

## CHAPTER ELEVEN

### THE RELATIVE COST OF 18-B PANEL AND LEGAL AID SOCIETY DEFENSE SERVICES

In this chapter we examine the extent of the financial burden placed on New York City by 18-B Panel representation. Our purpose is to understand why the City of New York made no attempt to control or prevent the growth in referrals of serious felony cases to the Panel. This trend was problematic given the City's inability to cope with the escalating cost of Panel representation, and given the ostensible cost-efficiency of institutional representation. In a report prepared by a task force of the Office of Court Administration's Subcommittee on Legal Representation of the Indigent,<sup>1148</sup> and in a report by a Mayor's Commission appointed during the 1982 strike of Legal Aid Society staff attorneys,<sup>1149</sup> the City had been told that on a per-case basis, Panel representation costs up to three times as much as Society representation.<sup>1150</sup> Our

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1148. Office of Court Administration of the State of New York, Advisory Committee on Court Administration, Subcommittee on Legal Representation of the Indigent and Limited Income Groups, Report on the Legal Aid Society and the 18-B Panels (Circulating Draft, Aug. 1975) [hereinafter 1975 Report on the Legal Aid Society and on 18-B Panels].

1149. W. Mulligan, J. Gill & J. Keenan, Report and Recommendations to Mayor Edward I. Koch Concerning Future Representation of Indigent Criminal Defendants in New York City (Dec. 21, 1982) [hereinafter 1982 Report of the Keenan Commission].

1150. Similar assessments were made as long ago as 1965. See Institute of Judicial Administration Report to the Mayor of the City of New York on the Cost of Providing Defense Services for Indigent in Criminal Cases 2-3, 10-11 [hereinafter 1965 Report to Mayor on the Cost of Defense]; see also *infra* note 1151; *supra* note 380 and accompanying text. In addition, a 1978 study by the Committee on Legal Representation of the Indigent of the New York State Bar Association reported that the net cost per case for assigned counsel in the First Department (Manhattan and Bronx) was \$475.72. See Spiegler, Ding & Mendelson, *Report to the Committee on Legal Representation of Indigents in the Criminal Process*, New York State Bar Ass'n 212 (1980) [hereinafter 1980 Spiegler Report]. The findings of this study appeared to be consistent with the 1975 Report on the Legal Aid Society and on 18-B Panels, *supra* note 1148, *infra* note 1157, TABLE, and with the 1982 Report of the Keenan Commission, *supra* note 1149, *infra* note 1164 and accompanying text. The study found that the cost per case of institutional defenders in New York State ranged from a low of \$67.03 (net) in Genesee County to a high of \$530.96 (net) in Monroe County. Net cost per case was computed from a division of total expenditures by total dispositions utilizing the annual reports filed by court assigned panels and institutional defenders with the OCA. The report cautioned that:

current record-keeping and reporting practices are unsuited to the making of any meaningful comparative cost assessments or to the undertaking of any serious evaluation of the cost-effectiveness of present expenditure patterns. . . . [I]n the face of such difficulties, the staff feels that any assertions concerning per case costs, or comparative defense system costs would be unwarranted, if not unfair. . . . Without changes in the current state of reporting and accountability, and without instituting standards of performance against which defense services may be judged, the formulation of public policy in this critical area will continue to be the product of chance, caprice and crises. *Id.* at 213.

For similar conclusions drawn after an analysis of national data, see S. Singer, B. Lynch & K. Smith, NLADA Final Report of the Indigent Defense Systems Analysis Project 102 (1976) [hereinafter 1976 Indigent Defense Systems Analysis Project]. While the authors found, from a

findings, however, indicate that the Panel in fact disposed of cases more cheaply than the Society. It is not surprising, therefore, that the City administration, which traditionally has valued cost-efficiency more highly than effective adversarial representation,<sup>1151</sup> had not acted to stem the unabated growth in Panel caseloads.

The chapter begins with an analysis of the comparative per-case costs expected of each entity given the findings of the earlier reports and the Legal Aid Society's budget contentions. Next, we compare the results of this analysis with the information given to the City in the compensation claims submitted by 18-B Panel attorneys in over 13,800 cases. Then we analyze the comparative costs of Panel and Society representation in terms of the kinds of cases (Supreme Court and Criminal Court) handled by each entity<sup>1152</sup> and the method of disposition (trial and non-trial).<sup>1153</sup> We conclude with a discussion of some systemic implications regarding the present structure of the indigent defense system.

## I.

### PREVAILING ESTIMATES OF RELATIVE COST

Following the adoption of Article 18-B in 1965, two blue-ribbon panels<sup>1154</sup> advised the City of New York that the institutional method of providing representation to the indigent was substantially more economical on a per-case basis than a system of assignment of private attorneys. Both studies confirmed the City's commitment to the Legal Aid Society for they showed that, when compared with the 18-B Panel, the Society was the cheaper delivery system. Both studies undertook a comparative cost analysis, that is, an analysis of comparable case costs which each system bore. Neither study, however, disaggregated cases in terms of charge severity or method of disposition.

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review of seven jurisdictions, that the cost per case for the combined defender offices was \$42.53 as compared to \$424.69 for assigned private counsel, they cautioned that "a summary analysis of these cost per case figures reveals that a cost effectiveness assessment must take into account the scope of services provided by the defender agency and the assigned counsel, a comparison of the kinds of cases represented by each type of counsel and the method of disposition for their respective caseloads." *Id.* See also LaFrance, *Criminal Defense Systems for the Poor*, 50 NOTRE DAME LAWYER 41, 59-60 (1974).

1151. For example, the purpose of the first City-sponsored indigent defense study was to make recommendations to the City about whether the Legal Aid Society should remain the principal provider of indigent defense services. These recommendations were based upon concepts of cost-efficiency. See 1965 Report to Mayor on the Cost of Defense, *supra* note 1150, at 2-3. The City selected the Society because the IJA study reported that equivalent representation for a 12 month period by an assigned panel of private attorneys would cost the City of New York more than 10 times the annual budget of the Criminal courts' branch of the Legal Aid Society. *Id.* at 10-11. See also *supra* notes 380-84 and accompanying text.

1152. See *supra* note 985; *infra* TABLE 11-8, at 872.

1153. See *supra* TABLE 9-6, at 833, TABLE 9-7, at 833.

1154. See 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 1148; 1982 Report of the Keenan Commission, *supra* note 1149.

The first comparative analysis was undertaken in 1974 by a task force of the Subcommittee on Legal Representation of the Indigent.<sup>1155</sup> The task force compared per-case costs in terms of "gross" and "net" dispositions. Gross disposition costs were calculated by dividing total expenditures by the number of cases *assigned* to each entity. Net disposition costs were obtained by dividing total expenditures into reported *dispositions*.<sup>1156</sup> On the basis of these calculations, the Legal Aid Society proved to be more than 2½ times cheaper than the 18-B Panel.<sup>1157</sup>

The second study was conducted by the Keenan Commission during the 1982 strike by the Legal Aid Society staff attorneys.<sup>1158</sup> In comparing per-case costs, the Commission divided the expenditures into total *assignments*.<sup>1159</sup> Its findings were in line with those of the 1975 *Report on Legal Aid and on 18-B Panels*,<sup>1160</sup> and of reports from other jurisdictions.<sup>1161</sup> Moreover, it reinforced the City's view that private assigned attorneys were not a viable economic alternative to the Society.

1155. 1975 Report on the Legal Aid Society and 18-B Panels, *supra* note 1148.

1156. The problem with this method of accounting is that it relies upon each entity's procedures for reporting assignments and dispositions. The Legal Aid Society included relieved cases and double-counted felony indictments while the 18-B Panels did not. See *supra* text accompanying notes 930-33, 948-49, 954; TABLE 7-1, at 779.

