Study of Case Counting Practices Among Providers of Mandated Criminal Defense

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Improving the quality of mandated representation throughout the state of New York

Contents

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In 2017, ILS conducted a multi-method study to develop definitions for case counting for use among all providers of criminal representation across New York State.[1] We conducted a series of inquiries into how providers count cases at present, and how feasible the application of a uniform case definition would be.

The importance of case definitions

The question 'What is a case?' comes up for ILS a lot, often as a note of caution. If one provider counts cases a certain way, and another provider counts them a different way, how can you be sure that anything else about your research is valid? The concern is well-taken. Moreover, the definition of 'case' is probably nowhere more important than it is in the context of implementation of caseload standards, where the very nature of the exercise implies some attempt to quantify workload in terms of 'cases'. Thus, deciding how to count cases is an important part of the implementation of caseload standards themselves.

Our caseload standards follow the common practice of counting *new* case assignments, a common but not universal approach to caseload counting.[2] Importantly, this therefore narrows the task of defining how to count a case to the question of how to define when a case is newly opened, and does not evoke other issues sometimes discussed in the context of caseload calculations, such as case backlog.

Cases, for defenders, are units of work within which legal advice and representation are provided to clients. As such, counting cases among providers of defense services is a distinct exercise from counting caseloads of even closely related entities like judges, courts or prosecutors. Defenders do not only receive cases when courts assign them, but may open cases when clients request representation. Equally, defenders may receive assignments to represent a person long after their court case has begun, such as in situations where a person was previously represented by another attorney who had to withdraw from the case. For these reasons and more, defenders may count different numbers of cases than their colleagues in the judiciary or the prosecution – indeed, even when those colleagues have been engaged in the processing of the self-same cases – for the simple reason that the events that trigger the onset of representation are similar, but not always the same as, the events that trigger the onset of a court case or a prosecution.[3] Any definition of defender cases, therefore, must be tailored to the unique features of defense work.

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[1] Multi-method approaches are reviewed in J, Brewer and A, Hunter (2006), *Foundations of Multimethod Research: Synthesizing Styles* (Sage, Thousand Oaks, CA).

[2] Case counting practices in the Legal Services Corporation emphasize counting cases closed, for example, in order to record the 'level of service' clients received during the case (see *Legal Services Corporation Case Service Report Handbook*, 2011, available at https://www.lsc.gov/sites/default/files/attach/2015/09/LSCCaseServiceReportHandbook-2011.pdf). Attorneys for Children in New York State, meanwhile, are limited to 150 open cases at any one time (Rules of the Chief Administrative Judge, § 127.5 Workload of the Attorney for the Child. Available at http://www.nycourts.gov/rules/chiefadmin/127.shtml#05).

[3] Throughout the development of our caseload standards, we have assumed that individual cases vary tremendously in length, and that cases can end or begin for a variety of reasons other than the actual arraignment

The opening of new cases is a quintessentially practical exercise. New cases are 'counted' when they are opened as case files in either (or both of) a paper filing system or a computerized case management system. When a provider is required to report to ILS, or any other entity, how many new cases it opened in a given period, those files are the raw material from which the number is produced. Defenders are generally reactive agencies whose caseloads are determined by the actions of local prosecuting agencies. Counting practices are thus largely the product of how defenders receive and respond to case assignments and organize their files and their representation. Decisions on how and when to count cases reflect therefore reflect a mixture of administrative necessity and defender's discretionary decisions based on their understanding that certain acts of representation merit counting, while others are more peripheral, perhaps best seen as subordinate to a larger case, or even too small to count at all.

In this study, we sought to capture the practical constraints upon case counting and the normative practices of defenders around the state that result. Our objective was to ascertain whether a uniform set of definitions for counting cases could feasibly be implemented, to develop such a definition, and to identify resource needs among providers to implement that definition. Above all we sought to avoid one critical pitfall: the creation of definitions that would be impossible for providers to implement because the information required was simply unavailable.

Study Questions

We sought to study the case opening process in providers of representation around New York to answer three questions. First, could providers report to ILS their caseloads and other information needed for implementation of standards? We wondered how many providers had the ability to track cases in a computerized system that allowed for quick extraction of counts, and whether such systems actually contained all the information needed to categorize cases appropriately. In the findings that follow, we identify the deficiencies that would require remedy for providers to generate this information.

Second, what are providers actually counting when they count 'cases'? We wished to understand the administrative procedures extant within providers that surrounded the decision to open a new record within a provider's filing system that would represent a 'case' for counting purposes. Specifically, we were interested in the types and timing of events that would result in a legal matter being converted into an administrative record of a new case, available for counting. Factors such as the timing of the administrative decision on when a case should be opened, the ways in which co-occurring legal matters pertaining to a single client are separated into different cases, and the ways in which legal matters pertaining to a single client but occurring over time were separated into cases, were all of concern. Our hope was to be able to describe the practices providers had in place at the time we conducted our inquiry, to assess the degree of pre-existing consensus among those practices, and to judge whether it would be possible for those procedures to be changed in the event we published definitions that implied the need for changes in providers' practices.

Third, to what extent are providers' practices amenable to change? It was our intuition that provider counting procedures would be determined to some extent by extrinsic factors such as the manner of communication received from courts and the efficiency of information transmission between various

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of a defendant or disposition of the case by a judge. Cases are thus best understood as discrete interactions with clients in which legal advice and representation are provided.

other parties. If so, changing the manner in which caseloads are counted might be either very difficult or impossible. We sought to understand the obstacles to implementing changes in counting procedures among providers, identify areas where support would be needed for that implementation, and also identify areas where change would be impossible.

Methods

We collected data by a variety of methods to answer our questions. First, we identified a random sample of eleven counties in which we sought to conduct interviews with every provider of representation regarding their case counting practices.[4] This part of our data collection was exploratory and took the form of semi-structured interviews, guided by a series of questions we compiled.[5] The questions asked providers to describe what events typically led them to open new cases in their system, how they would count cases in situations where a single client faced multiple legal matters, and how and whether they would open new cases for existing clients if new legal matters arose. By sampling randomly, we assured that the providers we spoke to were a representative sample of the state as a whole, including providers of all organizational types (public defender, assigned counsel, legal aid society, and others), and providers with both very small and very large caseloads. In total, we interviewed twenty-one of the twenty-three providers in these counties.[6] We also coordinated our research efforts with the *Hurrell-Harring* team at ILS which conducted similar interviews with the eleven providers in all five *Hurrell-Harring* counties and shared their data with us.[7]

Following these interviews, we went on to develop a survey instrument that included similar questions to our interviews, but in simplified form, asking again about when providers opened and counted new cases. To that survey, we then added a request for caseload data – specific numbers of new assignments received by the program in 2016 across the seven types of case. To assess how often respondents were unable to provide the information we requested, we allowed respondents to indicate if a number was unknown or had to be estimated. This survey was sent in August and September to

[4] We selected these counties using a systematic sampling strategy to obtain a random set of counties from an ordered sampling frame. In this case, the 52 counties of upstate New York, in addition to New York City, constituted the sampling frame. We ordered them using expenditure data from lowest annual expenditures to highest. We then selected every fifth county for a total sample of eleven counties. This strategy assured that we sampled providers that were operating across the full range of circumstances prevailing across the state, from small programs with limited budgets to programs with budgets in the tens of millions. The counties (in alphabetical order) were Cattaraugus, Cayuga, Franklin, Fulton, Genesee, Hamilton, Nassau, Oswego, Rockland, Schoharie and Ulster.

[5] For the list of questions, see Appendix A.

[6] These interviews were conducted by Andy Davies and Alyssa Clark in the months of July and August, 2017. Most interviews were conducted in person, but three (Ulster County assigned counsel, Schoharie County assigned counsel and Hamilton County assigned counsel) were conducted by telephone. We did not interview the assigned counsel administrators in Cattaraugus and Rockland counties.

