29 of 33).

In FY 06, seven of thirty-one staff attorneys (23%) were people of color. There were no people of color among the five managing and supervising attorneys. In FY 07, nine of thirty-three staff attorneys (27%) were people of color. There were no people of color among the five managing and supervising attorneys.

In FY 06, two of thirty-six staff and managerial/supervisory attorneys (6%) were fluent in Spanish. Three staff attorneys were fluent in other languages. In FY 07, two of thirty-eight staff and managerial/supervisory attorneys (5%) were fluent in Spanish. Three staff attorneys were fluent in other languages.

(iii) Training

NYCDS provided all attorneys with the NY Defender Digest, the NYSACDL Newsletter ATTICUS, and the NYSDA Public Defense Backup Center Report. All attorneys had access to the online version of the New York Law Journal.

NYCDS is also an authorized CLE provider. During the FY 06-07 reporting period, NYCDS offered six in-house CLE programs on a range of timely topics including collateral consequences, preserving the trial record for appeal, parole, and school suspension hearings.

In FY 06, NYCDS paid for all or part of the tuition for attorneys to attend several CLE programs. According to the NYCDS questionnaire, three attorneys attended a program in May 2006, one attended a program in March 2006, and nine attended a program in February 2006. In FY 07, NYCDS again paid for all or part of the tuition for attorneys to attend several programs. According to the NYCDS report, four attorneys attended a program in May 2007, one attended a program in April 2007, three attended a program in October 2006, and one attended another program (date not specified).

In addition, during FY 06-07, NYCDS obtained several CLE videotapes dealing with ethical issues. According to the NYCDS, seventeen attorneys viewed the videotapes. NYCDS was also able to secure discounts for attorneys who were not directly sponsored by the office to attend certain programs. Since NYCDS does not monitor its legal staff's attendance at programs it does not sponsor, it cannot quantify the participation in that training.

In FY 06 and 07, NYCDS budgeted \$10,000 for CLE and other training. In FY 06, \$5,100 was spent, and in FY 2007, \$4,000 was spent.

NYCDS did not require its supervisory attorneys to attend training programs that teach supervisory skills. By way of explanation, NYCDS reports that all of its supervisors had almost twenty years of supervisory experience, including while working at The Legal Aid Society, and that they had attended many LAS supervisory training programs. In addition, NYCDS supervisors served periodically as faculty for area law school trial advocacy programs, and attended trainings held at those schools.

(iv) Supervision

The ratio of supervisors to staff at NYCDS was in compliance with First Department standards during the FY 06-07 reporting period. NYCDS staff consisted of thirty-one attorneys and five supervisors (a ratio of approximately 1:8) in FY06 and thirty-three attorneys and four supervisors (a ratio of approximately 1:8) in FY07. One supervisor, charged with all of the administrative aspects of running NYCDS, did not carry a caseload. The other three supervisors worked arraignments periodically and carried a relatively small caseload (i.e., carrying an

average of fifteen cases). There has been no turnover of supervisors since the office was formed in 1997. As noted in section (b) (iii) supra, NYCDS did not require its supervisory attorneys to attend training programs that teach supervisory skills.

(v) **Workloads**

Under the terms of its contract with the City of New York, NYCDS is required to provide representation in a fixed number of cases. In the FY 06-07 reporting period, as in past reporting periods, the contractually specified number of cases was 16,000. In fact, however, in each year of the FY 06-07 reporting period, NYCDS took on – for no additional compensation – a caseload in excess of what was required under its contract. Specifically, NYCDS took on 16,703 cases in FY 06 and 18, 841 cases (or nearly 18% above the contractual requirement) in FY 07. Moreover, the percentage of felonies and misdemeanors (as opposed to violations and other minor charges) in NYCDS’s caseload was sufficiently high as to cause that caseload to exceed the First Department’s maximum by some 30% in each year of the FY 06-07 reporting period.

Despite the fact that NYCDS reports that it monitored individual caseloads and took measures to relieve its most seriously overburdened attorneys – by, for example, taking such an attorney out of his/her next arraignment assignment so that the attorney did not pick up new cases – the fact remains that NYCDS’s caseload was, as a whole, significantly above the First Department’s maximum during the reporting period. The degree to which NYCDS’s attorneys were overburdened during FY 06-07 reporting period is of great concern to the Committee.

To the extent that NYCDS’s overload was the result of its taking on more cases than required, the Committee strongly believes that it is incumbent upon NYCDS’s management to monitor the organization’s collective intake to prevent a recurrence of such a result. And to the extent that an increase in the percentage of more serious cases (*i.e.*, felonies or misdemeanors as opposed to violations or infractions) would have caused NYCDS to exceed the First Department’s maximum caseload even if NYCDS’s contractual limit had been observed, that result militates in favor of modifying future contracts with the City so that all cases are not counted equally. As noted above, this Committee believes that the terms of the City’s contracts with its indigent defense providers should not disregard the First Department’s caseload maximum, but should instead be designed to enable compliance with that maximum.