1157. The following TABLE, reproduced from Appendix A-1 of the 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 1148, contains the Task Force calculations:  
TABLE: *Comparative Costs, 18-B Panel and Legal Aid Society, 1974*

	Legal Aid Society	18-B (1st Dep't)	18-B (2d Dep't)
Total expenses (including appeals)	\$16,263,796	\$1,914,363	\$1,308,335
Number of Gross Dispositions	137,213	5,913	4,754
Number of Net Dispositions	103,119	4,701	No figures available
Costs per Gross Disposition	\$117.45	\$323.75	\$272.20
Costs per Net Disposition	\$155.82	\$407.22	No figures available

(If the expense figures and numbers of net and gross disposition are accurate, the costs per gross dispositions should be \$118.53 for the Legal Aid Society and \$275.21 for 18-B Panel Second Department. Costs per net disposition should be \$157.72 for the Legal Aid Society. For an explanation of Legal Aid Society and 18-B Panel expenses, see 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 1148, at Appendix A, pages A1-A2.)

The Subcommittee on Legal Representation of the Indigent was careful to note that these figures could not be taken at their face value and that there were important differences in caseload composition between the Legal Aid Society and the 18-B Panel. 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 1148, at 25. The report noted that the Panel handled almost all homicides and a higher proportion of serious felony cases whereas the Society handled a higher proportion of misdemeanor and violation cases. *Id.* at 26.

1158. 1982 Report of the Keenan Commission, *supra* note 1149.

1159. *Id.* at 12.

1160. See *supra* note 1157, TABLE.

1161. In its analysis of studies undertaken in other jurisdictions, the Commission found that institutional defense was one third the cost of assigned counsel. 1982 Report of the Keenan Commission, *supra* note 1149, at 12; see also Single & Lynch, *Indigent Defense Systems: Characteristics and Costs*, in THE DEFENSE COUNSEL 103 (W. McDonald ed. 1983); Cohen, Semple & Crew, *Assigned Counsel Versus Public Defender Systems in Virginia: A Comparison of Relative Benefits*, in THE DEFENSE COUNSEL 127 (W. McDonald ed. 1983).

In New York City the average cost per case handled by the Legal Aid Society for fiscal 1981 and 1982 is reported by the Society at \$180.94 and \$199.87 respectively. Based on Office of Court Administration data, the average cost per 18-B panel case in 1981 was \$306.62 in the First Department and \$347.11 in the Second Department.<sup>1162</sup>

The Legal Aid Society's own case-cost estimates were consistent with the 1975 and 1982 reports. The Society claimed to represent all eligible defendants for approximately \$170 per case.<sup>1163</sup> The Society's Special Assistant in Charge of Planning and Management explained how this figure was determined: "Our current budget submission [for February 1985] reflects a cost per case of \$170; a similar cost per case could have been obtained from our Annual Report by simple division of our expenditures by our assignments."<sup>1164</sup>

## II.

### IMPUTED KNOWLEDGE — ACTUAL CASE COSTS OF 18-B PANEL REPRESENTATION

One would expect that knowledge of the 18-B Panel's caseload of over 34,000 assignments and its position as an equivalent provider in Supreme Court would be problematic for the City based on its concern for cost-efficiency.<sup>1165</sup> Three related concerns logically should have motivated the City to

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1162. *Id.*

1163. See Legal Aid Society, Budget Submission to the City of New York for Fiscal Year 1986 at 7 (Jan. 28, 1985) [hereinafter FY 1986 Legal Aid Budget]. In its budget submission for fiscal year 1986, the Legal Aid Society stressed its cost efficiency when requesting that the City appropriate \$35,040,000 as its *major* contribution, see *infra* notes 1202-03 and accompanying text, to the Criminal Defense Division: "The expenditure of \$35,040,000 for Criminal Defense Division representation in FY 1986 assures a better return for the City of New York for concurrent expenditures for police, prosecution, probation and correction. The benefit-cost ratio of Society representation compares favorably with its counterparts, approximating \$170 per case for all services provided at the trial level." FY 1986 Legal Aid Budget, *supra* note 1163, at 7. The Society's contentions are in line with the most recent national data on the average cost-per-case for all indigent defense systems. See R. SPANGENBERG, B. LEE, M. BATTAGLIA, P. SMITH & A. DAVIS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY, FINAL REPORT '79-84 (1984) [hereinafter 1984 CRIMINAL DEFENSE SYSTEMS STUDY]. In that study, over 88% of 900 programs surveyed responded with an average cost-per-case of \$195.97. The average cost-per-case in New York State was estimated at \$210.50. *Id.* at 81. However, the authors cautioned, regarding the reliability of the data: "in the early stages of data collection effort, it became obvious . . . that we would be unable to collect reliable data for each case type from all programs in our sample. Many programs reported that they simply did not disaggregate their caseload data by type of case." *Id.* at 79.

1164. See Harold S. Jacobson, Assistant Attorney for Planning and Management of the Legal Aid Society, Internal Memorandum (Feb. 14, 1985) [hereinafter 1985 Jacobson Memorandum].

1165. The growth in 18-B Panel representation did not escape the notice of those in City government concerned with criminal justice administration. See *infra* text accompanying notes 1234-37. For over 3 years, the OCA analysis of citywide dispositions revealed that the Panel had become an equivalent provider in Supreme Court. See *supra* TABLE 7-2, at 782. In addition, the Panel administrators had been cataloguing the growth in Panel representation in felony cases since 1965 in their annual reports to OCA. See *supra* note 738 and accompanying

stem the flow of cases to the Panel. First, the City had no control over dollar amounts that individual Panel attorneys claimed, and therefore over the total costs of Panel representation, since under Article 18-B judges were charged with authorizing payment of services to assigned counsel.<sup>1166</sup> Second, no standards had evolved which governed the movement of cases from the Society to the Panel.<sup>1167</sup> Third, not only had the Panel become an equivalent provider in *indicted* felony cases, but compared to the Society, it tried a higher proportion of cases involving the greatest expenditure of money.<sup>1168</sup>

The City's failure to act despite this evident fiscal reality strongly suggests that the 18-B Panel had not in fact imposed a great financial burden. Consistent with this, when we analyzed over 13,800 compensation vouchers covering claims for Panel representation between 1983 and 1985,<sup>1169</sup> we found that Panel attorneys were a relatively inexpensive means by which the City disposed of large numbers of felony cases. As *Table 11-1* indicates, the mean claim for all Panel representation was only \$310.27. Nearly 60 percent of the cases claimed were for non-homicide felony assignments. These felonies, on the average, cost the city \$378 — only half of the sum allowable by statute. Most of the remainder (37.3 percent) were primarily misdemeanors. Their mean claim of \$145.60 constituted well under a third of the allowable maximum.<sup>1170</sup>

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text. Finally, New York City's Office of the Comptroller must have known the number of cases Panel attorneys handled, because under Article 18-B, since 1966, it was making payment of attorney compensation claims. See N.Y. COUNTY LAW § 722(a) (McKinney 1972); TABLE 3-1, at 665.

1166. N.Y. COUNTY LAW § 722(b) (McKinney 1972).

1167. See Agreement Between the City of New York and the Legal Aid Society, app. 2(c), para. Second, at 933. (Aug. 6, 1966) [hereinafter 1966 Agreement]; Plan of the Association of the Bar of the City of New York, Bronx County Bar Ass'n, Brooklyn Bar Ass'n, Queens County Bar Ass'n & Richmond County Bar Ass'n (approved by the Judicial Conference of the State of New York, Apr. 28, 1966) (adopted pursuant to Article 18-B of the County Law), reprinted *infra* app. 2(b), art. I(1), at 925 [hereinafter 1966 Bar Association Plan]. See also *supra* note 394 and accompanying text; *infra* text accompanying note 1238.

