

**REPORT OF TASK FORCE ON
INDIGENT REPRESENTATION
IN TOMPKINS COUNTY**

August, 2009

OVERVIEW

This is the report, including recommendations, of the Indigent Representation Task Force of Tompkins County. It includes the following sections:

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SECTION 1.

THE CHARGE

By resolution dated November 21, 2008 the Tompkins County Legislature Public Safety Committee appointed this Task Force. The Task Force was directed "to explore the benefits and costs of, and recommend . . . a future course of action regarding the most effective delivery of services to residents of Tompkins County who cannot afford legal representation, including analysis of an Assigned Counsel model, a Public Defender/Conflict Defenders' model or a hybrid thereof."

Further, the Task Force was instructed to be mindful of the "10 guiding principles" promulgated by the American Bar Association "as relevant to the unique conditions of Tompkins County" in its long range assessment and review.

Fundamental to any public defense delivery system, those principles are: independence; high quality representation delivered efficiently and cost-effectively; fairness and consistency; client confidentiality in compliance with professional standards; reasonable workloads; standards of defense counsel qualifications commensurate with the complexity of the case; continuous case representation for clients; resource parity between defense counsel and prosecution; continuing legal education training; and accountability to national and local standards.

Finally, the charge noted that an overarching purpose was to "optimize(ing) government efficiency and the reduction of current mandated costs to local citizens."

The Task Force consisted of: two members from the Tompkins County Legislature Public Safety Committee (Martha Robertson and James Dennis); four

members of the Advisory Board on Indigent Representation (Heather L. Bissel, Kelly A. Damm, Deborah F. Dietrich and William E. Furniss, Jr.); and one member of the legal community at large representing the Tompkins County Bar Association (Raymond Schlather).

The complete charge is included in Appendix 1.

SECTION 2.

SUMMARY OF KEY FINDINGS AND RECOMMENDATIONS

The current Assigned Counsel Program in Tompkins County provides quality indigent representation at reasonable cost to this community. Overall, the current assigned counsel program is a better alternative to a public defender's office, a legal aid society, or any combination thereof.

However, there is room for improvement in the existing system. Recommended changes include: more formalized oversight in the areas of program administration, attorney performance, vouchering and client eligibility; greater efficiency in the local courts; and implementation of a formal mentoring program as part of ongoing attorney training.

Further, given the increasing use of the "specialty courts" (the drug courts, the integrated domestic violence court, the family treatment court, and the sex offender court), and given the unique attorney requirements in each of those specialty courts, Tompkins County should explore providing institutional representation in some or all of those courts. This could result in increased savings over the long run.

Also, the Task Force discussed the cost benefit of encouraging the District Attorney's office and the local police to adopt practices that involve initially charging defendants at the likely end-result level (i.e. in many instances, with misdemeanors instead of felonies). However, this discussion involves broader policy considerations and boundaries that were not fully explored by the Task Force, and therefore no recommendation in this regard is being made.

Finally, the work of this Task Force is occurring at a time when fundamental changes in the delivery of indigent criminal defense services are being considered by the New York State Legislature. Specifically, proposed legislation is pending that would create a mandatory statewide public defender system at substantial local cost with loss of local control.

SECTION 3.

METHODOLOGY AND RESOURCES

The Task Force first convened on January 13, 2009 and met 14 times in seven months. It was supported by the Tompkins County Administrator, who attended all meetings, a member of his staff, and a Cornell University graduate intern.

Early on, the Task Force identified 11 upstate counties that were of interest for comparison purposes. Upon a preliminary review of statewide data and other information, these counties were selected either because of their comparable demographics, resources and size (when measured against Tompkins County), or because the systems of indigent representation used in those counties represented a cross-section of the various models to be analyzed, or because they were proximate and the quality of legal representation was known to members of the Task Force.

Financial and caseload data were gathered from each of these 11 counties. Statewide data were obtained from the New York State Office of Court Administration, the New York State Defenders' Association, and the New York State Comptroller's Office. Further, the Tompkins County Assigned Counsel office provided relevant information and materials, including the 1989 analysis of the Tompkins County Assigned Counsel Program by Marilyn Ray, Ph.D. and others. Also, the Task Force consulted the relevant guidelines promulgated by the American Bar Association, the "Standards for Providing Mandated Representation" set by the New York State Bar Association, and the applicable provisions of New York State

law, including County Law, Article 18-B, the Judiciary Law, the Family Court Act and the Appellate Division Department Rules.