(vi) **Evaluation, Performance and Discipline**

Although prior IDOOC reports have noted NYCDS’s failure to implement, as required by the First Department’s standards, a formal system for attorney evaluation and discipline, NYCDS still had not done so as of the FY 06-07 reporting periods. In its submission, NYCDS referenced the concerns raised by the prior IDOOC reports and stated it had “instituted a formalized evaluation process.” However, that process has not yet been implemented. As it has in the past, NYCDS contends that its small size, collegial atmosphere, high supervisor-to- attorney ratio,

case tracking data, and supervisory style enable it to ensure quality representation without these more formal mechanisms.

While we do not dispute the relevance of the factors cited by NYCDS, we continue to believe that NYCDS can and should bring itself into basic compliance with the First Department's performance standard regarding attorney evaluation and discipline. As we have previously noted, establishing standards of practice would give all the attorneys a consistent yardstick by which to measure their performance and need not detract from the organization's informal and collegial structure.

NYCDS handled complaints from judges or clients on an ad hoc basis; there was no formal system for handling complaints or any formal repository where complaints were gathered. NYCDS did not solicit input from clients in the form of consumer perspective or client satisfaction surveys.

(vii) Support Services

The support services offered by NYCDS during the FY 06-07 reporting period were within First Department standards. Each attorney computer had access to Westlaw, an internal e-mail system, the Internet, a motion bank and the case management system.

NYCDS employed two MSW-credentialed social workers, two investigators, and a trial assistant. Neither social worker was a person of color or fluent in a language other than English. Additional social work support was available as needed on a contractual basis. Both investigators were Latino and fluent in Spanish, and one had prior experience as an undercover officer in the New York City Police Department. NYCDS estimates that the two investigators were used in approximately 51-75% of NYCDS cases. It is worth noting that an updated case tracking system would be able to record and provide that kind of data as a matter of course. In similar fashion, an upgraded case tracking system would also be able to track and quantify the number of cases in which social workers and/or experts were used. NYCDS also reports that it typically had five or six law student interns supervised by the staff attorneys.

(viii) Case Management and Quality Control

As noted above, NYCDS would benefit from a new case tracking system. During the FY 06-07 reporting period, NYCDS tracked cases as they progressed and generated daily calendars for each attorney. The calendars were sent to the individual attorney and to the attorney's supervisor. The case management system was also accessible from the lawyers' and supervisors' desktop computers. The system did not generate "ticklers" for filing deadlines or speedy trial time, but the Director reports that NYCDS filed motions in every case and has never been precluded from filing motions because of a missed deadline.

NYCDS did not conduct file reviews either post-arraignment or when cases were closed; however, through its computer tracking system it generated data on dispositions and monitored dispositions at arraignment and post-arraignment. In lieu of specific case reviews, NYCDS generally relied upon the observations by supervisors in court as a form of quality assurance/risk management. While NYCDS substantially met the First Department's standards for case management and quality control, it could nonetheless improve its practices by adding more formal checks. Even periodic reviews of random files would provide a useful addition to NYCDS's informal means of quality control.

(ix) Reporting Obligations

NYCDS met its reporting obligations to the City and to this Committee during the FY 06 and 07 reporting periods.

4. NEIGHBORHOOD DEFENDER SERVICE OF HARLEM

(a) Overview

Neighborhood Defender Service of Harlem ("NDS") continues to be the smallest of the First Department's institutional indigent defense providers, with 12.8 FTE criminal defense trial attorneys on staff during the FY 06-07 reporting period. NDS was in compliance with all First Department standards during the reporting period, and the staff – both professional and paraprofessional – that met with the Committee were uniformly impressive in their skill and dedication. As in the past, the Committee's chief concern with respect to NDS is its ability, in light of the precariousness of its funding, to maintain and build upon the services it provides.

(b) Compliance with First Department Performance Standards

(i) Professional Independence

The governing structure for NDS complies with the First Department's standards for ensuring professional independence, and the composition of the Board appropriately reflects the diversity of the community that NDS serves. NDS reports that it experienced no threats to its professional independence during the FY 06-07 reporting period.

NDS further reports that it does not believe that any economic or other factors affected its professional independence during the reporting period. Nonetheless, the First Department's standards recognize that financial uncertainty can hamper professional independence, and in that regard the Committee remains concerned that NDS – alone among the First Department's institutional indigent defense providers – operates under a fee-for-service contract with the City that must be renewed annually. Moreover, NDS must frequently rely on action by the New York

City Council to restore previous levels of funding.