1168. See TABLE 9-6, at 833; TABLE 9-7, at 833.

1169. See *supra* pp. 708-09.

1170. The maximum allowable compensation in effect at the time of our study was \$1,500 for representation in capital offenses (homicide), \$750 for felonies and \$500 for other crimes. See Act of 1978, c. 700, § 1, 1978 N.Y. Laws 878.

TABLE 11-1: *18-B Panel Claims for Compensation, By Category of Offense, 1983-1985*<sup>1171</sup>

<u>Offense</u>	(All methods of dispositions)			
	<u>\$ Sum of Total Claims</u>	<u>Number of Cases</u>	<u>% of Total Cases</u>	<u>Mean \$ Claim</u>
Homicide	396,109.00	303	2.2	1307.29
Other Felony	3,128,969.00	8,268	59.9	378.44
Misdemeanor	748,801.65	5,143	37.3	145.60
Violation	8,740.50	89	0.6	98.21
Total	\$4,282,620.15	13,803	100.0	\$ 310.27

This analysis reveals two explanations for the low cost of the average 18-B Panel case. First, the same factors that combined to reduce the quality of Panel representation—the virtual absence of any significant out-of-court preparation<sup>1172</sup>—were also responsible for minimizing its costs. At the statutory compensation rate of \$15 per hour, the mean claim for out-of-court activities scarcely amounted to four hours per case.

TABLE 11-2 *Breakdown Of 18-B Panel Claims Between In-Court and Out-of-Court Activity and Expenses, 1983-1985*<sup>1173</sup>

<u>Type Of Claim</u>	<u>Dollar Amount of Claim</u>	<u>Mean Claim</u>
In-Court	\$3,421,710.25	\$245.55
Out-of-Court	\$868,206.00	\$62.30
Expenses	\$20,952.00	\$1.50
Total	\$4,310,868.25	\$309.36

Second, 94 percent of the cases in the voucher sample were disposed of by guilty plea or other non-trial disposition,<sup>1174</sup> and hence resulted in claims for substantially less than the allowable compensation.<sup>1175</sup>

1171. Excluded from *Table 11-1* are claims (n=253) for representation in special proceedings and vouchers (n=63) that could not be classified because the charge was not included within the attorney's compensation claim.

1172. See *supra* TABLE 6-2, at 759; TABLE 6-3, at 763; TABLE 6-6, at 767, TABLE 6-9, at 773.

1173. The following *Table 11-2* breaks down the claims between in-court and out-of-court activities without regard to charge severity and method of disposition.

1174. See *supra* note 820, TABLE B.

1175. Our analysis of the mean claim for over 13,800 vouchers, when controlling for charge severity and method of disposition, demonstrates that the mean claim for felonies disposed of by guilty pleas (\$343.05) is approximately one-half the claim allowed by statute (\$750). The mean claim for misdemeanors disposed of by guilty pleas (\$134.34) is little more than one-fourth the claim allowed by statute (\$500). See *supra* note 1170.

TABLE 11-3: *Mean 18-B Panel Claims By Offense And Method of Disposition, 1983-1985*

Method of Disposition	Mean Dollar Claim By Offense			
	Homicide	Other Felony	Misdemeanor	Violation
Trial	\$2770.90	\$1803.02	\$626.96	\$101.55
Plea	\$942.51	\$343.05	\$134.34	\$100.50
Other Disposition	\$494.74	\$209.54	\$139.54	\$97.21

## III.

THE COMPARATIVE COSTS OF 18-B PANEL AND LEGAL AID  
SOCIETY REPRESENTATION

Given the extra burden that trials impose on the City of New York, and the fact that the 18-B Panel brought over twice the number of Supreme Court cases to trial than the Legal Aid Society,<sup>1176</sup> the City may have been expected to enhance the cost-efficiency of indigent defense by requiring the allegedly cheaper defense entity, the Society, to stop shedding cases that result in trial dispositions.<sup>1177</sup> For example, the City could have done this by setting standards for the selection of cases at arraignment to ensure that the Society took the defendant facing comparatively more severe charges. Instead, the City had done nothing to police the system and to ensure such a result. Its indifference suggests what our research confirmed — that Panel representation was actually less costly than Society representation.

The City's inaction is not the only factor indicating that the assigned counsel system provided indigent defense more cheaply than the Legal Aid Society. In 1984, only five states had a lower hourly rate of compensation for assigned counsel than New York State.<sup>1178</sup> Furthermore, Article 18-B and the

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1176. See *supra* TABLE 9-6, at 833.

1177. For an analysis of the Society's case-selection practices, which affected the proportionate number of trial cases referred to the 18-B Panel, see *supra* pp. 820-31; TABLE 9-2, at 826; TABLE 9-3, at 827; TABLE 9-4, at 828; and TABLE 9-5, at 829.

1178. See NEW YORK STATE DEFENDERS ASS'N, ASSIGNED COUNSEL FEES IN NEW YORK STATE: TIME FOR A CHANGE 3 n.17 (1985) [hereinafter 1985 NYSDA ASSIGNED COUNSEL FEES REPORT]. Legislators increased the compensation rate only once (1978) during the 20 year period following the enactment of the statute. See 1978 N.Y. Laws, c. 700, § 1 (codified as amended at N.Y. COUNTY LAW § 722(b) (McKinney Supp. 1987)). By contrast, national standards require that assigned counsel should be adequately compensated and that fees should be "related" to the prevailing rate for private attorneys performing the same services, see NLADA GUIDELINES FOR LEGAL DEFENSE SYSTEMS FINAL REPORT, Guideline 3.1, at 511 & 271-72 (1976) [hereinafter 1976 NLADA GUIDELINES], the rates in New York State were lower than all but five states in the United States. When compared with hourly billing rates for private attorneys and paralegals in the Eastern part of the United States, the inexpensive nature of the 18-B Panel system is further accentuated. In 1983, paralegals were billed at an hourly rate (\$36) which exceeded the hourly Panel rate for in-court work (\$25). Private attorneys received fees which ranged from \$58 (under two years experience) to \$129 per hour (21 or more years of experience). See Altman and Weil, Inc., *The 1984 Survey of Law Economics*, cited in 1985 NYSAA ASSIGNED COUNSEL FEES REPORT, *supra* at 4. The Table below illustrates these rates in greater detail.

Rules of the Appellate Division preclude reimbursing attorneys for rent, office equipment, office maintenance, and organized support services, such as secretaries and paralegals.<sup>1179</sup> Although compensation for investigators and experts is provided on an ad hoc basis, such personnel were rarely used<sup>1180</sup> and were subject to a \$300 statutory cap.<sup>1181</sup> By contrast, the City allocated funds to the Society for support staff, investigators, and certain in-house experts.<sup>1182</sup> In addition, City appropriations provided funds for more than 70 full time managers and supervisors<sup>1183</sup> to coordinate the Society's activities.

Therefore, in reassessing the per-case cost of each defense entity we began by calculating an appropriate denominator (the number of cases handled to completion by each defense entity) and numerator (the total expenditures of

TABLE: *Hourly Billing Rates for Private Attorneys in the Northeastern U.S., 1983*

<u>Legal Experience</u>	<u>Average Hourly Billing Rate</u>
Paralegals	\$36
Under 2 years	\$58
2-3 years	\$67
4-5 years	\$83
6-10 years	\$91
11-20 years	\$118
21 or more years	\$129

*Id.*

When the years of experience required for certification to the homicide and felony 18-B Panel is taken into account, the disparity between the market rate and the mean claim is further evident. *See* General Requirements for Certification to the Indigent Defendant Legal Panels in the Appellate Division First Dep't (on file with Administrator's Office 1st Dep't), *pursuant to* N.Y. COMP. CODES R. & REGS. tit. 22, § 612 (1980) [hereinafter General Requirements of Certification]; *see supra* note 593. The mean claim for homicide-certified attorneys (five years' experience) represents, at most, 16 hours of comparable private attorney billing time, while the mean claim for felony-certified attorneys (five years' experience) represents 4.6 hours of private attorney time. General Requirements of Certification, *supra*. The mean claim for misdemeanor certified attorneys (3 years' experience) represents slightly more than 2 hours of private attorney time. *Id.*

1179. The 1966 Bar Association Plan and the regulations promulgated by the Appellate Division preclude reimbursement for these expenditures. *See* 1966 Bar Association Plan, *supra* note 1167, art. VI, at 930. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 606.3 (1980); *supra* note 415 and accompanying text.