[7] We are grateful for the collaboration of ILS Senior Research Associates, Giza Lopes and Melissa Mackey, and *Hurrell-Harring* Caseload Relief Implementation Attorney Nora Christenson, who conducted interviews in the five counties that followed near-identical protocols to the ones we performed in our sample of eleven counties. We are further grateful for the assistance of those individuals in obtaining needed data on the caseloads, staffing, salaries and spending of providers in these counties which are incorporated into the analyses that follow.

every one of the 133 providers of representation in the state that we identified as having provided criminal legal representation to persons accused of crime but unable to afford a lawyer in 2016.[8]

On October 3, we issued a draft set of definitions for case counting which were largely based on the research performed to date. These definitions built on the insights of that research by stipulating rules for counting that we believed would be feasible to implement in all providers statewide, though some logistical adjustments would be needed in some places. We invited responses to the definitions by November 1, whereupon these were reviewed and the definitions finalized.

In addition, we reviewed data from providers responding to questions on a separate survey about their use of computerized case management systems.[9] We also analyzed data collated as part of our annual collection of caseload, staffing and resource information regarding each provider of representation in the state to identify providers that had specific difficulties in reporting data to ILS.[10] And we received unsolicited feedback from a number of counties which we incorporated into our findings where relevant. These data collection efforts are quantified in Table 2.

Table 2: Data Collection and Responses

Data Collection Strategy	Total solicited	Total responses
Provider interviews	23	21
Survey of caseload information and data entry processes[11]	133	75
***Hurrell-Harring* county interviews and caseload data collection**	11	11
Survey of case management system usage	126	95
Legacy ILS data tracking program	155	151

Findings

In this section we report what we found in relation to our three research questions, addressing the ability of providers to report data to ILS and procedures within those providers for producing and

[8] This survey was first distributed on August 17, 2017 to providers in upstate counties. New York City providers received the survey in September. Providers that had not responded by October 13, 2017, were sent the same survey in paper form on that date. Two additional copies were sent out in November when we learned the originals we sent out had been misaddressed. A copy of the instrument, including instructions and other accompanying material, can be found in Appendix B. While a total of 155 providers of representation were active in 2016, eleven of these were located in the *Hurrell-Harring* counties and were excluded from this data solicitation. A further eleven provided mandated representation to adults in family court matters but provided no criminal representation, leading to a final sampling frame of 133 providers.

[9] This survey, known as the Quality Improvement Needs Assessment Survey, was sent out on May 11, 2017, with follow-up emails to providers as necessary to prompt their participation. This survey contained a variety of other questions regarding the need for quality improvement initiatives. Those data were gathered for a different purpose and are not reported or analyzed here. The relevant questions from the survey can be found in Appendix C of this report.

[10] These data support our 'Cost Estimate' reports which have been published annually since 2013 and are gathered in part from data supplied by providers pursuant to the requirements of NY County Law §722-f, and partly from direct solicitation by ILS through communication with providers.

[11] Of these, 4 responses indicated it was impossible to supply the data we had requested and stated nothing further. Seven responses were in fact sets of answers collated by ILS from interview notes. The remaining 64 were responses received directly from providers.

gathering those data. Throughout our reporting of results, we do not identify counties or providers by name. This is because we are interested in an aggregated and general picture of reporting capabilities across the state. Further, our sampling procedures were intended to assure that our findings would be representative of providers across the state in general, making the identification of individual counties and providers unnecessary.

Can providers report to ILS their caseloads?

When ILS requested information on the numbers of cases handled by 133 providers of criminal representation, it received a total of 68 responses. Among these, 64 contained usable data, but the number that included counts of cases in each of the seven categories was just 17 – less than 13% of providers statewide.[12] We sought to understand the challenges providers faced in supplying this information.

Our survey results suggested that computerized case tracking technology was relatively widespread among providers. 85 of the 95 providers (89%) that responded to our survey about case tracking technology indicated that they had some form of computerized case management system in place,[13] though only 77 of them (81%) all were recording information about every case (see Figure 1).[14] Most providers used either case management or electronic vouchering software, though 14 (15%) indicated they were using something else – most commonly a spreadsheet program such as Microsoft Excel. Of the 85 providers who reported some electronic recording of information, almost all recorded the type of case (whether felony, misdemeanor, appeal, etc.) and case disposition (81, 95% and 71, 86% respectively, see Figure 2), while many fewer recorded court appearances (43, 51%), motions filed (13, 15%) or client communication (7, 8%). While deficiencies exist, therefore, the technological infrastructure to count cases is relatively widespread across New York, and doesn't obviously account for the apparent difficulties providers had with reporting caseload information to us.

[12] This omits the *Hurrell-Harring* counties, where we obtained complete data from all eleven providers. As noted in Section IV, we were able to use a variety of techniques to overcome these deficiencies in the data we received to estimate needed resources for caseload relief statewide.

[13] We note, however, that assigned counsel systems were underrepresented among respondents (just 26 programs responded from among the 54 programs in the jurisdictions surveyed. Further, programs which lacked an administrator were almost absent from the respondents – predictably, since the survey was directed toward program heads, and these programs lack any person in a leadership role.

[14] Just five indicated they were not using such a system; one responded 'I don't know' and four left the question blank.

Figure 1: Presence and use of electronic systems for recording information (percentages are out of 95 total responses)

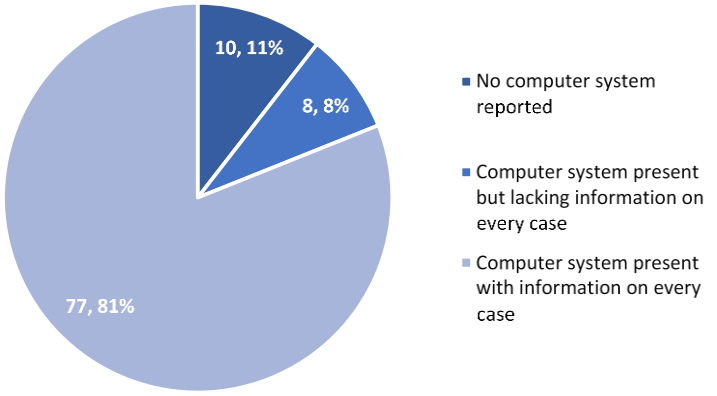
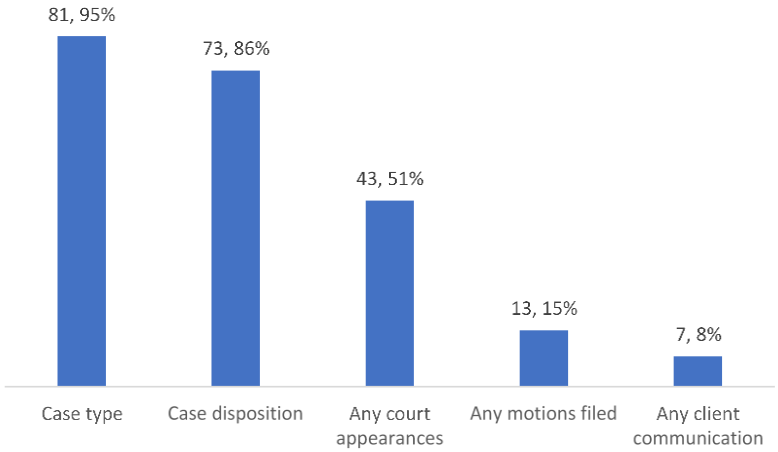


Figure 2: Extent of recording of specific case features in electronic systems (percentages are out of 85 responses where provider indicated use of a computerized system)



Second, providers may have internal data tracking infrastructures that are unsuited to the task of counting cases. In counties where the assigned counsel administration function is limited to payment of vouchers, providers are frequently more able to track the numbers of payments to attorneys than they are to count the number of cases in which those attorneys provided services. Voucher counts may be imperfect proxies for counts of actual cases where attorneys are permitted to request payment for multiple cases at once, for example, or can request 'interim' payments for lengthy cases.

> *The Assigned Counsel Plan…does not have a case management system but rather a vouchering system. The system collects only information that is relevant to payment (i.e., whether the case is a misdemeanor or a felony and how many hours the attorney worked on the case)…. The entire payment system is under the control of [the Treasurer's Department]…. The [Treasurer] has not been authorized to proceed on the development of a combined case management and vouchering system.*

Some such providers did collect sufficient information on vouchers to infer counts of actual cases from voucher submissions – for example, by requiring attorneys to indicate the docket numbers of the cases

that they were billing for on the voucher in question. Others did not, however, and this capability was particularly uncommon among assigned counsel systems that had no dedicated administrator, leaving the processing of vouchers most commonly to the county treasurer's department (or other equivalent), which generally has a limited need to count cases at all.