(ii) Qualifications of Lawyers

Although NDS hires many of its trial attorneys directly from law school, NDS had a certification system in place during the reporting period that conformed to the First Department's standards and was sufficient to ensure that attorneys were suitably qualified for the cases they were assigned. Moreover, because a sufficient number of NDS attorneys have remained on staff for a period of several years or more, the overall experience level of NDS trial attorneys during the reporting period has increased. As of the end of the FY 06-07 reporting period, fewer than one-third of the trial staff had less than two years' experience, more than one-half of the trial staff had at least five years' experience, and two of the thirteen trial attorneys had more than twenty years' experience. NDS' three criminal defense supervisors also had appropriate levels of experience, ranging from six years to fourteen years.

The Committee notes that although NDS maintained during the reporting period a sub-team (called defenseNDS) of attorneys and support personnel who were fluent in Spanish and who had received targeted training in immigration issues, the Committee was advised that NDS has since lost the two Spanish-speaking attorneys in charge of the sub-team. The Committee hopes that NDS will be able to replenish its Spanish-speaking legal staff during the current reporting period and revive this worthy initiative. The Committee further notes that the ethnic diversity of the trial level staff of NDS during the reporting period unfortunately was not reflective of the community that NDS serves. Nonetheless, the Committee is satisfied that NDS fully appreciates the importance of the issue, and that NDS took appropriate steps during the reporting period to attempt to achieve diversity.

(iii) Training

NDS provided an appropriate level of training and orientation to its newly hired attorneys and support staff, as well as continuing legal education (CLE) to all of its attorneys during the reporting period. Training for newly hired attorneys was provided either through formal group training or through shadowing senior attorneys, depending upon the size of the entering class. NDS attorneys – both trial and supervisory level – also attended a broad array of outside CLE programs during the reporting period, with NDS paying for attendance at a sufficient number of sessions so as to enable each NDS attorney to fulfill his or her CLE requirements.

(iv) Supervision

NDS' staff/supervisor ratios were well within the First Department standards during the reporting period, and no supervisor carried a caseload so high as to hinder his or her ability to render adequate supervision. The system of supervision at NDS, while not as formal a process as the Committee supports, was sufficient to ensure adequate supervision of NDS' staff attorneys

during the reporting period. NDS also maintained a substantial internship program – both during the school year and during the summer – and the Committee is satisfied that the supervisory systems in place were sufficient to ensure adequate supervision of the student interns.

(v) Workloads

Caseloads at NDS during the FY 06-07 reporting period did not exceed the First Department maximum. In addition, the one-day caseload snapshot provided to the Committee confirmed that no attorney within NDS appeared to be disproportionately overloaded. Nonetheless, the trial attorneys interviewed confirmed that while caseloads at NDS were manageable – in the sense that the ultimate outcome was not affected – they were nonetheless high enough to create a concern that cases were taking longer to resolve, and that there was too little time for personal interaction with clients. The Committee notes that the discomfort reported by the attorneys for NDS – which was the *only* trial-level institutional provider in compliance with the First Department’s caseload maximum– underscores why the First Department’s standard is a maximum, not a target, and why it is so troubling that the First Department’s institutional providers as a whole are burdened with caseloads that significantly exceed the First Department’s maximum.

(vi) Evaluation, Performance and Discipline

While the evaluation procedures at NDS during FY 06-07 were (as in past reporting periods) relatively informal, the Committee is satisfied with the adequacy of those procedures. Unlike other defender offices lacking formal evaluation practices, NDS’s evaluation procedures were based upon written standards that were adequate and appropriate in light of the extremely small size of NDS. NDS also had in place during the reporting period disciplinary procedures adequate to address any serious performance deficiencies.

(vii) Support Services

A relatively low percentage of the cases handled by NDS during the reporting period involved the use of the investigators and social workers. Although NDS noted that many of the less serious cases it handles have no need for investigative resources, the Committee was not in a position to determine whether the size of the investigative staff was sufficient to ensure that cases in need of investigation received it. With respect to social workers, it appeared to the Committee that the relatively small size of the social work staff – and the increasing importance of services provided by the social work staff – resulted in a high degree of “triage” for social work services during the FY 06-07 reporting period. Accordingly, it is the Committee’s hope that NDS will be in a position to augment its social work staff in the future.

The remaining categories of support identified by the First Department standards – physical working conditions, availability of interpretive services, and access to legal research resources – all appear to have been adequate at NDS during the FY 06-07 reporting period.

(viii) Case Management and Quality Control

NDS had a relatively dated, DOS-based, computerized case management system in place during the FY 06-07 reporting period. An upgrade was reportedly underway, and NDS's progress on that front will be of particular interest to the Committee during the next reporting period.

(ix) Reporting Obligations

NDS timely met all of its reporting obligations to the City and to this Committee during the FY 06-07 reporting period, and its written report to this Committee responded with particular care and thoroughness to the questions posed by the Committee.