1180. *See supra* TABLE 6-3, at 763.

1181. *See* N.Y. COUNTY LAW § 722(c) (McKinney 1986); *see also* N.Y. COMP. CODES R. & REGS. tit. 22, § 606.2 (1980); *see also supra* note 874 and accompanying text; *supra* note 361. In 1984, the First Department Panel expended \$542,410 for investigators and experts. *See* Report UCS-195 (1984) (18-B 1st Dep't). This figure includes the cost of investigations as well as the compensation awarded these individuals.

1182. Agreement Between the City of New York and the Legal Aid Society (Sept. 6, 1966), reprinted *infra* app. 2(c), para. First, at 933. [hereinafter 1966 Agreement]; *see also supra* note 388 and accompanying text. While the salaries paid the Society investigators in 1984 were subsumed under professional staff salaries (\$20,775,892), the cost of investigations and expert witnesses involved an additional \$229,758. LEGAL AID SOCIETY, 1984 ANNUAL REPORT 58 (1984). As of February 1986, the Society reported a support staff of 504 individuals. *See* Report UCS-195 (1985) (Legal Aid Society).

1183. *See* Legal Aid Society, Budget Submission to the City of New York for Fiscal Year 1984, at 2 (Jan. 11, 1983), where the Society requested funds for 86 supervisors. *See* FY 1986 Legal Aid Budget, *supra* note 1163, at 3, where the Society sought funding for 79 "field" supervisors.



each entity attributable to criminal defense services). We then refined the analysis by weighting cases according to offense type and method of disposition. Finally, we compared the two entities on a cost-per-case basis.

*A. Calculating an Appropriate Denominator: The Number of Completed Cases Handled by Each Defense Entity*

Before reaching our own cost estimates for the year 1984, we needed a standard measure of what constituted a "caseload." "Gross dispositions," as reported to OCA, did not provide such a measure.<sup>1184</sup> For example, the Society's reported "gross dispositions" included "arraignment only" cases but failed to report that those cases were immediately reassigned to the 18-B Panel.<sup>1185</sup> In contrast, the Panel administrators omitted all arraignment cases and reported those cases in which the Panel had been relieved.<sup>1186</sup> Furthermore, as we indicated in Chapter Seven, the Society counted each criminal court felony assignment that resulted in a Supreme Court indictment twice, while the Panel administrators counted each felony assignment only once.<sup>1187</sup>

Because neither gross dispositions nor number of assignments afforded a comparable measure,<sup>1188</sup> we analyzed "final dispositions," which permitted a comparison between the number of cases both entities represented to completion and their relative time and expenditures.<sup>1189</sup> We defined final dispositions

1184. See *supra* pp. 776-81.

1185. See *supra* text accompanying notes 930-37. The Legal Aid Society's practice over the past ten years of not reporting relieved cases and cases in which the defendant absconded, TABLE 7-1, at 779; *supra* note 941 and accompanying text, changed following the filing of our Draft Report. In its annual report for calendar year 1985 the Society listed a total of 40,171 relieved cases (combined Criminal Court and Supreme Court) and 18,121 cases in which the defendant absconded. Report UCS-195 (1985) (Legal Aid Society).

1186. See *supra* text accompanying note 928; *infra* pp. 864-65.

1187. See *supra* pp. 779-80.

1188. The unreliability of these data, which the City received from the Society's OCA reports, is similar to that encountered in other jurisdictions where researchers have sought to compare expenditures of a judicare system of assigned counsel in civil claims with a staffed office of institutional defenders. See S. BRAKEL, JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS AND POOR PEOPLE 113 (1974), where the author states:

At the core — methodologically — of these various misleading efforts has been the cost-per-case analysis. This method of evaluating program costs has been employed in various ways and with various results, sometimes lumping all cases together, at other times selecting among 'comparable' cases and dividing by the number of cases to obtain an 'average' cost per case.

*Id.* at 113. See, e.g., Goodman and Feuillan, *Alternative Approaches to the Provision of Legal Services for the Rural Poor: Judicare and the Decentralized Staff Program* 141-43 (Washington, D.C.: Bureau of Social Science Research, Inc., 1972), cited in S. BRAKEL, *supra*, where research found staff attorney costs to be significantly cheaper than reimbursement to individual lawyers. That analysis, however, compared "the costs of complex, fully litigated cases to the costs of a piece of simple advice . . .," S. BRAKEL, *supra* at 114.

1189. For our analysis of final Legal Aid Society and 18-B Panel dispositions, see *supra* note 986. To determine the difference in time to completion between final dispositions, we analyzed OCA time records in Criminal Court and Supreme Court. These records measure the average time to disposition in terms of appearance dates for completed cases, i.e., cases involving a plea dismissal, and acquittal or conviction after trial. See Criminal Court of the City

to include dismissals, guilty pleas, acquittals, trial convictions and appeals.<sup>1190</sup> We excluded double-counted felonies and "arraignment only" cases, as well as cases in which representation was terminated by reason of conflict of interest, lack of client cooperation, non-indigency, an absconded defendant, or transfer to another jurisdiction.<sup>1191</sup> For calendar year 1984, 16 percent of the 18-B Panel's "gross dispositions" and one-third of the Legal Aid Society's gross dispositions were excluded.<sup>1192</sup> Thus defined, the Society's "net" dispositions for 1984 amounted to 128,157,<sup>1193</sup> and the Panel's to 26,664.<sup>1194</sup>

Because the Legal Aid Society's net disposition figures included cases (71,836) completed at arraignment<sup>1195</sup> while the 18-B Panel administrator's disposition figures did not, it remained to determine the number of Panel cases disposed of at Criminal Court arraignment. Initially, we determined the number of arraignment shifts to which Panel attorneys were appointed. In

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of New York, Caseload Activity Report — Arrest Cases (1984) [hereinafter 1984 Caseload Activity Report — Arrest Cases]; Office of Court Administration of the State of New York, Supreme Court Criminal Term Disposition Report (1984) [hereinafter 1984 OCA Criminal Term Disposition Report]. *See also infra* notes 1227-1228. The only measure of the comparative time expended as between different methods of disposition is contained in our analysis of the mean claim for trial dispositions and guilty pleas in over 13,800 Panel vouchers. *See supra* TABLE 11-3, at 858. We estimated that the time expended for an appeal was comparable to the time expended in the disposition of a trial case in Supreme Court.

1190. *See supra* notes 958, 985. The 18-B Panel administrators included the cost of appeals within the total expenditures reported to OCA and did not differentiate between appellate and trial level expenditures as the Legal Aid Society did. We were therefore required to include appellate expenditures in our overall cost comparison. In 1984, the Panel handled 38% of all indigent appeals (823 out of 2151) while the Society handled 62 percent (1328). *See infra* TABLE 11-5, at 864.