Third, providers were not always informed of new assignments. This meant that our request, which specifically focused on the counting of newly opened cases, was framed in a way that made it impossible for providers in this situation to respond. In several of the assigned counsel programs which we visited, administrators were never informed of new cases until the point when the attorney submitted a voucher for payment; in others the administrator was provided with such information unreliably.

> *As far as my office works with Assigned Counsel, we receive the invoices for payment after the cases are complete. That is the only interaction with my office in terms of the cases of Assigned Counsel.*
>
> *Parole matters were the most difficult to find. My office is not always aware of them when the defendant's new charge/s are opened.*

Where reporting of new cases is unreliable, the administrator is not able to produce counts of 'new cases' for a specific period until they are satisfied that all cases assigned have been closed (something that it is not strictly possible for them ever to know). In this situation, they are left only with the ability to report retrospectively on caseload numbers, and then only with the data provided to them at point of closure. This brings other complications, since cases are occasionally consolidated at the point of closure (as, for example, where charges in one court are 'dismissed in satisfaction' as a result of a plea deal reached on a separate set of charges) meaning that a single voucher may reflect the disposition of multiple cases. While systems could be designed to overcome this obstacle for the purpose of retrospective reporting (indeed, we learned of several that already track enough information to do so), the absence of such systems at present compromises providers' abilities to report caseload totals accurately.

Fourth, some providers had no central data repository, or none from which data could readily be extracted. In one, a provider tracked information in a central database on every felony case, but did not track misdemeanor cases individually, instead requiring attorneys to report monthly assignment totals. In others, providers were still using word documents, handwritten notebooks, or other systems that simply were not designed for quick and efficient data management and the extraction of counts of cases. The absence of systems with the capability of speedy data extraction significantly increased the work required to report data to us, and in some cases prevented it altogether.

> *In order to compile the information that was required…I reviewed the 2016 assignments for…County Court and the various Justice Courts…on a monthly basis and then totaled the monthly amounts. My administrative assistant keeps folders for every month. I physically inspected our paperwork for each assignment and determined from the charges against each defendant whether the most serious charge was a violent felony, another felony or a misdemeanor/violation. A software program that would make it easier to track cases and obtain information about closed cases would be beneficial.*

The information is very difficult to provide. Adopting a Case Management System will greatly increase the ability to track these cases.

Fifth, some providers lacked the ability to exploit their computerized data tracking even where it existed because of limited staffing, expertise, or training in how to use the system. Several providers indicated that present staffing levels were either insufficient to enter data on all cases, or insufficient to guarantee that data entry was consistent and accurate. Similarly, several providers expressed to us that they simply didn't know how to generate counts of cases in the format and approach we were requesting.

We have historically had issues with data integrity and consistency in data input as we have a number of different staff members who interact with the case management system. Because of these issues, data is not always input in a consistent manner, making it difficult to track later…. I believe that in order to accurately report these caseloads we would not only need a cleaner and more user-friendly database, but would also need additional training and oversight for much of our clerical staff.

Our current CMS requires manual input of charge codes at the time of opening the case. This necessarily results in some human error in collecting the types of cases.

In addition to developing a combined case management and vouchering system, there would also be a need for staff that is trained in both data analysis and indigent defense. Right now, I am the only employee of the Assigned Counsel Plan other than an assignment clerk. Neither of us have the capability to run queries in databases to obtain information.

In the absence of additional staff or training, generation of accurate caseload counts will continue to be a challenge.

Sixth, even providers with good internal tracking systems faced problems because their software packages did not have the flexibility to produce the needed data in the correct format. Providers indicated that additional work with software developers, and in some cases purchase of new, alternative software, was required to create that capability. Existing tracking systems often did not allow providers to distinguish violent from non-violent felonies, appeals of verdict from appeals of guilty pleas, and post-disposition cases, for example.

The…system does not keep track of the numbers you are requesting…. I looked at the UCS-195 for 2016 and then ran a parole case list for the year 2016 to provide you with the numbers.

Unfortunately, at this time we do not track post-disposition cases at all…

At this point it is difficult to distinguish what a client is appealing (guilty verdict or plea) through our case management system.

Prior reporting requirements did not separate out violent felonies from non-violent felonies, so we are in the process of updating the CMS to reflect this reporting requirement. Consequently, the number of violent vs. non-violent felonies is an estimate.

Providers need to be allocated sufficient funding to allow them to work with software developers to incorporate these new capabilities for data tracking and reporting.

Seventh, it was not uncommon that certain types of representation were not tracked at the case-level at all, preventing counts of cases from being generated. We found this to be quite common in two particular situations – counsel at first appearance (CAFA) representation and specialty court representation – in both of which attorneys were sometimes assigned not to individual cases, but instead to cover specific courts or on-call shifts. In these situations, where the attorney's responsibility was to provide representation to all defendants who needed it during a shift, often with no expectation that he or she would continue to represent the client(s) later, individual cases were not always tracked. Rather, tracking would begin when some other threshold was passed, such as the assignment within the office of the case to a particular attorney, or (in the specialty court context) when a violation was alleged. As a result, there was sometimes no detailed record of representation conducted (and sometimes no record at all), and case counts from such programs omitted this work.[15]

<u>What are providers actually counting when they count 'new cases'?</u>

For our purposes, the counting of a new case occurs when a provider creates a record – whether on paper or in a computer – that will subsequently be countable when they are asked to report how many new cases they opened in a given period. We were concerned to ask providers what circumstances occasioned the opening of a new case.

We learned of three important decision-points for case opening where procedures varied. First, in the handling of new assignments: some providers open a case immediately upon meeting a client while others wait until conflict-of-interest and eligibility determinations have been made. Second, distinguishing 'cases' from sets of charges or changing instruments was important: some providers counted all charging instruments as separate cases, while others consolidated them if they referred to the same incident. Third, handling new legal matters for existing clients made a difference: clients accused of violating the terms of probation, for example, might be treated as new cases, or as a continuation of the old one. Last, we also learned about situations where providers would record as cases advocacy that was not presently captured in our caseload standards.

First, regarding when a provider opens a new case, our interviews and surveys revealed that while some providers did so immediately, others did so only after confirmation the client was financially eligible to receive services and no conflict of interest existed.

> *We open a case once we are assigned or our services are requested, provided there is no conflict. We do not count cases that go out as conflicts. We attempt to check conflicts [and] eligibility as soon as we are assigned or requested to represent.*

[15] Not pertinent to counting abilities, but nevertheless worthy of note, is the fact that in the course of our research we discovered that the scope of representation offered by providers in specialty courts differs substantially from place to place. Some providers attend all specialty court status conferences and may even represent defendants whose retained attorneys do not appear with them (and may count such representation as distinct cases); others decline to extend this favor. Still others will only attend status conferences at all if they are forewarned that a client is likely to be accused of violating the court's terms; among those, some will assign the case to the original attorney while others will not. These different practices have some relatively consistent implications for case counting: providers that represent clients throughout the period of specialty court generally tend to count the case as a single matter, whereas providers which end representation at the time of the referral to the specialty court and assign representation on violation matters to new attorneys often count that violation representation as a separate case.

> *After Arraignment, the Local Court will fax the charging documents; depositions; court information; etc. and the Defendant's Application for Services to this Office. On the next business day, the Application will be reviewed for eligibility and checked for Conflicts. If eligible, a case is opened and an Attorney assigned.*
>
> *We open a file even if there IS a conflict – a conflict letter stating the conflict which is sent to the assigning Judge. Once we receive a letter from the Court relieving the office of the conflict, we then close out the case in [the case management system] outlining the conflict and if the Judge had granted the relief and who was assigned from 18-B.*

In appellate cases, too, the timing of case opening could differ. One provider noted it would only count a new case after an order of assignment was received from the Appellate Division; another indicated a case would only be counted after the case had been both assigned and perfected.