B. The Appellate Offices

1. OFFICE OF THE APPELLATE DEFENDER

(a) Overview

The Office of the Appellate Defender (“OAD”) is a nonprofit corporation, established in 1988, which is dedicated to the representation of indigent defendants with criminal appeals in state court, as well as collateral proceedings in both federal and state courts. OAD places great emphasis on training inexperienced lawyers, and to that end it devotes a significant amount of its resources to train attorneys to become highly proficient in criminal appellate practice. OAD's ultimate goal is to develop highly motivated and experienced attorneys, who will continue to represent indigent defendants in all aspects of criminal defense practice after they leave OAD. OAD has also developed a social work program to assist its clients with the myriad social, familial and economic problems that they face while in prison and after their release from prison. OAD continues to be in substantial compliance with the First Department's performance standards.

(b) Compliance with First Department Performance Standards

(i) Professional Independence

During FY 06-07, the greatest challenge to OAD's professional independence continued to be the uncertainty and unpredictability of its yearly funding. As in the past, OAD was faced

each year with the uncertainty of whether it would be granted an annual contract from New York City, and what its annual budget would be if a contract was awarded. This uncertainty adversely affected OAD's long-range planning, and the unpredictability of its annual budget made it difficult for OAD to accurately assess its ability to recruit and hire attorneys and other staff. OAD's recruitment and hiring was further hindered by the timing of the fiscal year, which begins in July, because recruitment and hiring of attorneys typically occurs much earlier in the year.

During FY 06-07, OAD operated under a New York City contract with a granted budget of \$2,250,000. As in the past, OAD supplemented its funding by lobbying for governmental funds and soliciting contributions from the private sector.

(ii) Qualifications of Lawyers

The qualifications and quality of counsel at OAD continued to remain high during the FY 06-07 reporting period. OAD's mission is to hire attorneys with limited or no appellate experience, and provide them with rigorous supervision and extensive training, with the goal of having them develop into highly qualified appellate lawyers. Although inexperienced, the lawyers hired by OAD are motivated, and have demonstrated excellent skills in legal research and writing and a strong commitment to indigent defense work. Many of the lawyers hired by OAD during FY 06-07 clerked in state or federal courts or had post-graduate work experience. OAD reports that it is committed to promoting diversity in hiring by seeking out applicants associated with minority bar associations and law student organizations.

As of June 30, 2007 there were twelve staff attorneys and six supervising attorneys. This favorable ratio between the number of staff attorneys and supervising attorneys allowed for the close supervision of staff attorneys. All OAD cases were double-teamed by a staff attorney and an experienced supervising attorney who was familiar with the case, including the complete appellate record. All new attorneys participated in a comprehensive training program, and all attorneys were required to participate in several moot arguments before every court appearance.

The First Department's guidelines provide that appellate lawyers briefing and arguing their own appellate cases should have experience in at least ten criminal cases, including writing at least five appellate briefs and arguing at least five criminal appeals. While OAD was not in strict compliance with this guideline during the FY 06-7 reporting period, its extensive training regimen and intense supervision satisfied the objectives of the First Department's attorney qualifications performance standard.

Newly hired attorneys are offered two year positions with the possibility of a third year. The relatively short tenure of employment guarantees a continuous turnover of lawyers from OAD into the pool of lawyers capable of handling criminal appeals and trial-level representation of indigent defendants. The limitation on the length of an attorney's employment at OAD, coupled with the relative inexperience of the staff attorneys, tends to put OAD at a disadvantage

when competing with other indigent defense organizations for a New York City contract. Nevertheless, the quality and overall morale of OAD's attorneys appears to have remained high during the reporting period.

(iii) Training

With its strong emphasis on training, OAD devoted a substantial portion of its resources to training. During FY 06-07, OAD's training program consisted of nearly forty formal sessions on a wide range of topics, including all significant procedural and substantive areas of criminal law and appellate practice, as well as federal habeas corpus, representation of children, immigration issues, and social work assistance to clients and their families. Subjects covered also include advocacy skills, issue spotting, brief writing and oral advocacy skills.

Each session lasted two hours and was usually accompanied by extensive written materials. The written materials from these training sessions constituted OAD's Training Manual, which was updated annually. OAD also maintained a Legal Manual, which contains directions, sample forms, advice, and information on most appellate proceedings.

Many of the offered courses were CLE credited, and OAD was an accredited provider of Continuing Legal Education (CLE). Over the course of approximately six weeks, new attorneys were required to participate in the aforementioned comprehensive training program.

An important component of OAD's training model was the requirement that for every case handled by a staff attorney, he or she was coupled with a more experienced supervising attorney who was very familiar with the case. Throughout the life of the case, the supervising attorney would frequently conference the case with the staff attorney, discuss strategy, and review every written submission by the staff attorney.