It must be noted, however, that between 1984 and 1986 the Legal Aid Society's Criminal Appeals Bureau grew by more than 43 percent, from 94 to 135 staff attorneys. *See* Legal Aid Society, Budget Submission to the City of New York for Fiscal Year 1987 (rev. Mar. 17, 1986) 26. In 1984 the Society expended \$6,222,009 on its Criminal Appeals Bureau while bringing 1,328 appeals to final disposition. *See* Legal Aid Society, Reply Memorandum to McConville and Mirsky Draft Report at 44-45 (Oct. 1, 1985) [hereinafter 1985 Reply Memorandum]. While appellate dispositions represented only 1 percent of the Society's total final dispositions (*i.e.*, 1,328 of 128,157), *see infra* TABLE 11-5, at 867, expenditures on them amounted to 15% of overall costs attributable to the Criminal Defense Division in New York State. *See infra* p. 865. On a per disposition basis, the Society allocated \$4,685 for each appeal, over three times the ordinary compensation provided to 18-B Panel attorneys for appeals of capital offenses (\$1,500), and over six times that allocated to Panel attorneys for appeals of other felonies (\$750). *See supra* note 1170.

1191. *See supra* pp. 775-78.

1192. Report UCS-195 (1984) (18-B 1st Dep't); Report UCS-195 (1984) (18-B 2d Dep't); Report UCS-195 (1984) (Legal Aid Society).

1193. *See infra* TABLE 11-8, at 872; *see supra* note 986. The figure reported to OCA by the Legal Aid Society was 194,995 "gross dispositions." *See* Report UCS-195 (1984) (Legal Aid Society).

1194. Excluding arraignments there were 17,723 final dispositions in the First Department and 8,941 in the Second. *See infra* TABLE 11-8, at 872; *see supra* note 986. The "gross disposition" figure reported to OCA by the administrators was 31,996. Report UCS-195 (1984) (18-B 1st Dep't); Report UCS-195 (1984) (18-B 2d Dep't). Contrary to the administrators' notes appended to the annual return, dispositions did not include cases handled in the arraignment parts by 18-B Panel attorneys.

1195. *See infra* TABLE 11-8, at 872; *see also supra* note 986.

1984, the Panel administrators appointed Panel attorneys to 1,650 rotational arraignment shifts in the First Department and 1,786 in the Second Department.<sup>1196</sup> We took into account the possibility that some attorneys did not appear for their appointed shifts, and conservatively estimated that Panel attorneys handled 1,500 shifts in each Department. This estimate excluded all *judicial* appointments which for some 10 percent of Panel attorneys who accepted arraignment appointments accounted for substantially more arraignment shifts than those appointed by the Panel administrator.<sup>1197</sup> The precise number of such judicial appointments was not recorded.

We further estimated the number of cases which were disposed of at each arraignment shift. Our survey of arraignment appearances in New York County revealed that over a randomly selected thirty-seven day period, 118 18-B Panel attorneys handled 954 cases at arraignment.<sup>1198</sup> This averaged 8.1 cases per attorney appearance. We conservatively estimated that each Panel attorney disposed of three of these eight cases.<sup>1199</sup> Extrapolating from this estimate, assigned Panel attorneys disposed of roughly 9,000 cases (4,500 per Department) at arraignment in Criminal Court during 1984.

Taking into account all cases completed at arraignment city-wide, 18-B Panel attorneys accounted for 35,664 final dispositions as compared with 128,157 final dispositions completed by the Legal Aid Society.<sup>1200</sup>

### *B. Calculating the Numerator: Defense Entity Expenditures*

Of the two defense entities, only the Legal Aid Society, in its budget submissions to New York City, explicitly defined its cost per case. The Society obtained its per case cost of \$170 by dividing the City's major contribution by the number of reported assignments.<sup>1201</sup> Excluded from consideration, however, were the contributions New York State and New York City made through supplemental programs designed to ease the financial burden in serious felony cases.<sup>1202</sup> These funds accounted for more than thirty percent of all

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1196. See, e.g., *supra* TABLE 8-2, at 798; *supra* note 1016.

1197. See *supra* TABLE 8-3, at 800.

1198. See *supra* notes 1036-39 and accompanying text.

1199. The 18-B Panel Administrator, Second Department, reports that an estimated six cases are disposed of daily by each of the 1,768 Panel attorneys who submitted vouchers for their daily arraignment shifts. Report UCS-195 (1984) (18-B 2d Dep't) at 2.

1200. See *infra* TABLE 11-8, at 872; *supra* note 986.

1201. See *supra* note 1163 and accompanying text.

1202. In fiscal year 1984, the Legal Aid Society's independent certified audit reported that funds awarded by New York City, New York State, and the federal government to the Society for its Criminal Defense Division expenditures amounted to \$41,033,576. See LEGAL AID SOCIETY, 1984 ANNUAL REPORT 58 (1984). The City's "major" contribution was \$27,218,682. The Society also received from New York City and New York State \$937,779 in Special Narcotics funding and \$2,058,107 in Emergency Felony funding. Information provided by New York City's Office of Budget Management. These special contributions are not reflected in the budget estimates used by the Legal Aid Society to compute its costs per case. Similarly, the Society received, but did not apply to its cost per case computations, \$10,171,533 in State funds through the Target Crime Initiative Program. See Letter from Archibald R. Murray, Executive Director of the Legal Aid Society, to the Committee on Criminal Advocacy of the Association of the

Criminal Defense Division expenditures.<sup>1203</sup>

Furthermore, OCA instructed both defense entities — in their annual reports — to include all expenditures for each calendar year.<sup>1204</sup> Yet the Legal Aid Society failed to report twenty-three percent of its attributable costs included within its independent certified audit.<sup>1205</sup> In contrast, the 18-B Panel reported all but three percent of its expenditures.<sup>1206</sup> It was necessary, therefore, to reconstruct the expenditures of both entities to determine actual costs.

### 1. *Legal Aid Society's Expenditures*

For calendar year 1984, the Legal Aid Society recorded in its annual report to OCA expenditures of \$31,885,385,<sup>1207</sup> consisting of the following line items:

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Bar of the City of New York at 7 (Oct. 22, 1985) [hereinafter Oct. 1985 Murray Letter]. In contrast, the 18-B Panel does not receive any supplemental funding and attorneys are compensated entirely through the City's miscellaneous budget.

1203. State funds contributed through the Target Crime Initiative Program alone amounted to 24.8% of the total Criminal Defense Division expenditures. *See supra* note 1202. Contributions from the Emergency Felony and Special Narcotics funds, *see id.*, were 5.0% and 2.3%, respectively, of the total Criminal Defense Division expenditures. These three supplemental contributions amounted to 32.1% of Criminal Defense Division expenditures. *Id.*

1204. OCA's instructions related to each of the enumerated categories of expenses appear under the general heading "Cost of Operation of Plan." Administrative expenses include "rent, furniture, supplies, maintenance, heat, electricity, insurance, health insurance, etc." Other legal expenses include "travel, printing, photography, etc. incurred in connection with specific cases." *See* Office of Court Administration, State of New York, Instructions to Form UCS-195 (rev. Dec. 1983).

1205. *See* the independent certified audit contained within the LEGAL AID SOCIETY, 1984 ANNUAL REPORT 56-59 (1984), and compare it with Report UCS-195 (1984) (Legal Aid Society). The Annual Report is separately published and presented to the Society's Board of Directors. It is not appended to the Society's annual report to OCA, *see* Report UCS-195 (1984) (Legal Aid Society).

The Legal Aid Society's practice of substantially under-reporting its annual expenditures to OCA changed following the filing of our Draft Report. In its report to OCA for calendar year 1985, the Society reported \$48,791,565 (an additional 17 million dollars over 1984). It appended the following statement of explanation: "Report is not comparable with prior year's submissions; funding is included from all sources with the exception of the Federal Defender Services Unit . . . ." Report UCS-195 (1985) (Legal Aid Society), at 2.