Additionally, the Task Force heard from several speakers, including: The Tompkins County Assigned Counsel Supervising Attorney and Administrator; the Tompkins County District Attorney; the Tompkins County Director of Probation; the Executive Director of the NYS Defenders' Association; the Director of Hiscock Legal Aid Society in Onondaga County; the Chemung County Public Defender; the Chemung County Public Advocate; a former public defender in Cortland County; a former Director of a legal aid program in Bosnia; the two Tompkins County Judges; the two Ithaca City Judges; several local Town and Village Justices; and numerous members of the public, including local attorneys. The Task Force also received and reviewed written comments (Appendix 17).

From the foregoing, the Task Force focused on an "apples to apples" comparison of costs, caseloads, and divisions of labor. It also identified the common elements of effective, quality delivery systems and the common problems and complications associated therewith.

The Task Force also determined the cost of establishing a comprehensive public defender system in Tompkins County. Such a system would provide indigent representation in all criminal courts, including all Justice Courts, the City Court and the County Court, as well as the several specialty courts and the Family Court. It would also cover all appeals and all parole hearings. With respect to such a comprehensive system, the Task Force costed out two scenarios, to wit: a comprehensive system using caseload assignments under the New York State Bar Association standards (Appendix 18); and a comprehensive system using caseload

assignments using more realistic local standards derived from those established by the Tompkins County Advisory Board on Indigent Representation in 1990 based on the 1989 work and recommendations of Marilyn L. Ray, Ph.D. (Appendix 19), which local standards were re-examined, revised in part, and re-adopted by this Task Force.

Over the course of its many meetings, the Task Force engaged in extensive discussion and debate. Through listening, analysis, and discussion the Task Force was able to reach a consensus as to what will work best and most cost effectively in Tompkins County at this time and in the foreseeable future. The relevant analysis and recommendations are set forth in Section 4.

There is a significant caveat that cannot be ignored. The New York State Defenders' Association is promoting legislation to establish a statewide public defender system. For other counties, there may be good reason to have such a program. It is not necessary in Tompkins County at this time and may cost local taxpayers more than the current system. Nevertheless, if a statewide system is created, it will dramatically change the landscape.

Summaries of the so-called "apples to apples" comparison of the data from the 11 counties and Tompkins County are set forth in the sub-appendices of Appendix 2; Appendix 3 includes materials pertaining to the eligibility standards for, and the granting of indigent representation in Tompkins County; and an assortment of supporting materials from each of the 11 counties are separately included in Appendices 4 – 14, all as follows:

- Appendix 2A - Summary of Data (11 Counties, plus Tompkins County)
- Appendix 2B - Organizational Models of Surveyed Counties

Appendix 2C	Referrals by Type, Surveyed Counties
Appendix 2D	Cost of Indigent Defense, Surveyed Counties
Appendix 2E	Ranking of Net Local Indigent Defense Costs (Criminal Only), Surveyed Counties.
Appendix 3	Tompkins County Eligibility Standards and Materials
Appendix 4	- Broome County Materials
Appendix 5	- Cayuga County Materials
Appendix 6	- Chemung County Materials
Appendix 7	- Cortland County Materials
Appendix 8	- Oneida County Materials
Appendix 9	- Onondaga County Materials
Appendix 10	- Ontario County Materials
Appendix 11	- Oswego County Materials
Appendix 12	- Schenectady County Materials
Appendix 13	- St. Lawrence County Materials
Appendix 14	- Steuben County Materials

Further, statewide data for felony and misdemeanor arrests, ranked by county, are tabulated in Appendix 15. The minutes of each meeting of the Task Force are set forth chronologically in Appendix 16. Written comments received are set forth in Appendix 17. The two tables of projected costs for establishing a public defender system in Tompkins County are set forth in Appendices 18 and 19 respectively.

And, the proposed legislation for creation of a statewide public defender system and related materials are set forth in Appendix 20.

SECTION 4.
ANALYSES OF FINDINGS AND RECOMMENDATIONS,
INCLUDING ALTERNATIVES

Overview:

The Tompkins County Assigned Counsel Program works. In its current format, it provides quality, comprehensive, and relatively cost-effective legal services, as mandated by law, throughout Tompkins County.

Using either statewide caseload assignment standards or more realistic local assignment standards, the existing Assigned Counsel Program costs less than any public defender model. However, there is room for improvement in areas of training, accountability, and work flow. To make such improvement, all stakeholders must be engaged, including the attorneys, the program administration, and the courts.

A. Existing System:

The existing program in Tompkins County is a comprehensive assigned counsel program. This means that private lawyers are assigned to represent indigent persons in criminal court and related proceedings, family court and related proceedings, and in all appellate courts.