Oral advocacy skills were honed by regular moot courts, in addition to the aforementioned formal training sessions. All oral arguments were mooted before both the supervising attorney who was double teamed in the case and other staff attorneys. New attorneys, or those with limited appellate experience, were required to participate in two to three moot arguments before they were allowed to argue before an appellate court. In addition, a new program was initiated in 2007, where volunteer OAD Board members helped OAD attorneys moot their cases in preparation for arguing before the New York Court of Appeals or Second Circuit.

As in past reporting periods, OAD also trained law students and attorneys outside its organization. OAD conducted the Volunteer Appellate Defender Program, where supervising attorneys from OAD mentor attorneys from private law firms who are handling pro bono appeals. OAD supervising attorneys also provided classroom instruction on criminal appellate practice to law students from New York University School of Law, and they closely supervised

those students assigned to handle appeals from OAD's caseload. OAD also conducted a social work internship program for social work graduate students who are studying for their Masters Degree.

(iv) Supervision

A favorable one-to-two ratio between the number of supervising and staff attorneys allowed OAD to closely supervise its staff attorneys. A supervising attorney was paired with a staff attorney for each case that is assigned to that staff attorney. Case loads for supervising attorneys were kept intentionally light so that they they did not interfere with a supervising attorney's ability to work closely with the staff attorney with whom he or she was teamed. The double-teaming of staff and supervising attorneys for each case began when a case was first assigned to a staff attorney and continued throughout the life of the case. The double-teamed supervising attorney assisted the staff attorney with every aspect of the case from start to finish.

All appellate arguments were mooted by the staff attorney before his or her supervising attorney on the case. Other staff attorneys were also present at these moot courts, and the staff supervising attorney and staff attorneys critiqued the argument. The required number of moot court arguments depended on the complexity of the case and the experience level of the staff attorney, but there were always at least two moot arguments in preparation for each appellate argument.

(v) Workloads

OAD's case loads during the FY 06-07 reporting period complied with the First Department's performance standards. OAD maintained a system for weighing and assigning cases in order to equitably apportion the workload amongst its attorneys and to ensure that the more complex cases were assigned to the more experienced attorneys. The average number of cases assigned to an attorney increased as that attorney gained more experience and training during his or her employment at OAD.

Although the number of case assignments varied from attorney to attorney at any given time, each attorney at OAD had a manageable workload. OAD's total caseload was 160 for FY 06 and 144 for FY 07. None of the attorneys was required to handle more than 25 appeals in either FY 06 or FY 07.

OAD reports that it was rarely necessary to reassign cases from an attorney because of a too burdensome workload. OAD monitored each attorney's caseload at scheduled quarterly meetings in order to ensure that workloads were balanced and manageable, based upon the complexity of the assigned cases and the experience level of each attorney. In the event that a staff attorney left OAD, the supervising attorney who was double teamed with that staff attorney took over the case.

(vi) Evaluation, Promotion and Discipline

Each staff attorney had a formal annual written evaluation, which was prepared jointly by all of the supervising attorneys familiar with that attorney's work performance and productivity. The written evaluation covered various performance areas, including research skills, writing, oral argument and client relations. Each staff attorney was provided with a copy of the written evaluation, and was given the opportunity to discuss it with his or her supervisors if they so choose.

In addition to annual formal written evaluations, each staff attorney met regularly with their supervising attorneys once every three months in order to review and discuss the quality of their work performance and productivity.

Supervising attorneys were provided annual performance reviews, and staff attorneys were encouraged to anonymously submit their input regarding their supervising attorneys.

(vii) Support Services

During FY 06-07, each OAD attorney had access to the various technologies and office equipment necessary to do his or her job, including computers, photocopy machines with scanners and printers. Each attorney was provided with his or her own computer and access to Westlaw and the Internet. In addition, OAD maintained an extensive forms file, a brief bank and a library with publications necessary for criminal appellate practice in New York.

There was adequate support staff at OAD during the FY 06-07 reporting period. Support staff included, in part, an administrative attorney, two administrative assistants, two paralegals and two full time social workers.

OAD also maintained a social work program dedicated to assisting incarcerated clients as well as assisting clients and their families post release. OAD's social workers assisted incarcerated clients with their problems in prison, such as conducting crisis interventions and helping inmates prepare for their parole board appearances. The social work program also served OAD's clients who had been released from prison by assisting them with housing, medical and mental health needs, employment and job training, drug and alcohol rehabilitation and obtaining governmental benefits. In addition, OAD conducted workshops in some prisons which are available to all inmates.

(viii) Case Management and Quality Control

OAD used a custom-designed, computerized case-tracking database system which contained comprehensive information about every case in the office. The database tracked information about client contacts, case events, due dates and other information. All cases assigned to OAD were entered into this case tracking system.

Through its case tracking system, OAD also monitored each attorney's workload and productivity. At quarterly meetings between supervising attorneys and staff attorneys, the information retrieved from the case-tracking system was used to determine an attorney's productivity, and to assist that attorney in properly prioritizing his or her cases based upon their age and whether a client is incarcerated.