1206. For an analysis of the total expenditures reported by the 18-B Panel to the OCA, *see* TABLE 11-4, at 864; Report UCS-195 (1984) (1st Dep't); Report UCS-195 (1984) (2d Dep't). For an analysis of the 18-B Panel's hidden expenses, *see infra* TABLE 11-7, at 869; notes 1221-23 and accompanying text.

1207. Report UCS-195 (1984) (Legal Aid Society).

TABLE 11-4: *Legal Aid Society Expenditures Reported to OCA, 1984*

(a) Professional staff salaries	\$20,775,892
(b) Support staff salaries	8,450,617
(c) Expert costs	228,758
(d) Other legal expenses <sup>1208</sup>	549,396
(e) Administrative expenses	<u>1,880,722</u>
Total	\$31,885,385

Contrary to the OCA instructions, the \$31,885,385 total omitted such items as health insurance, rent, furniture, heat, electricity, insurance and travel. We nevertheless found the following omitted expenses in the Legal Aid Society's certified audit.<sup>1209</sup>

TABLE 11-5: *Legal Aid Society Expenditures Not Reported to OCA, 1984*

(a) Fringe benefit and other employee costs	\$7,015,158
(b) Occupancy costs	1,681,432
(c) Purchases and leases of office equipment	607,280
(d) Administrative support services <sup>1210</sup>	<u>1,589,603</u>
Total	\$10,893,473

In re-computing the Legal Aid Society's total expenditures, we deducted the cost of the operation of the federal courts branch of the New York City Federal Defender's Services Unit (\$1,438,971), which was not funded by New York City or New York State.<sup>1211</sup> Thus the estimated attributable expenditures in calendar year 1984 were \$41,339,887 — \$9,453,502 more than the Society reported to OCA. A proper comparative analysis with the 18-B Panel, however, required us to deduct another \$1,346,379 for services not provided

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1208. Our analysis of the Legal Aid Society's independent certified audit enabled us to determine the origins of certain expenditures reported to OCA. 1984 LEGAL AID SOCIETY ANNUAL REPORT, *supra* note 1202, at 58. The "Other Legal Expenses" item contained in the Report UCS-195 (1984) (Legal Aid Society), consists of the costs of law books and reference materials (\$224,474) and trial minutes (\$324,922). *Id.* at 58-59. Administrative expenses contained in the UCS-195 are not explained but presumably include communication expenses (\$736,171) and office operation expenses (\$735,032). *Id.* at 58.

1209. 1984 LEGAL AID SOCIETY ANNUAL REPORT, at 58-59.

1210. Because the Legal Aid Society's independent certified audit did not apportion the cost of administrative services (\$2,661,650) according to division (Criminal Defense Division, Civil Division), *id.* at 59, we initially computed its attributable costs (\$1,996,237) based upon a 75 percent pro rata share for the Criminal Defense Division (75 percent of the cost and effort of the Legal Aid Society is concentrated in the Criminal Defense Division). *Id.* at 58. In its response to our Draft Report, however, the Society attributed \$1,589,603 for administrative expenses. See 1985 Reply Memorandum, *supra* note 1190, at 44-45.

1211. By deducting the entire amount allocated for the Federal Defender's Unit, however, we understate the actual cost of the Criminal Defense Division within New York City. This is because the staff salaries (\$20,775,892) recorded in the Legal Aid Society's annual report to OCA already exclude salaries paid to attorneys in the federal unit. See Report UCS-195 (1984) (Legal Aid Society), TABLE 11-4, at 867.

by the Panel.<sup>1212</sup> Thus, for purposes of this analysis, the Society's total 1984 expenditure was \$39,993,508.

## 2. 18-B Panel Expenditures Reported to OCA, Citywide, 1984

For calendar year 1984, the administrators of the First and Second Departments reported total expenditures of \$13,483,292.<sup>1213</sup> These expenditures included the following:

TABLE 11-6: 18-B Panel Expenditures, Citywide, 1984

	<u>First Dep't</u>	<u>Second Dep't</u>
(a) Attorneys	\$7,342,339 <sup>1214</sup>	\$5,030,729
(b) Investigators and Experts <sup>1215</sup>	424,451	117,959
(c) Administrative Salaries	357,171	160,398
(d) Administrative Expenses	22,245	28,000
Total	\$8,146,206	\$5,337,086

The citywide sum of \$13,483,292 omitted certain "hidden" expenses incurred in the administration of the 18-B Panel system. These expenses were derived from Appellate Division records, and were not listed as line items by the Panel administrator's office.<sup>1216</sup> They included the administrator's rent, the cost of administering the assignment system, editing and publishing an advocacy manual, and fringe benefits for clerical employees. They were calculated as follows:

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1212. The total expenditures for the Society included the following special support units, for which there was no comparable 18-B Panel service:

(a) Post Conviction Services (Sentence Commutation and Habeas Unit)	\$272,670
(b) Special Litigation (Test Case and Systemic Litigation)	234,054
(c) Parole Revocation (Preliminary and Final Revocation Hearing)	839,655
Total	\$1,346,379

Oct. 1985 Murray Letter, *supra* note 1202, at 8; 1985 Reply Memorandum, *supra* note 1190, at 44.

In our Draft Report we excluded the cost of the Special Defender Services Unit (diversion and pre-sentence), \$934,188, and of the Prison Legal Assistants Program (para-legal communication with detained defendants), \$795,703. We included these expenditures here because 18-B Panel attorneys must provide these services regardless of the fact that they do not receive organized support of the type provided the Legal Aid Society's staff attorneys. The result was to increase the Society's comparative expenditures by \$1,729,891. *Id.*

1213. Report UCS-195 (1984) (18-B 1st Dep't); Report UCS-195 (1984) (18-B 2d Dep't).

1214. The UCS-195 (1984) (18-B 1st Dep't) records attorney expenditures in the amount of \$8,503,075. Of these, \$1,176,136 were for Family and Surrogate's Court matters, leaving a net of \$7,342,339 for 18-B Panel criminal matters. See Report UCS-195 (1984) (18-B 1st Dep't), Addendum at 3.

1215. The monies expended on 18-B Panel investigations included Family Court and Surrogate Court assignments. It is not possible, therefore, to precisely state the exact amount of money allocated for criminal matters, except that the expenditures reported overstate the actual cost of Panel representation in criminal matters.

1216. See Report UCS-195 (1984) (18-B 1st Dep't), Addendum Item VI.

TABLE 11-7: *18-B Panel Expenditures Not Reported to OCA, Citywide, 1984*

(a) Rent, postage, etc.	\$108,075
(b) Office of Projects Development	31,600
(c) Fringe benefits and other employee costs	<u>127,557</u>
Total	\$267,232 <sup>1217</sup>

From this sum, it was necessary to deduct \$75,059 for expenses related to Family and Surrogate Court matters.<sup>1218</sup> Thus the actual operating costs of the First Department Panel, \$8,338,379, were higher by \$192,173 than the figure reported in the OCA return.

It was not possible to obtain detailed breakdowns of the same kind for the Second Department because exact figures were undocumented. On the basis of discussions with the 18-B Panel administrator and his staff,<sup>1219</sup> we concluded that there would be little change in the amount reported to OCA because (a) a higher proportion of time and cost was attributable to non-criminal matters as compared to the First Department; (b) administrative expenses such as rent, telephone, postage and duplication, were lower; and (c) the Second Department did not publish and edit its own manual in trial advocacy. It seemed fair to conclude, however, that some additional costs must be attributed to the Second Department. We adjusted its total expenses by approximately \$110,000, for a total sum of \$5,450,000.

Therefore, the total comparative expenditures for the First and Second Department 18-B Panels, for 1984, were approximately \$13,788,379.

