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New York caseload standards announced and their importance to statewide reform explained

Posted on May 8, 2017 by David Carroll

Pleading the Sixth: In early April 2017, the New York governor's office and legislature reached a historic legislative agreement. The state of New York is already committed to pay for the systemic reforms promulgated pursuant to the settlement agreement in the NYCLU class action lawsuit in five upstate counties. Under the new legislation, the state has committed to also fund those same reforms in all counties and New York City through a five-year phase-in plan. The impact of that funding commitment became even more profound on May 8, 2017 with the release of new caseload standards by the New York State Office of Indigent Legal Services. New York can be complicated, so let us sort it all out for you.

On May 8, 2017, the Director of the New York State Office of Indigent Legal Services (ILS) released a report setting out the binding caseload standards required in five upstate counties as part of the settlement agreement in the New York Civil Liberties Union (NYCLU) class action lawsuit that alleged systemic deficiencies in the delivery of indigent defense services in those counties. State funding for the implementation of these standards in the five counties subject to the lawsuit, in the amount of $19,010,000 for FY 2017-18, is contained in the state budget enacted in early April.

The new ILS caseload standards are set out in two ways: a) a maximum number of new cases, by case type, that can be assigned to each full-time equivalent attorney in public defender offices; and b) a minimum number of hours to be devoted to each case type by private attorneys assigned to cases. For example, public defenders handling violent felonies should not exceed 50 new assignments per year, while private attorneys should spend a minimum of 37.5 hours on similar cases. The

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standard for non-violent felonies is 100 cases per public defender or a minimum of 18.8 hours per case for private counsel.

To give some context, the American Bar Association ***Ten Principles of a Public Defense Delivery System*** point to the caseload maximums prescribed by the National Advisory Commission on Criminal Justice Standards and Goals (NAC), a 1973 U.S. Department of Justice funded initiative, and which the ABA *Ten Principles* state "should in no event be exceeded." By comparison, NAC Standard 13.12 prescribes numerical caseload limits of 150 felonies per attorney per year (regardless of severity of the potential penalty). So, for example, if a New York public defender handled a caseload of only violent felonies, she should be assigned no more than 50 cases, or 1/3 of what the NAC standards allowed.

The other New York standards likewise reflect very significant reductions in workload compared to the 1973 NAC standards:

Case Type	NAC Standard	NY Public Defender caseload maximum	NY Private Attorney minimum hours
Misdemeanor & Violations	400	300	6.3
Probation Revocation	n/a	200	9.4
Parole Revocation	n/a	200	9.4
Appeals of Verdict	25	12	156.3
Appeals of Guilty Pleas	n/a	35	53.6

As the workload standard report concludes, "[i]mplementation of these standards in these counties marks an historic accomplishment: the achievement of fully funded caseload relief that is unprecedented in its provision of time and resources for public defenders and assigned counsel to represent their clients in accordance with established professional standards and ethical rules."

Why workload standards matter

Due process requires that the defense attorney subject the prosecution's case to "the crucible of meaningful adversarial testing," as the United States Supreme Court stated in ***United States v. Cronic***. No matter how complex or basic a case may seem at the outset, no matter how little or much time an attorney wants to spend on a case, and no matter how financial matters weigh on an attorney, there are certain fundamental tasks each attorney must do on behalf of the client in every case. Even in the simplest misdemeanor case, the attorney must, among other things:

- meet with and interview the client;

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- attempt to secure pretrial release if the client remains in custody (but before doing so, learn from the client what conditions of release are most favorable to the client);
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning about the defendant's background and life, interviewing both lay and expert witness, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence;
- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution's motions;
- prepare for and appear at necessary pretrial hearings, wherein he must preserve his client's rights;
- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while prepare for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).

Where a defendant is represented by an attorney who lacks the time necessary to properly investigate the case, to meet with the defendant, to file pre-trial motions, to study the prosecution's plea offer, etc. – essentially, where the attorney is forced to triage services in favor of one client over another – then both the system and the attorney are in breach of their ethical and constitutional obligations to that defendant.

Caseload standards are just one of several reforms statutorily required to be implemented statewide

On April 9, 2017, the New York governor's office and legislature reached a **legislative agreement — Chapter 59 of the Laws of 2017, Part VVV, §11-13.** The new legislation authorizes the New York State Office of Indigent Legal Services (ILS) to implement the *Hurrell-Harring* reforms statewide. While counties and cities are still responsible for bearing the cost of providing counsel, the state commits to paying the

costs of the new reforms in all 62 counties. "[A]dditional expenses incurred for the provision of counsel and services . . ., including any interim steps taken to implement such plan, shall be reimbursed by the state to the county or city providing such services. . . . The state shall appropriate funds sufficient to provide for the reimbursement required by this section."