These differences were often a product of differences in the administration of case assignments within the county. Where providers operated as 'clearinghouses' for all cases in a county (receiving all cases, and then passing on those where they discover a conflict) it was typical to count all such cases among the provider's caseload notwithstanding that they would not ultimately represent them. Where case assignments were administered by another entity, however, such as an assigned counsel administrator or the courts themselves, providers typically received and counted only cases in which they would provide representation. Some of this diversity may be valid – in the event clearinghouse providers are supplying at least some advice and representation to clients, for example – though there may be a danger of over-counting of cases where defendant clients are subjected to little more than an administrative reassignment to a new provider.

Second, regarding the combination of charges into cases, we asked providers whether their current practice defined a case as "one or more charges against a single defendant originating in a single court contained in a single charging instrument." Of the forty-nine responses to the question that we received, forty-four (90%) either flatly indicated the definition matched their practice, or described a practice that was not substantially different. In the latter group, one described their definition as based on 'time and date of offense', but noted that in sealed indictment cases (that is, a case where several offenses might be charged in a single instrument) they would generally open only one case. Another defined a case as 'all charges against a single defendant in a single court', and yet another noted they counted by 'court and attorney, not time and date'. Generally these alternative wordings were not clearly incompatible with the definition we proposed. During our interviews, where we had the opportunity to inquire further into what people meant when they articulated these definitions, we also inferred providers were in broad agreement.

The remaining five responses all issued the same caveat with regard to the 'charging instrument' in the definition, however, noting that where prosecutors opt to split a set of charges pertaining to a single incident into two separate charging instruments, the defender will typically count them as a single case.

> *We would open one case even if there were multiple charging instruments against a single defendant originating in a single court arising from the same incident or criminal transaction. Basically, if all charges would result in a concurrent sentence, [it's] one case*

Our office defines a case as all charges arising from the same transaction or occurrence--this does not always happen with a single charging instrument.

…[O]ur definition of a "case" could include multiple "charging instruments" (each charging a felony; misdemeanor or a violation). If they all arose out of the same incident, they would be included in one case. One Indictment with multiple counts is treated as one "case" while two Indictments are treated as two "cases".

In practice, there are numerous occasions where a single defendant will be charged under two dockets for related conduct that happened as part of a single occurrence. This is unnecessary and confusing…

One provider issued a note of caution about the consolidation of such instruments into cases, however:

[T]he charging documents/incident reports should be counted separately because the D.A. has the choice and authority to track/try, or proceed with each incident report.

Our research suggested that this 'charging instrument' distinction is largely a product of local prosecutorial practice: in some places, charges arising from single incidents may span multiple instruments, whereas in others it is the custom to consolidate them.

Third, regarding the opening of new cases in situations where an existing client encounters a new legal matter, we asked a series of questions regarding providers' present practices in an attempt to discover where some pre-existing consensus existed on this matter that could inform our definitions. We asked providers about a variety of situations and whether they opened a new case or not.[16] In Table 1, we distinguish below situations where most providers (80% or more) indicate they do open a new case from those where 80% or more indicate they do not. We then list situations where provider responses are more mixed. We also distinguish assigned counsel from institutional provider responses in recognition of the differences in the administration and counting procedures that frequently exist between such providers.

Table 1: Responses to the question: "Do you open a new case when…"

Situations where over 80% of providers DO open a new case

A client is rearrested on a new offense

	Assigned counsel	Institutional providers	TOTAL
Yes	12	40	52
No	1	2	3

A client is accused of violated the terms of their probation

[16] We had a total of 86 responses to these questions. These responses were a combination of 68 responses to our written survey, 11 responses from providers in the *Hurrell-Harring* counties researched and shared with us by the *Hurrell-Harring* team at ILS, and a further seven responses gathered by us in person through interviews. The numbers in the tables do generally not sum to 86. This is because survey responses are missing for a mixture of the following reasons: (a) the respondent provided appellate representation only and the questions were not applicable to them; (b) some providers indicated they did not know the answer; (c) the question was left blank.

	Assigned counsel	Institutional providers	TOTAL
Yes	13	41	54
No	4	6	10

Situations where over 80% of providers do NOT open a new case

A client previously found incapacitated because of mental disease or defect pursuant to CPL 730 is found fit to proceed on a felony case

	Assigned counsel	Institutional providers	TOTAL
Yes	3	4	7
No	11	35	46

A client is returned to court on a bench warrant

	Assigned counsel	Institutional providers	TOTAL
Yes	5	5	10
No	11	42	53

A client enters a specialty/treatment court program (e.g. drug court)

	Assigned counsel	Institutional providers	TOTAL
Yes	2	2	4
No	14	40	54

A client is accused of failure to complete a treatment program

	Assigned counsel	Institutional providers	TOTAL
Yes	3	4	7
No	11	37	48

Counsel in the case changes to another person within your office or program

	Assigned counsel	Institutional providers	TOTAL
Yes	6	2	8
No	11	44	55

Situations where providers vary

A client is accused of violating conditions of a Conditional Discharge

	Assigned counsel	Institutional providers	TOTAL
Yes	12	29	41
No	5	16	21

Charges in a case are severed

	Assigned counsel	Institutional providers	TOTAL
Yes	3	15	18
No	11	25	36

A client seeks modification of a sentence

	Assigned counsel	Institutional providers	TOTAL
Yes	7	17	24
No	9	28	37

A client is accused of violating conditions of an ACD, resulting in return of ACD to court calendar?

	Assigned counsel	Institutional providers	TOTAL
Yes	9	17	26
No	8	28	36

A client is accused of failure to pay a fine

	Assigned counsel	Institutional providers	TOTAL
Yes	7	16	23
No	10	28	38

<u>Are providers' practices amenable to change?</u>

In addition to respecting any pre-existing consensus on case counting practice, we also asked providers about how easy it would be for them to adapt existing case counting practices in this area to comport with different definitions. Essentially, the questions were two: in the event providers do not presently record new cases for new legal matters arising, could they do so if they had to? And secondly, in the event providers at present do distinguish sequential legal matters as different cases, but ILS required that such matters be regarded as singular, would it be possible to adapt reporting procedures to that definition as well?

Where providers were not counting cases as distinct matters, we learned that it would generally be possible for them to do so after some retraining of staff and reconfiguration of case management software. Counting additional cases where none are presently counted is a matter of changing procedures to open files in response to different triggering events. Indeed, we found that several providers were anticipating the implementation of ILS caseload standards by changing their counting processes. As one commented "we can do it however you want."

The situation is a little more complicated, however, when asking a provider that presently distinguishes matters as separate cases to recombine them. Recombination fundamentally requires some way (often using a 'Case ID' number) through which records can be cross-referenced and linked. We note that our survey responses suggest that the tendency to count new cases may be slightly more common in assigned counsel programs: to take just one example from Table 3, 30% of assigned counsel programs responding to the survey count cases returned on a bench warrant as new cases, whereas just 11% of institutional providers do so. We spoke with many assigned counsel programs across the state about their ability to recombine these diverse vouchers into single 'cases' for counting purposes, and encouragingly discovered that many had some kind of case numbering system that would allow for recombination. Some did not, however, and only kept records of legal matters which were entirely separate from one another and do not allow recombination after the fact.

Complicating this picture, we also learned that in some assigned counsel programs the idea of requiring attorneys to supply additional information that would allow recombination of cases (such as docket numbers) was considered problematic for the reason it might alienate assigned counsel, especially in circumstances where the assigned counsel program in question would not allow attorneys to bill for time spent filling out required paperwork. We also discovered that some providers are at the mercy of inconsistent approaches among courts, with some allowing attorneys to bill for their services when a client had a bench warrant issued and some not allowing it.

Where providers were advanced in their tracking of cases, we learned that they often also had the flexibility to count cases in several ways. One appellate provider had one system for recording cases prior to assignment – when helping a prospective client with an application for poor person relief, for example – but another way to count them if an assignment had occurred. Another public defender office opened cases for clients seeking advice even in the absence of an assignment from a court ('Advice-only' files) but indicated it could easily deduct these from their case counts to comply with ILS definitions if needed. Still another kept a record of appellate cases which were assigned out to a contractor in the county, but could deduct these counts from its reported numbers. The sophistication of tracking systems themselves, therefore, appeared to be related to providers' ability to report data, and to be flexible in how they did so.