In 2008, the Tompkins County Assigned Counsel Program was staffed by 2.33 full-time equivalent (FTE) county employees and approximately 50 private attorneys. The program handled 2,070 cases broken down as follows: 322 felonies; 1102 misdemeanors, violations and other offenses; and 646 family court

matters. The total cost of the program was 1.926 million dollars, of which 1.511 million dollars was a local charge (Appendix 2A).

In recent years, both the criminal courts and the family courts have developed "specialty courts" to address chronic problems of substance abuse, domestic violence, and most recently sexual abuse. These specialty courts either are state mandated or strongly encouraged (and likely will be mandated shortly). In Tompkins County currently there are the following specialty courts: Felony Drug Court -Tompkins County Court (mandated); Misdemeanor Drug Court - Ithaca City Court (mandated); Integrated Domestic Violence Court - Tompkins County and Family Courts (mandated); Family Treatment Court - Tompkins County Family Court; and Sexual Offender Court - Tompkins County Court. Except for the Integrated Domestic Violence Court, each of these specialty courts currently has two assigned attorneys to represent the many participants therein, which is substantially fewer than otherwise would be necessary if the cases were processed exclusively in the traditional court system. These assigned attorneys are required to represent all participants in the specialty court regardless of the financial eligibility of the individual participants. Moreover, there are only a handful of specialty court attorneys. These specialty court attorneys receive supplemental training that is unique to the specialty court. Further, these specialty court attorneys must commit to a regular, time-consuming schedule of meetings and court appearances in order to discharge their responsibility in those courts.

By virtually all anecdotal accounts, the attorneys who serve in the Assigned Counsel Program in Tompkins County are qualified and committed in their work. Presiding Judges, the District Attorney, the Probation Director, and other practicing

attorneys generally see no difference in the quality of legal services provided, whether the individual is represented by private counsel or assigned counsel. Stated another way, the limited incidents of inadequate representation occur as often with private counsel as with assigned counsel and are more a function of the attorney involved than the method of compensation.

The minutes of the various Task Force meetings set forth some of these anecdotal comments. (See Appendix 16, especially the minutes of 2/24/09, 4/14/09, 4/28/09 and 5/26/09; also see the written comments in Appendix 17.)

B. Comparison of Tompkins County with Other Counties:

To provide perspective and context for its review, the Task Force surveyed 11 counties to determine the organizational model, cost and indigent defense caseload within those counties. The counties were selected either because of their comparable demographics, resources and size (when measured against Tompkins County), or because the systems of indigent representation used in those counties represented a cross-section of the various models to be analyzed, or because they were proximate and the quality of legal representation was known to members of the Task Force.

The ability to develop basic benchmarks was hampered by the lack of a central publicly accessible repository of data regarding indigent defense, as well as variation in the way various counties report their costs and activity levels. Nevertheless, the Task Force has culled the available data from a variety of sources, including the New York State Office of Court Administration, the New York State Comptroller's Office, the New York State Defenders' Association, and directly

from each of the eleven surveyed counties, plus Tompkins County. The relevant data have been compiled in an "apples to apples" comparison that is set forth in Appendix 2A.

Moreover, there are overarching core principles of professionalism and ethics that must be observed in every system of indigent representation. One fundamental requirement is that attorneys must avoid a "conflict of interest." Specifically, neither a lawyer nor his/her law firm may represent competing interests, nor even potentially competing interests in a legal matter, both as a matter of ethics and as a matter of good practice. Thus, for example, a public defender's office cannot represent co-defendants in the same case and a legal aid society cannot represent spouses on opposite sides in Family Court. For assigned counsel systems, this is not a serious problem because generally the assigned individual attorneys are not from the same firm or institution. However, for the institutional representatives (public defender offices and legal aid societies), because of such conflicts, a backup system of representation is necessary.

Accordingly, any meaningful analysis of a County's comprehensive indigent representation system must recognize that, in the real world, conflicts of interest regularly arise. Lawyers must be provided in ways that avoid the conflict.

(i) Organizational Models:

The 11 surveyed counties include nearly all of the legally permissible permutations of an indigent defense system (see Appendix 2B), including:

- Assigned Counsel Programs: Four of the 11 surveyed counties (as well as Tompkins County) rely exclusively on an Assigned Counsel system to handle their criminal work. In three of those four counties

(Cayuga, Ontario and Oswego), the Assigned Counsel Program also represents indigent clients in Family Court. Onondaga County has a contract with the Hiscock Legal Aid Society to provide representation in Family Court cases.