### C. *Refining the Analysis: Weighting Cases*

Simply dividing total caseload into total expenditures would provide an accurate cost per case if the cases of both defense entities were of the same average complexity and difficulty. If, however, they were not, then we would be comparing the per-case cost of processing "easy" cases with that of processing "hard" cases.<sup>1220</sup> The same problem can also arise if the two defense entities responded to the lawyering tasks involved in the same case in different ways.<sup>1221</sup> The method used to deal with these variations among cases is called "case weighting," a means of standardizing all cases in terms of fixed baseline measures.<sup>1222</sup>

1217. These expenses were provided by the Administrative Assignment Clerk of the First Department in telephone conversations with the authors in April and May, 1985.

1218. *Id.* This amount is attributed to the salaries paid assignment clerks whose function is to staff the Family Court rotational system.

1219. This information was provided by the Second Department Panel Administrator, George M. Spankos, and his staff, in telephone conversations with the authors in April and May, 1985.

1220. *See, e.g.*, the Society's case selection practices, analyzed in *supra* TABLE 9-1, at 821; TABLE 9-2, at 826; TABLE 9-3, at 827; TABLE 9-4, at 828; and TABLE 9-5, at 829.

1221. *See, e.g., supra* TABLE 9-6, at 833; TABLE 9-7, at 833.

1222. *See* Jacoby, National Legal Aid and Defender Ass'n, Case Weighting Systems for

In the absence of the Legal Aid Society's individual staff attorney caseload records, which might have enabled us to construct time and work records similar to those of 18-B Panel attorneys,<sup>1223</sup> we utilized baseline measures central to all case weighting systems.<sup>1224</sup> From data collected by OCA,<sup>1225</sup> and from our analysis of over 13,800 Panel vouchers,<sup>1226</sup> we distinguished among cases according to seriousness and method of disposition.

Our baseline measure was a Supreme Court (felony) non-trial disposition to which we assigned a value of 1.0. We weighted all other dispositions in relation to that measure.<sup>1227</sup> A Criminal Court (misdemeanor and violation) arraignment disposition was weighted one-tenth of the baseline measure.<sup>1228</sup>

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the Public Defender: A Handbook for Budget Preparation (1985) [hereinafter 1985 NLADA Handbook for Budget Preparation].

1223. See *supra* p. 711; note 757 and accompanying text. Since 1981, institutional defenders have been provided by the National Legal Aid and Defender Association with a case management system called "Amicus." This system reports time and work expended on individual cases, thereby generating statistical data for the development of appropriate case weights. NATIONAL LEGAL AID & DEFENDER ASS'N, AMICUS, A MANUAL MANAGEMENT INFORMATION SYSTEM FOR PUBLIC DEFENDER OFFICES (1981). Nonetheless, in a March 14, 1985 letter to the President of the City Bar Association responding to our request for "case costs" related to felonies, misdemeanors and violations, the Society's Executive Director answered that it lacked the capacity to develop an appropriate weighted system. Letter from Archibald R. Murray, Executive Director of the Legal Aid Society, to Robert B. McKay, President of the Association of the Bar of the City of New York at 5 (Mar. 14, 1985); see also *supra* note 728 and accompanying text.

1224. The key elements in any weighted system are method of disposition and charge severity. See 1985 NLADA Handbook for Budget Preparation, *supra* note 1222, at 14. Dispositions may be divided into trial and non-trial methods (including guilty pleas and dismissals). Charge severity may be segregated according to offense (homicide, felony, misdemeanor) See *supra* TABLE 11-3, at 861. The importance of these variables is described in the 1985 NLADA Handbook for Budget Preparation, *supra* note 1222: "Dispositional routes describe how cases exit from the adjudication process. If a case exits early in the process then less effort is expended on it. . . . The type of offense is also important because the more serious the crime, the more attorney effort is expended. The very first distinction to be made is between felony and misdemeanor cases. Felony cases, on the whole, demand more time and energy from the staff." *Id.* at 14.

1225. See 1984 Caseload Activity Report — Arrest Cases, *supra* note 1189, and 1984 OCA Criminal Term Disposition Report, *supra* note 1189.

1226. See TABLE 11-3, at 861, in which the mean dollar claim for 13,803 vouchers was provided in terms of offense (homicide, felony, misdemeanor) and method of disposition (trial, plea, and other).

1227. The weighted system employed in our Draft Report accorded each Supreme Court trial an estimated value three times that of a non-trial Supreme Court disposition. Each Criminal Court trial was accorded a value of one-half the baseline measure. These estimates were derived from time to completion differences contained in the 1984 Caseload Activity Report — Arrest Cases, *supra* note 1189, and in the 1984 OCA Criminal Term Disposition Report, *supra* note 1189. Our current analysis relies upon the completed voucher sample, see TABLE 11-3, at 861, to distinguish between trial and non-trial dispositions in Criminal Court and Supreme Court. See *infra* note 1229.

1228. This value was arrived at after comparing the average reported appearance for cases which terminate at first appearance in Criminal Court (usually by guilty plea but sometimes by dismissal) with average reported appearances for Supreme Court cases. The 1984 OCA Criminal Term Disposition Report, *supra* note 1189, indicates that Supreme Court cases average 12 calendar appearances until disposition, excluding appearances in Criminal Court, and excluding



All other Criminal Court non-trial dispositions received a weight of one-third of the baseline.<sup>1229</sup> We assigned a Criminal Court trial a weight twice the baseline and a Supreme Court trial a weight five times that of the baseline measure.<sup>1230</sup> Appeals were also weighted at five times the baseline.<sup>1231</sup> This methodology of weighting was then applied to the final dispositions of each entity for 1984 as set out in *Table 11-8*.

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appearances for the purpose of sentencing. Consequently, a case disposed of at first appearance in Criminal Court is at best equivalent to one-tenth of each Supreme Court case.

1229. For 1984, the 1984 Caseload Activity Reports — *Arrest Cases*, *supra* note 1189, reports 3.6 appearances per Criminal Court case. Considering that the average Supreme Court case requires more investigation and preparation, and that each appearance requires more court discussion and motion practice, our estimate is conservative that each Criminal Court disposition (post-arraignment without trial) is equivalent to one-third of each Supreme Court disposition.

1230. Our voucher sample, *see* TABLE 11-3, at 861, revealed that misdemeanor cases which were resolved by trial had claims which were twice that of non-trial felonies. Thus, we weighted a Criminal Court trial as twice that of a Supreme Court non-trial (the baseline measure). The sample also revealed that felony trials involve a mean claim which is over five times that of the baseline measure. Thus, we allocated a Supreme Court trial a weight five times that of the baseline measure.

1231. For comparative purposes appeals are treated as equivalent to Supreme Court trial dispositions, and also given a value of five times that of the baseline measure. Appeals arguably involve a commitment of time and effort similar to that undertaken in a Supreme Court trial.

TABLE 11-8: *Legal Aid Society And 18-B Panel Comparative Caseloads, Based On Method Of Disposition, 1984*<sup>1232</sup>

Case Category	Legal Aid Society		18-B Panel First Dep't		18-B Panel Second Dep't	
	no. cases	weighted	no. cases	weighted	no. cases	weighted
Appeals (wt. = 5)	1,328	6,640	373	1,865	450*	2,250
Supreme Court Trials (wt. = 5)	688	3,440	899	4,495	578	2,890
Supreme Court Non-Trials (wt. = 1)	8,731	8,731	3,813	3,813	3,311	3,311
Criminal Court Trials (wt. = 2)	348	696	178	356	125	250
Criminal Court Non-Trials (wt. = 0.33)	45,226	15,075	12,460	4,153	4,477	1,492
Arraignment Dispositions (wt. = 0.1)	<u>71,836</u>	<u>7,184</u>	<u>4,500*</u>	<u>450</u>	<u>4,500*</u>	<u>450</u>
Total Final Dispositions	128,157	41,766	22,223	15,132	13,441	10,643

\* estimated

The weighted per-case cost that resulted for each defense entity showed that the Legal Aid Society expended far more money per weighted case than the 18-B Panel.