<u>Cases not weighted under the standards</u>

We inquired of providers what other work they counted but was not captured in our caseload standards. 22 providers enumerated this work for us, reporting a total of 1,847 matters not weighted by the standards. These same providers reported a total of 131,548 felony and misdemeanor cases alone, suggesting that the number of uncounted cases as a percentage of trial caseload counts is around 1.4%. The types of cases providers mentioned as unweighted included SORA classification or reclassification, motions under NY CPL 440, extradition or fugitive matters, parole appeals, Mental Hygiene Article 10 cases (civil commitment of sex offenders), and 'material witness applications'. Other types of cases reflected the breadth of practice of the provider: 'community intake' cases of clients who come to a provider looking for advice, 'investigations' of cases where no charges were pending, collateral proceedings where the proceeding may implicate a client's rights in the criminal case, and other idiosyncratic, though no doubt labor-intensive, work.

Distribution of Definitions, Feedback and Revision

Following the conclusion of the research reported above, we created a draft set of definitions for case counting taking into account what we had learned about the ways cases were counted at present, and the scope for flexibility and change in those practices. We distributed the draft on October 3, 2017, and received several responses from providers around the state suggesting revisions. Although no response indicated that the definitions as drafted would be impossible to implement, several took exception to certain parts of the definitions which conflicted with prevailing norms across the state on how cases are typically counted. Those points of objection are reported below, and ILS' response to them noted.

The draft definitions stated that specialty court proceedings should each be counted and weighted separately as 'post disposition' matters. We included this consideration based on what we had heard from providers about the additional workload such cases involved, and also occasional reports that specialty court representation was already treated as a distinct function within some programs.[17] Providers responded that they were not convinced specialty court proceedings should be counted separately from the underlying case, and moreover that the extent to which such representation was actually provided varied substantially across the state. Whereas one provider opined that "providers should be appearing with their drug court clients at every appearance, and not just appearances where there may be sanctions," another stated explicitly that their practice was the opposite: "[w]e do not have anything to do with the client in drug court, unless there is a violation and then a new file is opened." We were also made aware of the considerable differences in how drug courts are organized, such that in some referral happens quickly whereas in others it happens at the later stages of the case. We therefore dropped the separate weighting of specialty court proceedings pending further study.

We had also included in the draft definitions instructions to count Adjournment in Contemplation of Dismissal (ACD) cases returned to the court's calendar, and matters in which a client sought to modify their sentence, in the category of 'post-disposition' cases. This was an attempt to reflect the fact that these cases represented work that went above and beyond the typical services provided to clients facing trial. However, providers indicated first that ACD cases were both very uncommon and, often, insufficiently distinct from the original matter to be considered separate cases. Matters in which clients sought a modification were also recommended to be unweighted, partly because these are matters in which the right to counsel may not attach. We therefore dropped the weighting of these proceedings also.

The draft definitions also called for separate counting of cases in which a break in representation of over 90 days occurred due to the issuance of a bench warrant or a period of incapacitation under CPL §730. This was added in recognition of the fact that cases in which a period of hiatus or inactivity occurs may be administratively closed by some providers making recombination complicated, and further that lengthy periods of inactivity may effectively require attorneys to rework a case from scratch when the client is returned to court. Providers reported (and our survey results in Table 3 confirmed) that it was not common practice to close these cases, however, and indeed that such cases may not be 'inactive' at all. Moreover, they noted that the client's absence from court should not be taken as an indication that the case had ended. We therefore dropped the separate counting and weighting of these cases from the definitions.

[17] Our survey findings in Table 3, however, suggest the opposite, that

In response to other feedback, we clarified language in the definitions around the onset of representation in both trial and appeal cases (when legal advice and representation are offered; and in appellate cases other than direct appeals, only where leave to appeal is granted). We also clarified that 440 motions and habeas corpus matters could be counted, but only in the event an attorney is assigned to such cases, or actually files a 440 motion.

Providers also cautioned that the existing weights insufficiently distinguished types of 440 motion, inappropriately weighted cases in which a client was alleged to have failed to pay a fine, insufficiently distinguished circumstances in which cases are retried, did not account for a variety of parole-related proceedings, and inappropriately did not make distinctions between SORA proceedings at point of sentence and those at point of release from prison. We did not make significant changes in response to these criticisms, and instead reserve them for future study. We did not feel we had sufficient basis to subdivide and reweight 440 cases. While recognizing that 'failure to pay a fine' cases vary in the burden they impose, counting them as post-disposition cases similar to others in which a client was alleged to have failed to abide by the conditions of his or her sentence seemed appropriate and necessary. While we recognized retrials may differ in their burden depending on the stage at which they occur, we also thought that such proceedings are invariably burdensome enough to merit separate counting. Parole matters beyond defending a client against an alleged violation either do not require assignment of counsel, or (as in rescission cases) are best regarded as a component of an underlying case. SORA proceedings, we concluded, are sufficiently consequential to merit separate weighting regardless of the timing and context of the proceeding in relation to the underlying criminal case.

Conclusions

Our research suggested that while providers differ in certain details about case counting, significant consensus exists around certain key issues such as the grouping of charges into 'cases'. Moreover, with few exceptions, providers appear able to adapt their case counting practices to comport with new definitions when necessary, given adequate support. That said, we recognize the need both for flexibility in the case definitions we produce, and for adequate support for accurate caseload reporting within the planned funding distribution to counties.

Regarding the case definitions, we concluded they must:

- Reflect existing consensus on how caseload counting is already done where possible and appropriate.
- Not impose requirements that are impossible for providers to implement and adapt to.
- Not require providers to report information that is not, and could not be, available to them.
- Allow flexibility in situations where counts of newly opened cases are, for administrative reasons, impossible for providers to report.
- Make clear how cases handled only briefly by attorneys working 'on call' or covering certain courts should be counted.
- Define the onset of a case in such a way that neither counts situations where a provider did not provide any representation, nor fails to count situations where legal advice and representation were offered.
- Define how charges are consolidated into cases, considering that where multiple charging instruments refer to a single alleged incident it is common to consolidate these, but also leaving scope to count separately multiple prosecutions arising from a single incident.

- Allow for the creation of new case categories where appropriate for matters not presently captured under the standards.

Regarding our plan for the implementation of caseload standards, we recognized funding must be made available to providers to:

- Implement needed changes to administrative procedures that would allow them to track sufficient information to allow for case counts compliant with the definitions.
- Build basic administrative infrastructure that will allow data tracking to commence.
- Obtain case management software.
- Work with software developers to enhance their ability to track data.
- Employ administrative support staff to perform data entry.
- Train staff in data entry and the use of case management systems.
- Change internal administrative procedures for case tracking.
- Compensate attorneys for completion of paperwork necessary to ILS reporting requirements.

ILS should study in greater detail the following matters:

- Appropriate weighting of cases not yet counted under the standards including extradition or fugitive matters and Mental Hygiene Article 10 cases.
- Appropriate weighting of collateral proceedings where the proceeding may implicate a client's rights in the criminal case, particularly the right against self-incrimination, including DWI refusal hearings, CPS investigations and/or hearings, and school suspension hearings.
- Appropriate weighting of cases in which assignment of an attorney is for arraignment purposes only.
- Appropriate weighting of specialty court, sentence modification, and returns of ACD cases to court calendars.
- Appropriate weighting of cases in which a period of inactivity occurs (such as where a client has absconded or is incapacitated).
- Weighting of 440 motion cases, failure to pay a fine cases, retrial cases, parole matters other than parole violation cases, and SORA proceedings.

APPENDIX A – Interview questions used in 11 Counties

Your caseload tracking infrastructure

ILS needs to write a plan for providers to receive caseload relief statewide by 2023. That plan will require ILS to track caseload information for all provider. As such it might include new data entry staff or computer equipment for providers to supply that information. ILS also needs to understand the differences in how programs open cases, because differences in practices could result in differences in the numbers of cases being counted.

We have prepared the following list of specific questions to indicate the sorts of issues we are interested in learning more about. Often, the best place to start this conversation is for you to walk us through the administrative process by which cases are opened in your office, but we can conduct this conversation in any way you please.