Although OAD's case tracking system allowed for adequate case management and quality control, the system is thirteen years old and is now outdated. OAD is aware of the limitations of their current case tracking system, and they have already begun a project to upgrade this system. OAD expects to have a fully upgraded and more technically proficient case tracking system operational during the FY 08-09 reporting period.

As part of OAD's case management and quality control, attorneys were required to keep their clients well informed about the progress of their appeals. To that end, attorneys were strongly encouraged to meet personally with their clients, including prison visits, which often require long-distance travel. Also, attorneys were required to write to their clients in order to keep them informed about their pending appeals. OAD was receptive to accepting collect calls from their clients, and encouraged their clients to maintain contact in this way. OAD attorneys were also expected to contact the trial attorneys who represented their clients in the underlying case in order to gain a more informed understanding about their client's case and its possible appealable issues.

(ix) **Reporting Obligations**

OAD met all reporting obligations to New York City and to this Committee during the FY 06-07 reporting period.

2. LAS: CRIMINAL APPEALS BUREAU

(a) **Overview**

The Legal Aid Society's Criminal Appeals Bureau ("CAB") provides full post-conviction services to its clients by taking direct appeals to New York's intermediate appellate courts (First and Second Departments), and to the New York Court of Appeals. CAB also represents clients in state court habeas corpus proceedings, as well as in federal district court and the United States Court of Appeals for the Second Circuit.

Moreover, for the FY 06-07 reporting period, CAB sought to expand its services to its clients by, among other things, undertaking long-term investigations involving individuals whose post-conviction claims of innocence were, in many instances, ultimately vindicated and resulted

in their convictions being overturned. This effort has been helped by the hiring of a full-time social worker to assist in gathering mitigating evidence, and to aid in the re-entry planning for clients returning to their communities.

In addition, CAB represented hundreds of clients in connection with challenges posed by the reform of the Rockefeller drug laws and the passage of the Sex Offender Registration Act (“SORA”) at trial-level drug re-sentencing proceedings and SORA hearings.

Finally, CAB has instituted an ongoing program whereby CAB attorneys are permitted to rotate to the Criminal Defense Division for a year and work directly with the trial attorneys. This practice has had the effect of increasing the trial attorneys’ awareness of potential appellate issues likely to surface in the event of a post-conviction appeal.

Steven Banks serves as the organization’s Attorney-in-Chief, and Seymour W. James, Jr. as its Attorney-in-Charge of the Society’s Criminal Practice, including the Criminal Defense Division (“CDD”). CAB continues to be in substantial compliance with the First Department’s standards.

(b) Compliance with First Department Performance Standards

(i) Professional Independence

As noted above, LAS’s governing structure satisfies the First Department’s standards for promoting professional independence. The Society’s management team reports on all operational and policy matters directly to an independent Society Governing Board of Directors (“Board”) whose President, Ted Levine, serves without compensation. The Board is responsible for the oversight of all practices within the Society, including CAB.

(ii) Qualifications of Lawyers

CAB maintained hiring and certification criteria for FY 06-07 consistent with the standards established by the First Department. CAB had approximately forty staff and nine supervisory appellate lawyers, all of whom had been employed by CAB for a minimum of seven years. Indeed, the average number of years of practice for a supervisory CAB attorney was twenty-three. Moreover, thirty-three of the forty CAB staff attorneys, and eight of nine supervisory lawyers devoted 100 percent of their time exclusively to CAB client matters.

(iii) Training

Although CAB has in the past utilized an elaborate and comprehensive mix of internal and external training programs to equip its appellate lawyers, it had no new class of appellate lawyers during the FY 06-07 reporting period, and thus did not engage in any new lawyer training. CAB instead offered periodic training programs for its appellate lawyers.

(iv) Supervision

For FY 06-07, CAB reported nine supervisory attorneys, including two managing appellate attorneys and Messrs. Banks and James, all of whom are described as having responsibility for oversight of the appellate work. Supervision at CAB appears to have been very thorough, consisting of several levels of review of the appellate briefs, routine and informal strategy sessions between staff and supervisory attorneys involving review of the record on appeal and the issues to be addressed both in the appellate brief and at oral argument, and, where appropriate, moot court sessions prior to oral argument. In addition, CAB attorneys were divided into appellate “teams” which met weekly to discuss specific cases and general developments in their areas of practice. Finally, CAB instituted a system of “peer review” consisting of groups of several senior (albeit non-supervisory) appellate lawyers who assisted the supervisors by reviewing the written briefs of the more junior attorneys.

(v) Workloads

For the FY 06-07 reporting period, the percentage of CAB attorneys with caseloads that exceeded the First Department standards was 7.8% (or 3 attorneys) and 11.8% (or 4 attorneys), respectively. However, with the exception of attorneys participating in the CAB Guilty Plea Appeals Project and the Director of their Student Intern Program, all CAB attorneys’ caseloads were within the 25 brief per year limit.