1232. The 18-B Panel dispositions for the First Department were derived from Report UCS-195 (1984) (18-B 1st Dep't), and from the Office of Court Administration of the State of New York, Supreme Court Criminal Term Disposition Report (1984). *See supra* note 986. The administrator's worksheets for the 18-B Panel in the Second Department provided the actual number of final dispositions in Supreme Court and Criminal Court for 1984. *Id.* The appellate disposition figure for the Second Department is estimated on the basis of previous annual submissions made to OCA by the Second Department Administrator. *See, e.g.*, Report UCS-195 (1983) (18-B 2d Dep't). The arraignment dispositions are estimated on the basis of our own analysis. *See supra* pp. 378-79. The Monthly Caseload Activity Reports provide final dispositions for the Legal Aid Society. *See supra* note 986.

TABLE 11-9: *Legal Aid Society and 18-B Panel Comparative Weighted Cost Per Case, 1984*

	<u>Criminal Defense Costs</u>	<u>Weighted Case Load</u>	<u>Cost per Weighted Case</u>
Legal Aid Society	\$39,993,508	41,766	\$ 957.59
18-B Panel First	8,338,379	15,132	551.04
18-B Panel Second	5,450,000	10,643	512.07
18-B Panel Overall	13,788,379	25,775	534.95

These findings are consistent with what would be expected given the distribution of resources and cases between the two defense entities. In view of the absence of funds for organized support services and office expenditures, and the disproportionate number of indicted felonies referred to the 18-B Panel, it is not surprising that in the final analysis the Panel was far less expensive than the Legal Aid Society on a per case basis.

#### IV.

#### THE CITY'S FISCAL POLICIES AND THE GROWTH OF THE 18-B PANEL

Representation by the 18-B Panel afforded the City of New York a more cost-efficient means of disposing of indigent cases than Legal Aid Society representation. The simple reason for this discrepancy is that the Panel lacked the resources necessary to perform lawyering tasks conventionally associated with effective adversarial representation. From a strictly budgetary perspective, the fact that the Panel did not provide adequately for the defense of indigents is not a negative counterweight to its relative inexpensiveness.

At the same time it ignored the growth in 18-B Panel representation, the City had apparently not provided the Legal Aid Society with enough resources to enable it to stop the shedding, that is, the massive transfer of felonies to the Panel. Because the Society's management apparently regarded shedding as a necessary adaptation, it had not forced the City to confront the overall insufficiency of resources by negotiating caseload caps. In effect, the Society disposed of large numbers of cases in Criminal Court, while the Panel inexpensively but inadequately represented poor people accused of more serious crimes in Supreme Court.

In July 1985, when a bill to raise the compensation rates for 18-B Panel attorneys was before the New York State Legislature,<sup>1233</sup> the Mayor's Coordinator for Criminal Justice corresponded with the Governor. The Coordinator

1233. See Act of 1985, c. 315, 1985 N.Y. Laws 315. Between 1978 and 1984, the consumer price index increased by 61% from 195.4 (1978) to 315.3 (1984). See 1985 NYSDA ASSIGNED COUNSEL FEES REPORT, *supra* note 1178, at 3. The 1985 Legislature increased the rate of compensation commensurate with the consumer price index to \$40 for in-court representation and to \$25 for out-of-court representation. The statutory caps were also increased to \$2400 for representation in capital offenses, \$1200 for other felonies, and \$800 for remaining crimes. See N.Y. COUNTY LAW 722 (b) (McKinney Sup. 1987). The increase, however, only

expressed concern about the growth in Panel caseloads and the movement of cases from the Legal Aid Society to the Panel.<sup>1234</sup>

The City of New York is deeply concerned by the shifting of emphasis from utilization of its primary service provider, the Legal Aid Society, to the 18b [sic] Panel, originally designed to be limited to conflict and other narrowly circumscribed cases. The terms of our contract with the Legal Aid Society require that the City support an 18b [sic] role only on this limited basis.<sup>1235</sup>

The Coordinator indicated that the City was aware that referrals to the 18-B Panel had "risen dramatically" in recent years.<sup>1236</sup> He traced the number of assignments the Panel administrators had catalogued in the annual reports to OCA, identified the amount of money annually appropriated for the Panel, and estimated the additional burden that the increase in statutory rates would place upon the City.<sup>1237</sup>

To limit the fiscal burden which the increase in the 18-B Panel rates would impose, New York City intended to have the Legal Aid Society cease case shedding and asked the Governor to require OCA to lay down standards. In his letter to the Governor the Coordinator stated: "While we support this bill we do so with the understanding that the New York State Office of Court Administration will undertake a review of current assignment policies under the 18b [sic] plan in New York City and will, thereafter, issue standards for such assignments consistent with the [Bar Association's] indigency representation plan adopted by the City in 1967, and establish a mechanism for monitoring adherence to those standards."<sup>1238</sup>

## V.

### CHAPTER SUMMARY

The mean claims by 18-B Panel attorneys were substantially less than the maximum compensation permitted by statute. The lawyering tasks undertaken by these attorneys were related principally to in-court activity with little effort expended on out-of-court preparation. On a comparative basis, considering differences in the type of case and method of disposition, the Panel was nearly half as expensive as the Legal Aid Society. This is hardly surprising given that the Society received and the Panel did not receive extensive funding from both New York City and New York State to support a large managerial structure and a range of supportive services. Yet, the Panel, even in the ab-

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permitted assigned counsel "to maintain the very low standard of living that the \$15/\$25 fees brought in 1978." 1985 NYSDA ASSIGNED COUNSEL FEES REPORT, *supra* note 1178, at 3.

1234. Letter from Kenneth Conboy, New York City's Coordinator of Criminal Justice, to Governor Mario Cuomo, at 1 (July 9, 1985) [hereinafter 1985 Conboy Letter].

1235. *Id.*

1236. *Id.*

1237. *Id.*

1238. *Id.* at 2.

sence of comparable funding, was assigned a higher proportion of its cases in Supreme Court and disposed of twice the number of cases by trial.

From New York City's perspective, the guiding factors dictating the relative attractiveness of either defense entity were cost and efficiency. With the advent of the higher rate of compensation on January 1, 1986,<sup>1239</sup> the 18-B Panel no longer enjoyed the clear cost advantage it had once provided. Thereafter, the City acknowledged the need to set standards restricting the conditions under which the Legal Aid Society may be relieved or may decline assignment.<sup>1240</sup> It is possible that the City will also provide the Society with enough funds to hire additional attorneys and increase the Society's capacity to meet burgeoning caseload demands. If New York City reacts by drastically increasing the Society's staff, the growth of referrals to the Panel may be slowed if not arrested. The Panel of private attorneys may be thereby relegated, even if only temporarily, to its intended role as a residual defense entity.<sup>1241</sup>

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1239. *See supra* note 1233.

1240. 1985 Conboy Letter, *supra* note 1234, at 2. By contrast, national standards for the distribution of cases in a coordinated assigned counsel system are based on the relative size of each entity, attorney availability, and expertise. *See* 1976 NLADA GUIDELINES, Guideline 2.2, at 504 (1976); *see also supra* text accompanying note 462.

1241. Indeed, the Legal Aid Society received an additional five million dollars in governmental funds in fiscal year 1985, *see infra* note 1321, which enabled the Society to hire additional staff attorneys to stem the flow of cases to the 18-B Panel. By early 1988, Panel attorneys had expressed concern that the Society had joined with court administration to reduce the number of Panel assignments to conflict cases only. *See* Notice of Meeting of All 18-B Attorneys, Letter to 18-B Panel Members from 18-B Ad Hoc Committee (Mar. 15, 1988).