I. When opening a case in your system, do you record sufficient information to categorize it into one of the types named in the caseload standards (violent felony, other felony, misdemeanor/violation, post-disposition case, parole revocation, appeals of verdicts, appeals of guilty pleas)? *(If not, what additional equipment or infrastructure would allow you to do that?)*

II. Do you have a computer system that will allow you to quickly extract counts of cases in each category? *(If not, what additional equipment or infrastructure would allow you to do that?)*

III. When is a case usually opened in your system? *(For example: upon first meeting a client, upon arraignment, upon assignment by a court, only after a conflict check has taken place, only after an eligibility determination has taken place, etc.)*

IV. Do you open a new case when:
   i. An existing client is rearrested on a new offense before the closure of his/her pending case
   ii. Counsel in the case changes to another person within your office or program
   iii. Charges in a case are severed
   iv. Charges relating to multiple cases against a single client are rolled together or combined
   v. An existing client is returned to court on a bench warrant
   vi. A case transfers to a new court (e.g. felony case to County court)

V. Do you open a new case when an existing client is accused of:
   i. Violating their conditions of probation
   ii. Violating conditions of a Conditional Discharge
   iii. Violating conditions of an ACD, resulting in return of ACD to court calendar
   iv. Failure to pay a fine
   v. Failure to complete a treatment program
   vi. A client seeks modification of a sentence

VI. How do you count cases in Integrated Domestic Violence court (if you have one)?

VII. Could you describe how you think local prosecutorial charging decisions influence your case count? For example, where a person is accused of a series of offenses committed in multiple places over a period of several weeks, do prosecutors charge as one case, or several?

APPENDIX B – Caseload survey instrument and accompanying materials

Dear [NAME] –

Apologies for the impersonal nature of this message. I'm using a mailing list to contact you and other colleagues around the state to ask for help. As you may know, my office, the Office of Indigent Legal Services, has the responsibility to submit a plan for the implementation of caseload standards for all providers of criminal defense representation across the state by December of this year. I'm contacting you either because you're someone who provides criminal defense services, or you're someone I've relied on the past to supply information about them.

I'm attaching to this message a request for information that is essential to our planning process (ILS Caseloads Standard Data Request Form.docx) along with a set of instructions (ILS Caseload Standards Data Request – instructions and definitions.docx). I'm requesting, essentially, detailed information on the types of cases you handled in the last year and the staff and resources your program had available to handle them. The form also contains detailed questions about how exactly you count cases. And, if you can't easily report the information we're asking for, it asks what additional resources you would need to do so. There's also some background information (Caseloads standards – background information.docx).

You can fill the Data Request Form out on your computer by typing in the grey boxes you see in the document, or you can print it, fill it out by hand, and scan it. In either case, you can email your response back to us at surveys@ils.ny.gov, or mail it to the address in my signature block below. Either myself or Research Analyst Alyssa Clark will acknowledge receipt.

We do not expect every provider in the state to be able to report caseload data to us in the way we are asking for it. The purpose of this request, therefore, is to determine how many providers across the state can report these data to us, and, for those who are not able to, assess what resources are needed to make that possible. Your response will help us to make three substantive points in our report in December:

- First, not all providers are presently equipped to supply needed data for caseloads standards implementation
- Second, specific additional resources are needed in those providers to build that capacity; and
- Third, available data suggest significant funding is needed to alleviate the pressure of caseloads.

Your response will help give us the evidence we need to substantiate those points.

You may have already received several solicitations from my office this year for information. I apologize if these requests seem onerous, and I recognize reporting data can be a burden. These requests are necessary because this legislation has tremendous potential to bring large increases in resources to providers of indigent legal services across the state. We have heard from so many of you for years that caseload relief is the primary need you have. This year's state budget contains promises of significant steps toward progress at alleviating that problem. Yes, caseload data are important to the budgeting process, and gathering them takes time. But we expect that the resources they will make available will ultimately be worth the effort.

I can be contacted at the address and phone number below, or by replying to this email. I looked forward to hearing from you!

Sincerely,

Andy Davies

ILS Caseloads Standard Data Request Form

You can help us plan for implementation of statewide caseload standards by filling out as much as possible of this questionnaire. If you cannot fill out something, check 'Unknown'. All questions refer to your program in the calendar year (January 1-December 31) 2016 unless otherwise specified.

- Please **fill out** this document by hand, or by typing in the grey boxes.
- Please **return it to us** via email at surveys@ils.ny.gov, or mail to: Andrew Davies, Office of Indigent Legal Services, 80 South Swan St., Suite 1147, Albany, NY 12210.
- **Any questions**? Contact Andy at andrew.davies@ils.ny.gov or 518-461-1889.

Your name: _____

Your county: _____

Your contact phone: _____

Your contact email: _____

Your organization name: _____

1. Please report the total number of new cases assigned during 2016 in the following categories:

Violent felonies	_____	Estimate: ☐	Unknown: ☐
Other felonies	_____	Estimate: ☐	Unknown: ☐
Misdemeanors and violations	_____	Estimate: ☐	Unknown: ☐
Parole revocation	_____	Estimate: ☐	Unknown: ☐
Post-disposition cases	_____	Estimate: ☐	Unknown: ☐
Appeals of a guilty plea	_____	Estimate: ☐	Unknown: ☐
Appeals of a verdict	_____	Estimate: ☐	Unknown: ☐
Other criminal cases *[describe under Q.5]*	_____	Estimate: ☐	Unknown: ☐

2. Please tell us how much your program spent in 2016 on criminal representation:

$_____ Estimate: ☐ Unknown: ☐

Questions 3 & 4 are for institutional providers only.
Assigned counsel need not answer questions 3 & 4

3. Please report the number of full-time equivalent staff employed on July 1, 2016, in the following categories:

Attorneys in criminal practice	_____	Estimate: ☐	Unknown: ☐
Non-attorneys working on criminal cases	_____	Estimate: ☐	Unknown: ☐

4. **Please tell us the average cost of salary and benefits for the following types of staff member:**

An attorney providing criminal representation $_____ Estimate: ☐ Unknown: ☐

A non-attorney assisting with criminal cases $_____ Estimate: ☐ Unknown: ☐

5. **If any of the above information (questions 1-4) was difficult or impossible to provide, please explain why, and what steps could be taken to make the information obtainable. Again, the purpose of asking these questions is to help us assess need for developing this capability.**

_____

6. **Do you open a new case when:**

An existing client is rearrested on a new offense before the closure of his/her pending case?	Yes: ☐	No: ☐
Counsel in the case changes to another person within your office or program?	Yes: ☐	No: ☐
Charges in a case are severed?	Yes: ☐	No: ☐
Charges relating to multiple cases against a single client are rolled together or combined?	Yes: ☐	No: ☐
A client previously found incapacitated because of mental disease or defect pursuant to CPL 730 is found fit to proceed on a felony case?	Yes: ☐	No: ☐
A case transfers to a new court (e.g. felony case to County court)?	Yes: ☐	No: ☐

Please explain your answers to Question 6 here, if necessary:

_____

7. **Do you open a new case when an existing client:**

Is returned to court on a bench warrant?	Yes: ☐	No: ☐
Seeks modification of a sentence?	Yes: ☐	No: ☐
Enters a specialty/treatment court program (e.g. drug court)?	Yes: ☐	No: ☐
Is accused of violating their conditions of probation?	Yes: ☐	No: ☐
Is accused of violating conditions of a Conditional Discharge?	Yes: ☐	No: ☐
Is accused of violating conditions of an ACD, resulting in return of ACD to court calendar?	Yes: ☐	No: ☐
Is accused of failure to pay a fine?	Yes: ☐	No: ☐
Is accused of failure to complete a treatment program?	Yes: ☐	No: ☐

Please explain your answers to Question 7 here, if necessary:

_____

8. **When opening a case in your system, do you record sufficient information to categorize it into one of the types named in the caseload standards?** *(The categories are: violent felony, other felony, misdemeanor/violation, post-disposition case, parole revocation, appeals of verdicts, appeals of guilty pleas. If not, what additional equipment or infrastructure would allow you to do that?)*

_____

9. **Do you have a computer system that will allow you to quickly extract counts of cases in each category?** *(If not, what additional equipment or infrastructure would allow you to do that?)*

_____

10. **When is a case usually opened in your system?** *(For example: upon first meeting a client, upon arraignment, upon assignment by a court, only after a conflict check has taken place, only after an eligibility determination has taken place, etc.)*

_____

11. **If a case were defined as "one or more charges against a single defendant originating in a single court contained in a single charging instrument," would that differ from how you define a case at present? Please explain.**

_____

12. **Please tell us any other information you think we should know:**

_____

Thank you for your time and attention!