- Public Defender Offices: Seven of the 11 surveyed counties rely on a County Public Defender's Office to provide defense for those charged with criminal offenses; and all but one of those counties also use a Public Defender's office to handle Family Court cases. In Broome County, Family Court clients are served by a Legal Aid Society.
- Because Public Defenders' Offices and Legal Aid Societies regularly encounter conflicts of interest, an Assigned Counsel Program exists in five counties to serve solely as a conflict defender. In a sixth county, Onondaga, the Assigned Counsel Program serves as a conflict defender in Family Court cases in addition to serving as the primary vehicle for criminal defense.
- As indicated, Legal Aid Societies exist in two of the 11 surveyed counties (Broome and Onondaga). In both counties, the Legal Aid Society represents clients in Family Court.
- In Chemung County, there is a transition underway in the way the County handles conflict defense, with a Public Advocate assuming conflict cases that historically have been directed to the Assigned Counsel Program. The Assigned Counsel Program now serves in an even more limited final back-up role.

- In Ontario County, a multi-year transition from an Assigned Counsel Program to a Public Defender's Office is underway. The Public Defender's Office is expected to be fully operational in 2010. The Assigned Counsel Program will continue as back-up to handle the conflict cases.

(ii) Costs:

Costs vary generally with population among the surveyed counties, with indigent defense budgets in Onondaga and Broome Counties predictably larger than those of smaller counties. Within the group of surveyed counties, there does not seem to be a correlation between the organizational model and cost of an indigent defense program.

As shown in Appendix 2D, standardizing costs on a per capita basis helps make comparisons. In this context, the per capita cost means the cost of all indigent representation services in the County divided by the total population of the County; the resulting number is the average cost per person in the County to provide indigent representation. When looking at total costs, before the application of state aid, costs in the 11 surveyed counties range from \$9.70 per capita in Cayuga County to \$22.85 per person in Schenectady County. The gross cost of services in Tompkins County was \$19.06 per capita. Preliminary projections for 2009 suggest that this may be closer to \$17.00 per capita in the current year.

Appendix 2E uses statewide data to rank the net local cost (after aid is applied) of indigent defense per capita among all of New York State's counties outside of New York City.

As shown, four of the counties surveyed, as well as Tompkins County, rank among the ten most expensive programs per capita in the state outside of New York City (Appendix 2E).

Over the past three years, Tompkins County's net local indigent defense costs have averaged \$14.69 per capita, the eighth highest cost for such service among the state's 57 counties outside of New York City. During the same period, these 57 counties averaged \$10.23 per capita for indigent defense (Appendix 2E).

(iii) Caseload:

There are gaps and inconsistencies in the caseload levels reported to the state by County indigent defense agencies. This may be due to the state's imprecise reporting requirements, the apparent double counting of some types of caseloads (e.g. felonies that subsequently are reduced to misdemeanors), and -- in some counties -- the inclusion of cases that were quickly discontinued because of conflict of interest, retention of private counsel, or subsequent determination that the person was not indigent (e.g. Broome County, Appendix 2A). In any event, the resulting data should be considered as illuminating rather than providing a precise measurement of case referrals.

Appendix 15 shows the estimated number of felony, misdemeanor/violations, and Family Court cases managed statewide in 2008 by indigent defense agencies.

On average, felonies represent about 18% of the referrals managed by indigent defense offices; 55% are misdemeanors and violations; and the remaining 27% of the cases are Family Court clients. Tompkins County caseloads generally follow that pattern, but are at the misdemeanor end of the bell curve (11%

felonies, 68% misdemeanors/violations and 21% Family Court cases). As noted below, this suggests that a possible area for identifying greater efficiencies in the existing program is at the misdemeanor/violation level of indigent representation.

When standardized by population, caseloads in Tompkins County are less than most of the surveyed counties. Again, however, the quality of the data is questionable.

The County Administration Department prepared an analysis (Appendix 2D) that looks at indigent felony and misdemeanor arrests per 10,000 people as another indicator of caseload. Appendix 2D shows that Tompkins County has one of the lowest arrest rates of the surveyed counties. Similarly, Appendix 15 establishes the same phenomenon statewide (excluding New York City).

In Appendix 2E, a summary of per capita costs and arrests within each of the surveyed counties is presented to provide context for the analysis of the Tompkins County indigent defense system in criminal cases. Notably, in per capita costs, Tompkins County is in the mid-range of surveyed counties (5/12) and in the high range of counties statewide (excluding New York City) (8/57). Whereas, in per capita arrests, Tompkins County is the lowest of the surveyed counties and near the bottom statewide.

This apparent anomaly (high per capita costs vs. low per capita arrests) is not readily explained. Some argue that it correlates to the high quality of representation in Tompkins County. Others suggest that the political will and philosophy in this community supports a broad systemic intervention in the lives of miscreants such that the role of defense counsel includes time-consuming social work and specialty court representation; they point out the apparent long-term

benefits, including the lowest per capita jail expenses in the state, decreased recidivism and a generally higher standard of living in Tompkins County when compared to its neighbors. Still others claim that the high per capita costs simply illustrate the need for greater efficiencies in the existing assigned counsel system.