(vi) Evaluation, Performance and Discipline

For the FY 06-07 reporting period, LAS instituted a formal evaluation procedure designed to review all attorneys’ performances and address any problems related to standards and discipline. The CAB attorneys interviewed for this Report were uniform in their expression of satisfaction with the newly instituted review procedures as they provided a valuable assessment of an attorney’s strengths and weaknesses, but also afforded the opportunity for input before a review was finalized.

(vii) **Support Services**

CAB's support personnel consisted of four Word Processors, five Paralegals and a Sentence Mitigation Specialist who had worked extensively on Rockefeller re-sentencing cases. Under the system in place during the FY 06-07 reporting period (which was substantially updated with improved software), CAB was better able to track cases and generate forms automatically. The ratio of support personnel to attorneys was 1 to 9, while the ratio of paralegals to attorneys was approximately 1 to 7. In addition, CAB had a support staff that was fluent in Spanish, Yiddish, Hebrew, Portuguese, Urdu, Punjabi, French, Italian and Japanese.

(viii) **Case Management and Quality Control**

CAB utilized a case tracking system known as "LAS CTS" which essentially allowed it to generate pre-programmed letters, motions and additional documents, as well as track cases for which the record has yet to be received. All key information pertaining to CAB cases was entered into and maintained by LAS CTS. In addition, the actual files for cases awaiting receipt of the record were maintained in the Managing Attorney's office. After receipt of the record, the case is then assigned to a CAB staff attorney. All closed files (with the exception of recently closed matters) were maintained off-site along with all of their pertinent orders, decisions, briefs, etc. Those quality management procedures and practices met First Department standards.

(iv) **Reporting Obligations**

CAB satisfied all reporting obligations to the City of New York and this Committee for FY 06-07.

3. THE CENTER FOR APPELLATE LITIGATION

(a) **Overview**

The Center for Appellate Litigation ("CAL") is a not-for-profit corporation providing criminal appellate and post-conviction representation to eligible clients in the First Judicial Department. During the FY 06-07 reporting period, CAL handled 330 appellate cases and continued to support a number of projects and initiatives (under its umbrella "Justice First Project") designed to enhance the scope and quality of representation it provides.

(b) **Compliance with First Department Performance Standards**

(i) **Professional Independence**

The majority of CAL corporate officers during the FY 06-07 reporting period were appellate practitioners. CAL operated under two, multi-year contracts with NYC. CAL reports

that, during this period, it was free to exercise its own professional judgment, and that it has never experienced any problems or interference with its professional independence.

(ii) Qualification of Lawyers

Most of the fourteen CAL staff attorneys (ten full-time, four part-time) employed during the reporting period had substantial experience in criminal appellate representation. The average tenure of CAL attorneys was seven years, and the average level of criminal defense experience was twelve years. Six of the attorneys on staff have been with the office since its inception in 1997. The office has experienced relatively little staff turnover. The most recent hiring (of two attorneys) took place in the fall of 2006.

(iii) Training

CAL is an accredited New York State Continuing Legal Education provider. During the FY 06-07 reporting period, CAL conducted twelve CLE sessions. These sessions were conducted “in-house,” frequently in conjunction with Appellate Advocates, a Second Department appellate defender office. Training topics included: DNA motions, issue preservation, reasonable doubt, immigration concerns, and ineffective assistance of counsel. CAL encourages its lawyers, both staff and supervisors, to attend relevant CLE offerings of bar associations and criminal defense organizations. Tuition and/or registration fees for such programs were paid by CAL.

In addition to addressing its own staff training needs, CAL staff members participated in CLE programs for 18-B counsel and other defender providers. CAL regularly distributed handouts of criminal decisions of the First and Second Department, significant Third and Fourth Department appellate decisions, all New York Court of Appeals decisions, and significant United States Supreme Court, Federal Circuit Court and District Court decisions. All attorneys were expected to read and annotate their own handouts and maintain their own handout files.

CAL’s training program for new hires was coordinated, and conducted jointly with, Appellate Advocates (also an accredited CLE Provider). Training sessions covered a wide range of topics relevant to appellate practice. CAL also maintained an extensive internal “Practice Manual” setting forth office procedures and recommended practices with respect to representation, ranging from initial client contact and issue spotting to oral argument and case closing. During an attorney’s first year of hire, all oral arguments were moot courted. After that, moots were done either at the attorney’s discretion or when the oral argument was to be in the New York Court of Appeals or the Second Circuit. Weekly “team” meetings of a small group of attorneys with their assigned supervising attorney provided further opportunities to discuss complex or difficult case-related issues.

