The Transformation of Assigned Counsel Programs

By Cynthia Feathers

On June 16, the NYSBA House of Delegates approved a resolution to seek legislation to increase compensation rates for private attorneys assigned to represent criminal defendants and Family Court litigants who are financially unable to obtain counsel and are eligible for assigned counsel. In addition, the State Bar seeks to have the increases paid for by the state and adjusted annually. Such measures would be vital elements in the reform of mandated representation that has already begun.

Reform is long overdue. In 1965, New York made a fateful mistake in creating a system that requires each county to design, implement, and fund its own program for mandated representation. County Law Article 18-B was our answer to the declaration in *Gideon v. Wainwright*[1] that criminal defendants facing serious charges and the loss of liberty in state court have a constitutional right to counsel. Our county-based, and mostly county-funded, mandated representation system was also our response to the broad right to counsel provided to Family Court litigants by the State Constitution and our statutory scheme.

The lack of state funding and oversight created a dysfunctional system in which the quality of representation is largely dependent on the wealth, or fiscal constraints, of the county. Our fragmented, underfunded system has failed to adequately protect the rights of criminal defendants, as well as Family Court litigants. That was a central conclusion of the 2006 Report by Chief Judge Kaye's Commission on the Future of Indigent Defense Services, which decried inequities among counties and disparities in resources allocated to the prosecution and the defense.

The Kaye Report's recommendations and warning went unheeded. The ultimate catalyst for change was litigation. In *Hurrell-Harring v. State of New York*,[2] filed in 2007, the named plaintiffs from five counties blamed the state for systemic failures that deprived them of the right to counsel. During the pendency of the litigation, a new state agency was created: the Office of Indigent Legal Services. That office was charged with monitoring, studying, and making efforts to improve mandated representation. William J. Leahy was appointed the Executive Director of ILS and continues to lead the agency.

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In a 2015 settlement agreement reached in *Hurrell-Harring*, the State of New York acknowledged for the first time its responsibility for complying with *Gideon's* promise. ILS was given the responsibility of remedying major deficiencies in the five counties that were added as defendants to the lawsuit. The initial period of implementation of the settlement has provided a vision about the transformative power of state funding to lift mandated representation. Yet state-funded relief pursuant to the agreement only applied to the five named counties.

The next major step occurred in April 2017, when the state budget included statutory amendments extending the *Hurrell-Harring* reforms statewide – at state expense – and broadening the powers and responsibilities of ILS. In 2018, $50 million was appropriated for reform in year one. That amount is expected to significantly increase each year over a five-year phase-in period, with full statewide reform required by 2023.

Pursuant to its new statutory mandate, ILS has developed statewide plans mirroring the three key components of the *Hurrell-Harring* settlement – counsel at arraignment, caseload relief, and quality improvement. The statewide plans address representation only in the criminal defense realm. Parental representation was not included in the groundbreaking amendments.

An increase in the rates for assigned counsel is the tip of the reform iceberg. So much more is happening below the surface in the assigned counsel arena. The progress now occurring gives reason for optimism and an opportunity to dispel myths about assigned counsel programs (ACPs). It is perhaps well known that ACPs are a vital component of mandated representation in New

York. Indeed, the most common mandated representation model in our counties is having a public defender or other institutional office as the primary provider of representation, in combination with an ACP. But there may not be widespread understanding of other truths regarding ACPs.

Myth one: ACPs are only needed to address conflicts of interest. In fact, other systemic benefits can flow from having both a public defender's office and an ACP. For example, ACPs can absorb excessive caseloads faced by public defenders. Further, a vibrant program empowers the private bar to participate in providing effective public defense. ACPs are the product of the local bar association in each county or New York City borough, and the panel attorneys are members of the local bar. Together, the associations and attorneys can increase their community's awareness of the importance of quality mandated representation and foster a commitment to that goal.

Myth two: Quality in criminal defense or parental representation, at both the trial and appellate levels, can only be provided by staff attorneys at institutional offices. The essential components of competent representation include an administrator or other strong leader; training and supervision; access to, and appropriate use of, non-attorney professional services, such as investigators and expert witnesses; effective communication with clients; reasonable caseloads; and a fit between the expertise of the attorney and the challenge of the case assigned. These elements can be present – or absent – in both institutional offices and ACPs. A major thrust of the transformation unfolding in New York today is the use of state resources to gradually bring to ACPs, as well as institutional programs, all the structural elements needed for quality representation.

Myth three: There has been an exodus of private attorneys from ACPs solely because of low, stagnant hourly rates. To be sure, adequate compensation is needed to attract and keep competent 18-B attorneys, and rates should never again be frozen for a 14-year period. However, attorneys report that they also leave ACPs because the programs offer too little in the way of litigation support and guidance. In *Hurrell-Harring* settlement counties, we have also found that the converse is true. If you build it, they will come. A structured program – one that offers a cohesive community of private attorneys, mentoring services and resource attorneys, and training and supervision – is a magnet for dedicated attorneys, at all levels of experience, who yearn to grow as professionals and to provide meaningful representation to their clients.

Admittedly, after five decades of low expectations by counties, courts, providers, and clients, ACP attorneys cannot be expected to become a statewide *Gideon* army overnight. But the combination of the statewide *Hurrell-Harring* implementation, and an increase in assigned counsel rates, could help create the fierce commitment in our private bar that will be needed to fully realize the promise of *Gideon* and to protect the legal rights of vulnerable persons facing dire legal consequences.

NYSBA should be lauded for so steadfastly advancing the mission of quality mandated representation. The Association's current stance on 18-B rates is only the most recent manifestation of decades of leadership directed toward making the right to counsel a reality in New York. No doubt such leadership will be instrumental to attaining mandated representation goals on the next frontier – state funding and oversight of parental representation.

1. 372 U.S. 335 (1963).
2. 20 Misc. 3d 1108(A) (Sup. Ct., Albany Co. 2008).