Whatever the explanation, there is one area of caseload management on which all members of the Task Force agree: the New York State Bar Association's attorney caseload standards for mandated indigent representation are not realistic. The standards are expressed in terms of the number of cases that an attorney can handle competently and professionally in a one-year period. Typically, an attorney has about 1500 hours of time each year for client representation; any extra time is spent in professional development and reading, and similar non-client specific functions. The NYSBA standards were adopted in 2005 and are based on the national workload standards established by the National Advisory Commission on Criminal Justice Standards and Goals in 1973. These standards set forth the "maximum cases per year" per attorney as follows: 150 felonies, or 400 misdemeanors, or 200 juvenile delinquency cases, or 200 mental health matters, or 25 appeals. Twenty years ago, Marilyn Ray, Ph.D. and a similarly convened local task force analyzed this same issue and concluded that more realistic caseload limits were: 80 felonies, or 275 misdemeanors, or about 160 family court cases, or 25 appeals. The analysis of 20 years ago (using a complicated formula that is not relevant to this analysis) was based on an array of data and anecdotal reports. Having reviewed the same, and having heard the current reports of defense counsel and others who appeared before this group, including public defenders and former public defenders in other counties, the Task Force is adamant that quality

representation requires more realistic workload maximums as follows: 75 felonies, or 200 misdemeanors, or 100 family court cases, or 25 appeals.

To put these standards into context, a single mid-level felony indictment that runs from initial charge and arraignment through pre-trial motions and usually a pre-trial hearing, and involves a four-day jury trial with reasonable preparation and legal research, and thereafter likely sentencing, typically takes about 150 hours of legal time to defend. An experienced attorney generally will try about six such cases per year (900 hours +/-), leaving 600 hours +/- to resolve his/her remaining caseload. In other words, if an experienced attorney had a caseload of 75 felonies, as recommended by the Task Force, and tried six of those cases as outlined above, (s)he would be able to spend, on average, less than 10 hours for each of the remaining 69 cases. In that 10 hours, (s)he would be required to meet with the client on several occasions, appear in court at least three or four times, prepare paperwork, do legal research, review police reports and material provided by the District Attorney, talk to prospective witnesses and negotiate the plea agreement or other disposition. The bottom line is that a 75 felony annual caseload for an experienced trial attorney is a full-time job.

Moreover, in 2006 the Spangenberg Group, in an analysis commissioned by the Chief Judge of New York's Court of Appeals, determined that a criminal case takes an average of 13.6 hours of attorney's time to resolve without a trial (Spangenberg, "Status of Indigent Defense in NY: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services" [June, 2006]).

Thus, the foregoing standards adopted by this Task Force are realistic. Those standards are reflected in the cost models that the Task Force developed for

a hypothetical public defender system in Tompkins County (Appendix 19).

However, the Task Force also projected costs based on the New York State Bar Association and national standards in order to establish the arguable range of such costs (Appendix 18).

iv. Staffing:

There is simply no reliable data available to compare staffing levels for indigent defense organizations among the surveyed counties. While some information contained in County operated public defender offices is available through published budget documents, similar information is not readily available for legal aid societies and is not relevant in assigned counsel programs.

The information that was obtained from surveyed counties is profiled in Appendix 2A. However, developing a precise comparison of staffing requirements for different organizational models is problematic. Soft variables include: differing local perceptions of what constitutes "quality representation" and "acceptable caseloads"; the prevalence of use of specialty courts in each county; the policies and practices of local prosecutors with respect to intensity and methods of prosecution, including plea bargaining; and the fiscal will and means of local governments to fund indigent defense. Parenthetically, many of these "soft variables" -- and resulting inequities in the delivery of indigent representation throughout the state -- are cited by the proponents of a statewide public defender system (Appendix 20).

A good illustration of the difficulty in determining appropriate staffing levels is the recent experience of Ontario County. In 2003, Keuka College published an

"Action Research Project" that was prepared for Ontario County to analyze whether the County should continue with its Assigned Counsel Program or should switch to a public defender model. Based on actual caseload and assigned counsel voucher data, the report determined that a public defender's office would require 11.5 attorneys, plus support staff, to provide 19,570 hours of indigent representation services (the then-current need in the County). At that level of staffing, the cost of a public defender's office would be approximately equal to the cost of the existing assigned counsel system. Nevertheless, the author of the report recommended, and later the County Legislature voted to implement, a public defender model. The rationale was that other counties that had public defenders then were paying in the range of \$6.76 per capita to \$10.76 per capita, which was considerably less than the \$13.97 per capita then being paid for the assigned counsel program. In other words, regardless of the caseload data, the rationale was that if other counties could make a public defender system work for less cost per capita, then Ontario County could too. The report offered few specifics on how such a reduction in costs could happen and did not address how the quality of representation would be affected by any such reduction. On its part, the Legislature did not give any realistic guidance. Instead, the Legislature simply established a one-year transition from assigned counsel to public defender, hired a public defender and directed the public defender to design a workable and budget-acceptable public defender program (Appendix 10).