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The agreement was reached after a series of seminal events in New York occurring over the last several years. First, in October 2014, the State of New York entered into a **settlement agreement** in the *Hurrell-Harring* class action lawsuit that was approved by the *Hurrell-Harring* Court on March 11, 2015. As part of that settlement, the state agreed to pay 100% of the cost of implementing the settlement reforms in the five counties that were named defendants, specifically, (1) to ensure that all indigent defendants are represented by counsel at their arraignment, (2) to establish and implement caseload standards for all attorneys, and (3) to assure the availability of adequate support services and resources.

Other counties found it unfair for the state to pay a portion of the costs of providing indigent defense services only in those five counties, while leaving all other counties responsible for the full costs. Subsequently, the New York State Assembly unanimously passed legislation in 2016 for the state to take over funding of all right to counsel services for indigent people. Gov. Cuomo vetoed that legislation on December 31, 2016, principally because it included state funding for representation of parents in non-criminal cases in family court and surrogate court (e.g., custody and termination of parental rights) for which there is a state, but no federal, right to counsel. In his **veto statement**, the Governor promised to work with the legislature to provide state funding for criminal defense representation and also "to ensure that counsel at arraignment, caseload standard reform, and quality improvements are extended through the State." The new legislation permits the Governor to uphold that promise of extending the *Hurrell-Harring* reforms statewide and providing state funding of the reforms.

Specifically, by December 1, 2017, ILS must develop a written plan for every county and New York City to: (1) provide counsel at arraignment; (2) establish caseload standards for every attorney; and (3) improve the

quality of indigent defense through supervision and training, access to support services, effective communication with clients, and ensuring attorneys have necessary qualifications and experience for the cases to which they are assigned. The written plans must include the interim steps to achieve compliance. The plans must be "fully implemented and adhered to" by April 1, 2023. Importantly, the legislation provides that "in no event shall a county and a city of New York be obligated to undertake any steps to implement the written plans . . . until funds have been appropriated by the state for such purpose." In its FY 2017-2018 state budget, New York has provided $1.25 million to ILS for the development and beginning implementation of these plans statewide.

Although the newly announced caseload standards are currently binding only on the five upstate counties that were subject to the *Hurrell-Harring* lawsuit, it is expected that they will become the basis of the ILS's December 2017 caseload plans for every county and New York City, that must also include the "number of attorneys, investigators and other non-attorney staff and the amount of in-kind resources necessary for each provider of mandated representation to implement such plan."

What this all means is that the state has committed to pay for the implementation of the *Hurrell-Harring* reforms statewide over the course of five years. ILS must adopt plans by December 1, 2017 and provide them to the division of budget to approve the "projected fiscal impact of the required appropriation for the implementation of" the plans and "approval shall not be unreasonably withheld." This will allow the state to appropriate necessary funding for the start of the state's next fiscal year on April 1, 2018 and subsequently in each year until full implementation is achieved by April 1, 2023. For example, if County X is currently spending $100,000 a year on indigent defense services and it will cost $90,000 a year to implement the reforms, then in 2023 and after the state will pay the full $90,000, while the county will still pay $100,000 plus whatever increases are necessary to maintain the current (2017) level of services.

Conclusion

The statutory changes and funding agreement reached by the state of New York is not a 100% state takeover of all indigent defense funding. Instead, it can be thought of as a lawsuit protection plan to prevent other counties from facing the type of litigation seen in *Hurrell-Harring*.

Nonetheless, there is no doubt about the historic groundswell that is about to take place throughout New York. As First Assistant Counsel to

Governor Cuomo, Sandi Toll, stated at a May 2, 2017 meeting at the New York State Bar Association to discuss the statewide reforms: "From Erie to Monroe and to Nassau, and every county now in between, the *Hurrell-Harring* settlement reforms will now be extended statewide... They will now serve as the standard for the rest of the nation to follow. It is truly impossible to quantify how momentous this is. This is truly transformational change."

Indeed, with other geographically large, populous states like California, Illinois, and Pennsylvania still needing comprehensive indigent defense reform, New York now stands as a model for what is truly possible.

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