ILS Caseload Standards Data Request

ILS is sending a form to providers of representation across the state requesting data to help assess whether programs need additional resources to meet caseload standards. You will find a set of Instructions and definitions associated with this request below.

It's our expectation that providers of representation will differ in their ability to respond to this request in full, and we are therefore asking that you do the following:

1) Try to provide the data we are requesting in Questions 1 to 4 of the form. Assigned counsel programs do not need to answer questions 3 and 4.
2) Whether or not you can provide the data, please let us know what it would take for you to track caseloads efficiently and accurately such that this kind of reporting could become more feasible. Tell us about those things in Question 5.
3) Questions 6-11 ask about how you track your caseload. Please answer as fully as you can.

If you administer two or more separate systems (such as a defender office and an assigned counsel program), or provide services in several counties, please fill out separate forms for each system in each county.

The more specific and complete you can be in your responses, the better a position we will be in to submit a convincing plan in December. We might try to follow up with you to fill in any missing information.

Please scan and submit your response to surveys@ils.ny.gov, or mail it to:

Andrew Davies
Office of Indigent Legal Services
80 South Swan Street, Suite 1147
Albany NY 12210

Instructions and Definitions

ILS does not have a standard definition of a 'case' but is studying how programs record cases to try and develop one. We are therefore requesting that programs provide counts of cases using whatever conventions and practices they have for counting at present. If you are interested in learning more about our attempt to study this, contact andrew.davies@ils.ny.gov, 518-461-1889.

- If a question does not apply to you, please write "N/A" in the field.
- If an answer is unknown check 'Unknown'.
- If an answer is an estimate, check 'Estimate.'

Question 1: Instructions for counting and reporting caseloads

We request that you supply, if you are able, counts of new cases assigned in the categories provided here.

The categories are as follows.

Violent Felony: 'Violent felony' is as defined in Penal Law § 70.02 and any class A felony except those defined in Article 220 of the Penal Law (Class A "drug" felonies). We include non-drug class A felonies because they constitute some of the most serious offenses which can result in life imprisonment (P.L. §

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

Non-violent Felony: A non-violent felony is any case in which the top charge is a felony other than a violent felony as defined above.

Misdemeanors and Violations: A misdemeanor or violation case is any case in which the top charge is a misdemeanor, violation, or lesser charge where representation is provided.

Parole Revocation: Parole revocation is any case where a person is accused of having violated the terms of his or her parole. Such cases include violations which are only 'technical' in nature and do not involve the commission of a new offense. If, however, the violation did result from an accusation of new criminal conduct resulting in new criminal charges and your program will represent the client in that case, the new criminal case should also be counted separately as a 'violent felony', 'non-violent felony', or 'misdemeanor or violation' as appropriate, in addition to the parole revocation case.

Post-Disposition: Post-disposition cases are those in which the client is accused of failing to abide by the conditions of a sentence, or has an ACD case restored to the court's calendar. This includes cases in which a client:

- is accused of violating the terms of probation or conditional discharge,
- is accused of failure to pay a fine,
- has an ACD case restored to the court's calendar under Criminal Procedure Law §170.55 and/or §170.56,
- is accused of failing to complete a treatment program
- seeks modification of a sentence

Violation of probation cases include violations which are only 'technical' in nature and do not involve the commission of a new offense.

If, however, the violation did result from an accusation of new criminal conduct resulting in new criminal charges and your program will represent the client in that case, the new criminal case should also be counted separately as a 'violent felony', 'non-violent felony', or 'misdemeanor or violation' as appropriate, in addition to the post-disposition case.

Appeals of Guilty Pleas: An appeal of a guilty plea is a case in which the defendant seeks to overturn the outcome of a case in a trial court that was resolved in a fashion other than a verdict.

Appeals of Verdicts: An appeal of verdict is a case in which the defendant seeks to overturn the verdict of a trial court. This category also includes cases in which the prosecution seeks to overturn a dismissal by a trial judge.

Other cases: We recognize that several types of cases aren't covered by the standards. We would like to hear from you on what those cases are, and how many of them you provide representation in. This will

help us make more informed decisions both about funding requests and possible modifications to the standards. Examples of case types not covered by the standards include defense of persons considered for classification on the sex offender's register and petitions for review of those classifications under Corrections Law Article 6-C (sex offender registration act, SORA), defense of persons subject to a civil management detention under Mental Hygiene Law Article 10 (sex offender civil commitment), administrative appeals of denial of parole, and motions for post-conviction relief filed under NYCPL Article 440. *Please describe all 'Other' cases under Question 5.*

Question 2: Instructions for Reporting your Program's Spending

Spending should reflect the total amount spent to run all aspects of the program in 2016. Spending should be for 18-b representation only and should include spending for attorneys, non-attorneys, and all other costs related to criminal representation.

Question 3: Instructions for reporting how many staff you have

This question is for institutional providers only. Assigned counsel need not answer.

We count 'staff' in full-time equivalent terms. That means one staff-person who works full-time in your program is counted as '1', and a staff member who works 50% of full-time is counted as 0.5. A program with one full-time and one 50% attorney, for example, would therefore have *"1.5 full-time equivalent"* attorney staff.

For staff who maintain a caseload of *both* criminal and non-criminal cases (for example, they provide representation to parents in family court matters as well as representing criminal defendants) we ask that you quantify how much time they spend on each. (You can estimate the numbers if you need to.) The examples below illustrate this.

> Attorney 1 is full-time employee that spends 75% of his/her time on criminal cases and 25% on non-criminal cases. The program therefore adds 0.75 to total reported under "Attorneys in criminal practice."
>
> Attorney 2 is part-time (40%) employee that spends 75% of his/her time on criminal cases and 25% on non-criminal cases. The program therefore adds 0.3 (found by multiplying 0.4 by 0.75) to total reported under "Attorneys in criminal practice".

"Non-attorneys" includes everyone who works for you who isn't an attorney – receptionists, investigators, paralegals, etc. – all added together. The same rules for full- and part-time, and time spent on criminal and non-criminal cases, apply to these personnel.

Question 4: Instructions for Reporting your Program's Salaries

This question is for institutional providers only. Assigned counsel need not answer.

This question is intended to capture the average cost of compensating an attorney and a non-attorney in your program for a year. Thus please report the average your program spends on individuals in each category to cover both salaries and fringe benefits. Include the salaries of supervisors in your calculations. If none of your staff in fact work full-time hours, please report what the average of their salary and benefit packages would be if they worked full-time.

Question 5: Other issues

If you wish to report to us why obtaining the data for Questions 1-4 is difficult or impossible, and note additional resources or capabilities that would make obtaining it more easy, please do so here. All information entered here will assist ILS in crafting a plan to implement caseload standards statewide.

Questions 6-11

Please answer to the best of your ability, attaching additional pages if necessary.

Thank you for all your help!

Caseload Standards: Some Frequently Asked Questions

Why do we have new caseload standards?

ILS was required to create caseload standards under the *Hurrell-Harring et al. v. The State of New York* settlement agreement. Under the 2017-18 budget, ILS now has the responsibility to develop a plan for implementing caseload standards statewide. Specifically, that new law says ILS must "Develop and implement a written plan that establishes numerical caseload/workload standards for each provider of constitutionally mandated publicly funded representation in criminal cases for people who are unable to afford counsel."

What are the new caseload standards?

The new caseload standards were published recently in a 15-page report that you can find here: https://goo.gl/utZV9F. They place a limit on the maximum number of cases that attorneys should on average be handling in institutional providers. For attorneys in assigned counsel programs they state the minimum number of hours that attorneys should, on average, spend on cases. The standards are as follows.

Case type	Maximum Annual Assignments	Minimum Average Hours
Violent Felonies	50	37.5
Non-violent Felonies	100	18.8
Misdemeanors and Violations	300	6.3
Post-Disposition	200	9.4
Parole Revocation	200	9.4
Appeals of Verdicts	12	156.3
Appeals of Guilty Pleas	35	53.6

How do they apply to assigned counsel lawyers?