As set forth above, there are workload standards for indigent representation regardless of the delivery model. Historically, Tompkins County has opted for a more realistic set of such standards. Based on credible anecdotal evidence,

including the reports of former and current public defenders and assistant public defenders, these more realistic workload standards are necessary to provide the high quality of indigent legal representation in this community.

C. The Public Defender Alternative:

Accordingly, given that the Task Force is satisfied that the quality of the existing indigent representation in Tompkins County is more than adequate, the real question is simply whether an alternative program of equal quality is more cost-efficient. The public defender model is cited most often as such an alternative. Therefore, the Task Force has projected the total cost of a public defender system for all indigent representation in Tompkins County (Appendices 18 and 19).

In projecting the Tompkins County public defender system costs, several assumptions were made, including most importantly:

(a) Annual workload requirements are based on more realistic local standards (Appendix 19); but for comparison purposes, a separate calculation using the New York State Bar Association and national standards is provided (Appendix 18);

(b) Though costed out as a hypothetical single public defender model, this total cost as a practical matter would be distributed among two or more indigent representation entities because of conflicts of interest.

However, to simplify this analysis, the Task Force is assuming that in the real world the total cost of funding a primary public defender with a back-up conflict defender and/or assigned counsel system is equal to the projected hypothetical single public defender system for all indigent representation.

(c) Staff salaries and benefits are equivalent to those paid to comparable county employees, including those in the District Attorney's office.

(d) Space allocation, equipment costs and training opportunities are equivalent to those used by the county for its needs and programs.

Based on the foregoing, the existing assigned counsel program is more cost-efficient than a public defender program. Specifically, whereas the total cost of the existing assigned counsel system in 2008 was 1.926 million dollars (Appendix 2A), the total cost of a public defender option for the same year is projected at 2.928 million dollars using local workload standards (Appendix 19), and at 2.031 million dollars using NYSBA/national workload standards (Appendix 18).

The net local cost under any scenario is approximately 20% less. New York State subsidizes local indigent representation using a complicated formula that is tied to the prior year's expenditures. This is more commonly referred to as "maintenance of effort" funding. The salutary purpose of such funding is to encourage ongoing, full support for indigent representation. An unintended consequence of New York State's maintenance of effort funding formula is that any legitimate reduction in the local cost of indigent representation (e.g. savings due to better management, or even a decline in the local crime rate) results in a loss of that state subsidy. In other words, the County is penalized for improving the delivery of indigent representation services. It appears that this may be happening in Tompkins County now; the 2009 expenditure for all indigent representation recently was projected to total approximately \$200,000.00 less than for 2008. The Task Force recommends that the County work with other counties to convince the NYS Legislature to change this punitive formula.

Even with the maintenance of effort "penalty", the Assigned Counsel Program is more cost-effective than the local standards public defender model.

Therefore, the Task Force recommends that the county continue the existing assigned counsel system to provide indigent representation in Tompkins County. That being said, the Task Force recommends certain improvements in the program.

D. Recommended Changes:

In most respects, the current assigned counsel program functions well. However, given the increasing fiscal demands on county government, enhanced accountability and improvement of the system are desired. Many of the improvements discussed below are changes to administrative processes. Others require increased cooperation between the legislative and judicial branches of local government.

More Formalized Oversight:

(a) Attorneys

The program should ensure that the attorneys are complying with the ethical standards set by New York State, that they are complying with the Continuing Legal Education (CLE) requirements of New York State, and that they are providing zealous representation to their clients. To that end, the attorneys should be required to complete a certain number of CLE hours per year to continue to work in the specified area of the assigned counsel program.

The criminal court attorneys should be required to complete and to provide proof of such completion of a minimum of six hours of criminal CLE work per year. The family court attorneys shall be required to complete and to provide proof of

completion of a minimum of six hours of family law CLE work per year. This helps to ensure that the attorneys are cognizant of the ongoing changes in the law as well as the improved procedures and arguments that will help them to better represent clients. The CLE certificates of a given year should be provided to the assigned counsel office by January 31st of the following year.