(iv) Supervision

In addition to the Attorney-in-Charge, CAL had five supervising attorneys during the FY 06-07 reporting period. CAL had an excellent ratio of supervising attorneys to staff attorneys – 5 to 15 or 1 to 3 – and an efficient system for early, frequent and meaningful supervisory review. All supervising attorneys had ample experience and capability to discharge their responsibilities, both supervisory and administrative.

CAL's method of attorney supervision was different for reviewing individual briefs than for caseload management. With regard to briefs (including pre-briefing, issue-identification strategy, and final brief), no substantive staff attorney brief was filed without first being edited and reviewed by a supervising attorney on a rotating basis. The depth with which the supervisor reviewed the record and case file depended on the experience level of the staff attorney. For new attorneys – *i.e.*, those in their first year of hire – all records were read closely. With regard to caseload management, each supervisor had responsibility for two to four attorneys and, as such, was available to discuss cases with staff attorneys on an ongoing basis. Additionally, using a computer-generated inventory of cases, supervisors met with each attorney monthly to discuss in detail the progress, and legal ramifications, of each case.

All law students working in various capacities in the office were closely and directly supervised by senior attorneys.

(v) Workloads

Cases were assigned to an individual CAL attorney for briefing only after the complete appellate record had been received. Prior to assignment, a supervising attorney reviewed the completeness of the record as well as its length and complexity, including the complexity of the issues likely to be raised. Assignments were made with a view to matching the complexity of the case to the experience level of the attorney and to varying the lengths and types of cases assigned.

During the FY 06-07 reporting period, CAL took in (and perfected or otherwise disposed of) 330 Appellate Division assignments per year. Staff attorneys briefed on average approximately fourteen substantive cases per year, a workload well within the First Department's standards. Typically, each staff attorney was working on one trial brief and had two briefing-ready cases behind it, being prepped for briefing. Appeals were broken down between trial cases and plea/hearing cases, with trials comprising about 65% of the total. Cases were not broken down by level of conviction; rather, record length was the primary (but not sole) indicator of complexity.

CAL supervisors carried a half-caseload during the reporting period. Since CAL's staff-to-supervisor ratio was low, supervisors had sufficient time and resources both to perform their

supervisory duties and to remain working lawyers – the latter being an important part of CAL’s overall philosophy.

(v) Evaluation, Performance and Discipline

A staff attorney’s caseload management and productivity were reviewed monthly by the attorney’s immediate supervisor. Any shortfall was addressed orally at those times, and any disciplinary or remedial action was conveyed orally by the Attorney-in-Charge. More formal productivity reviews were conducted four times per year, overseen by the Attorney-in-Charge with input from the management staff. Quality of written work was noted when each brief was reviewed before filing, and then evaluated in writing and orally in July. The Attorney-in-Charge discussed any disciplinary/remedial action at that time.

The performance of management/supervising attorneys was reviewed on a yearly basis by the Attorney-in-Charge. Under the procedures in place during the FY 06-07 reporting period, criteria for promotion to supervisory positions were to be announced (although the last opening was in 1999) and staff attorneys were to be invited to apply. Those practices met First Department standards.

(vii) Support Services

The space occupied by CAL during the FY 06-07 reporting period was well-maintained and sufficient for housing CAL’s staff. The physical library was adequate and augmented by individual online access to extensive web-based resources. CAL also maintained a computerized brief and motion bank that was accessible through the office network.

The mailroom was fully equipped (copying, scanning, binding) and staffed by two mail clerks. CAL employed a paralegal who assembled the record on appeal and tracked the appeals prior to assignment, and an administrative assistant who answered the door and phone, did typing and performed data entry for CAL’s MIS system. Spanish translation was available in house; contract translators were available for other languages.

(viii) Case Management and Quality Control

CAL employed a customized database management program for its case management information system. This program provided detailed information on each case’s history, progress and outcome. Procedures were in place to allow for timely and efficient transfer of cases due to conflict of interest or substitution by retained counsel.

As noted above, cases were assigned after supervisor consultation, with assignments matched to a staff attorney’s experience and caseload, and an inventory of an attorney’s caseload was done by the attorney and a supervisor on a monthly basis, with appropriate case management action taken as necessary. Requests for an enlarged briefing schedule were made only by the

Attorney-in-Charge, personally, to the Deputy Clerk, thus providing a built-in “notice” mechanism for this eventuality. On average, CAL perfected its cases well within the required 120-day period. CAL office policy also required that, should complaints arise from whatever source (judicial, client), they be brought to the attention of the Attorney-in-Charge for review and resolution.

When an appeal was exhausted and no additional relief was sought, the case file was returned to CAL’s central file area; after four years it was archived and moved off-site. Formal case-closing procedures included a file review by the paralegal and periodic audits by a supervising attorney.

(ix) Reporting Obligations

Under its contract with the City, CAL submitted quarterly programmatic and statistical reports and timely met IDOOC reporting requirements.