The new legislation required that the standards apply to assigned counsel lawyers as well as defenders in public defender offices, legal aid societies or other institutional providers. But they apply in a slightly different way. Whereas for a defender who works in an office, caseload standards take the form of limits on the number of assignments he or she can receive on average in a year, for assigned counsel attorneys they instead state how many hours, on average, he or she is expected to spend on particular types of cases. By adhering to these standards, assigned counsel lawyers can spend the same amount of time per case as a lawyer in an institutional provider operating under caseload caps. We note, however, that assigned counsel lawyers receiving assignments in excess of the annual maxima established for institutional providers would also be presumptively out of compliance with the standards.

Why are caseload standards important?

Defenders across the state frequently don't have enough time to spend on each individual client because their caseloads are too high, or they aren't sure their time will be compensated. The standards are intended to eliminate those problems, and make sure lawyers have enough time to provide quality representation to every client.

Why don't the standards cover family court cases?

The scope of the legislation passed this year specifically focuses on representation in criminal cases only, reflecting the focus of the Hurrell-Harring lawsuit. ILS considers providers of parent representation to

be in need of caseload relief also, but we do not have authority and promised funding to create and implement caseload standards in that area at this time.

Doesn't ILS already have caseload standards?
Previously we've relied on a standard that was based on one developed in the 1970s, but that has been widely criticized since that time. When we started using it in 2013 we wrote that "With further study, we may conclude that these maxima should be set lower" (see page 6 and 7 of this report: https://goo.gl/oJstfl). The Hurrell-Harring settlement required us to conduct that study, and these new standards are the result.

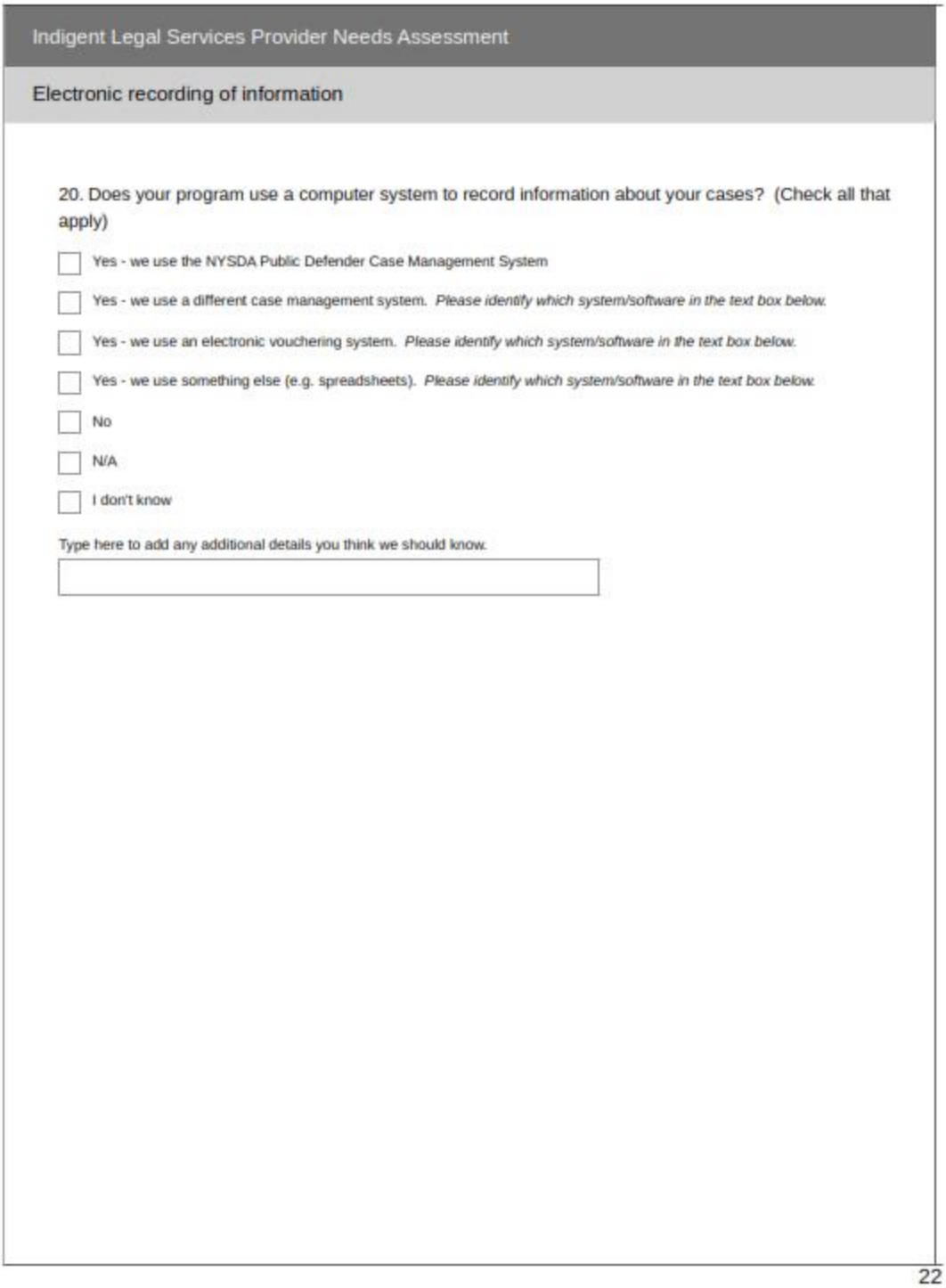
Does this mean providers of representation get more money?
Implementing the standards will require significant new funding to counties to support defenders. This year, ILS' mandate is to plan for their implementation; no money has yet been appropriated to support localities. Once our plan is submitted in December, the legislation clearly says that the standards have to be fully implemented by 2023 with full state funding.

Is this going to mean we have to report more data?
Yes, eventually, but there should also be additional state funding to help support this new data reporting. Right now we are planning for implementation, so the questions we are studying are (a) what information do we need from providers, (b) how much of that information can providers supply, and (c) what will it take to get that information from everyone in the future. We have always requested some caseload information from providers across the state, but the new standards make it more complicated. They break out cases into new categories, and they separate criminal from family court work.

Will we have to submit exactly the same data you're asking for now in future years?
Not necessarily. The purpose of this exercise is to find out what people can provide based on our understanding of our needs. But that understanding might change, and we may also discover there are better ways of doing this – other technological approaches, and other information we could use – that we should explore. This is just our first attempt.

What about cases that don't fall into the categories named in the standards?
We recognize that not all representation actually falls into one of the categories above, with the result that the standards don't prescribe any weight for them. We are also requesting data from you on the types and numbers of those cases in the form we are sending out. That information can help us to understand how to allocate funding even if the cases aren't covered by the standards. It could also help us to develop and modify the standards in the future.

APPENDIX C – Caseload survey instrument and accompanying materials



Indigent Legal Services Provider Needs Assessment

Electronic recording of information

20. Does your program use a computer system to record information about your cases? (Check all that apply)

- [ ] Yes - we use the NYSDA Public Defender Case Management System
- [ ] Yes - we use a different case management system. *Please identify which system/software in the text box below.*
- [ ] Yes - we use an electronic vouchering system. *Please identify which system/software in the text box below.*
- [ ] Yes - we use something else (e.g. spreadsheets). *Please identify which system/software in the text box below.*
- [ ] No
- [ ] N/A
- [ ] I don't know

Type here to add any additional details you think we should know.

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Indigent Legal Services Provider Needs Assessment

Electronic recording of information

21. Do you record information about every single case assigned to your program in your computer system?

- ◯ Yes
- ◯ No
- ◯ N/A
- ◯ I don't know

Type here to add any additional details you think we should know.

23

Indigent Legal Services Provider Needs Assessment

Electronic recording of information

22. Do you record the following features of each case in your computer system?

	In all cases	In some cases	Not recorded	N/A	I don't know
Case type (e.g. felony, misdemeanor, appeal etc.)	○	○	○	○	○
Any motions filed	○	○	○	○	○
Any court appearances	○	○	○	○	○
Any client communication	○	○	○	○	○
Case disposition	○	○	○	○	○

Type here to add any additional details you think we should know.

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