Further the program should establish a mechanism by which attorneys may be suspended and/or removed from the panel. If an attorney does not meet the CLE requirements, then that attorney should be suspended from the panel until (s)he does meet the requirements. If there are persistent founded complaints about an attorney's competency or professionalism, (s)he should be removed from the panel, either temporarily or permanently, depending on the severity of the matter. If an attorney intentionally has falsified a voucher, (s)he should be removed from the panel permanently.

The ABIR committee should work with the assigned counsel program administrators to determine those actions that may be taken administratively and those actions that may be taken only after a hearing. For example, a suspension from the panel pending completion of the CLE requirements presumably is administrative, whereas a suspension from the panel for lack of professionalism would require a hearing prior to any such suspension.

(b) Assigned Counsel Program Administration

- Voucher review:

First, the Assigned Counsel Program's supervising attorney should have an early and active role in reviewing the vouchers submitted by assigned counsel for payment of their services rendered in indigent

cases. In order to do this, County Law No. 8 - 1993, as amended by County Law No. 6 - 1994, must be further changed in Section 13-6. Specifically, the supervising attorney should be authorized to reduce or to deny a voucher, subject to the ultimate review -- upon request -- of the trial judge. Once a trial judge approves a voucher, it becomes a court-ordered County expense that must be paid.

Second, the County should start using the review process authorized by 22 NYCRR 127.2. That regulation provides a mechanism under County Law, Section 722-b whereby the County may seek administrative review in the NYS Office of Court Administration of any trial court order that is in excess of the statutory maximums to be paid. The statutory maximums are \$2,400 for misdemeanors and \$4,400 for all other cases. If a trial judge authorizes payment of a voucher that is in excess of these maximums, the order may be appealed by the County. The Task Force believes that this appeal procedure should only be pursued if there is substantial disagreement between the Assigned Counsel Program's supervising attorney and the trial judge.

Third, there should be systematic review by the Assigned Counsel Program and the ABIR to ensure that attorneys are not over-billing and that the vouchers on similar cases are similar in nature and amount. Acceptable norms should be established; and significant

deviations from those norms should be scrutinized and questioned.

Finally, there should be regular spot auditing of vouchers throughout the Assigned Counsel Program. As noted above, any intentional falsification of a voucher by an attorney should result in a permanent dismissal from the Assigned Counsel Program, and a referral to the appropriate disciplinary authority.

- Brief Bank:

The Assigned Counsel Program should maintain a brief bank for the panel of attorneys approved to practice on the panel. The brief bank should include all of the forms, motions, notices, petitions, etc. that regularly are used in courts. It also could include practice notes from attorneys regarding the local practices and idiosyncrasies of the different courts and judges. "Google forms" is one available mechanism for the creation of such a brief bank.

- Mentoring Program:

The ABIR, in coordination with the Assigned Counsel Program, should institute a formal mentoring program to ensure that more experienced attorneys are mentoring newer attorneys. Tompkins County has a long, rich tradition of experienced attorneys offering their time and guidance to less experienced attorneys on a voluntary basis. The Task

Force is satisfied that a more formal voluntary program can be implemented in the assigned counsel system.

- Complaint Procedure:

A formal complaint form should be created for clients' use with respect to claims of inadequate counsel, lack of professionalism, or other failings of the Assigned Counsel Program and its attorneys. Clients should be advised of the form and their right to lodge such complaints, including a possible waiver of the attorney-client privilege in connection therewith, when they are assigned the attorney. Clients should be assured that such complaints will not be reviewed by the assigned attorney, but rather by the Assigned Counsel administration and/or the ABIR Committee. However, anonymous complaints should not be considered. Upon review of such complaints, the ABIR and/or the Assigned Counsel Program should take appropriate action, including: determining whether the complaint is founded; referral for further proceedings and/or a hearing; or other administrative remedies. In all cases, the complaining client should be notified of the results of the final outcome of the complaint.

- Clustering of Assignments:

The assigned counsel office should cluster assignments in the various local courts as much as possible. However, in doing this, the assigned counsel office should not sacrifice quality of

representation. To "cluster assignments" is to assign all or most of a particular court's cases to one or more of the same attorneys in the same court. The idea is to have a different, smaller group of attorneys assigned to handle all of the assigned counsel cases in each of the local courts so as to cut down on travel and court waiting time.

(c) Clients

- Eligibility Review:

The eligibility standards and related materials of the Tompkins County Assigned Counsel Program are set forth in Appendix 3. Currently, there appears to be a fair amount of discretion on the part of the Assigned Counsel Program Administrator and the supervising attorney to deviate from these standards on a case-by-case basis. Given the uncertain nature and related extraordinary costs of legal proceedings generally, such discretion is necessary and appropriate. However, the Task Force believes that the ABIR should work with the Assigned Counsel Program Administrator and supervising attorney to fashion written, realistic guidelines for the exercise of that discretion.

- Recoupment:

When a client receives written notification that an attorney has been assigned to represent him/her, the client also should be notified by the Assigned Counsel Administrator that the program will seek repayment of all assigned counsel fees and expenses if the program determines

that the client no longer is qualified for assignment of counsel. In providing this notice, the Assigned Counsel Program must be careful not to interfere with the attorney-client relationship between the assigned attorney and the client. Any such recoupment should be by recourse to the civil courts, using customary judicial procedures.

Additionally, the Assigned Counsel Program and the ABIR should develop a fee structure and recovery mechanism for non-indigent specialty court participants that reasonably reflects the cost of participation in the specialty court program.

Finally, the County Attorney should seek to recover from responsible persons (typically parents) the cost of indigent representation that is provided to youth in cases where the responsible person would not qualify for indigent representation. (The law deems all youth eligible for assigned counsel, regardless of financial status.)

Local Courts

The Magistrate's Association should be engaged to modify local court practices in the following areas:

(a) The cases of individuals represented by counsel then and there present, whether assigned or retained, should be handled at the beginning of the Court session in order to minimize costly waiting time.

(b) The number of Court appearances and pre-trial conferences should be minimized. In this regard, monthly appearances and/or pre-trial conferences are not necessary. After an initial appearance and arraignment with counsel, the next appearance should be for argument of motions, with further appearances for trial, sentencing, etc. This procedure currently is being used in Ithaca City Court with noted efficiencies for all parties, including the court, the attorneys and the clients.

(c) Teleconferences for administrative-type appearances should be used whenever possible, in lieu of personal appearances.

As noted above, the indigent representation caseload in Tompkins County is skewed more heavily toward misdemeanor/violation cases than is the state average for the same type caseload (68% in Tompkins County vs. 55% statewide). Almost all misdemeanor/violation cases are processed in local courts as opposed to the County Court. There is room for greater efficiencies (and savings) in the handling of misdemeanor/violation cases -- from determining client eligibility to clustering assignments to monitoring vouchers to reducing unnecessary attorney time in the local courts.

Additionally, the Assigned Counsel Program should develop the annual costs per court paid by the Assigned Counsel Program and related caseload data. This information should be publicly released and distributed to the Tompkins County Legislature, the ABIR and the courts every year.

Specialty Courts

Tompkins County should explore the feasibility and cost-effectiveness of providing institutional representation in the Misdemeanor Drug Court, the Felony

Drug Court, the Family Treatment Court (Drug Court), and the Sex Offender Court. The Integrated Domestic Violence Court (IDV) should continue to use assigned counsel.

The specialty courts are putting an increasingly significant financial burden on the assigned counsel budget each year. They are growing in scope and expanding in size and use. Except in the IDV court, two attorneys typically represent all of the participants in each of these courts. The courts meet one afternoon each week. Each court session generally is preceded by two or more hours of "team" meetings involving the specialty court professionals (including the attorneys) who review the progress of each client and strategize for that client. In short, for each attorney, the specialty court assignment consumes the better part of a day. Multiplying this by the four specialty courts (excluding IDV), and factoring in the ongoing growth of these courts, produces the near equivalent of two full-time attorneys, each of whom would be paid in excess of \$100,000.00 per year at assigned counsel rates.

Under the circumstances, the County may be able to decrease these costs by contracting with a legal aid society or some other acceptable entity for the provision of these attorney services. This requires further research and analysis.

The IDV Court is not included in this suggestion because of the nature of that specialty court. The IDV Court combines cases into one court when there is a family court matter, a criminal court matter, and possibly a divorce matter -- all involving the same parties. The IDV Court puts all of these cases in front of one Judge who then can resolve the interrelated issues in a coordinated manner.

However, there is no waiver with respect to conflict of interest, and each party requires his or her own attorney.

E. Conclusion

Tompkins County should retain its current assigned counsel program. It provides quality indigent representation throughout the county at a reasonable cost. Overall, the current assigned counsel program is a better alternative to a public defender's office, a legal aid society, or any combination thereof.

There is room for improvement in the existing system. Recommended changes are set forth in this report and include more formal oversight of attorney competency and performance, more rigorous oversight of client eligibility and attorney vouchering, greater efficiency in the local courts, and implementation of a formal mentoring program as part of ongoing attorney training.

Additionally, Tompkins County should explore contracting for institutional representation in some or all of the so-called specialty courts.

SECTION 5.

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Respectfully submitted,

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/s/ Martha Robertson

/s/ Raymond Schlather, Chair

SECTION 6.

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