CHAPTER FIVE

THE 18-B PANEL'S OPERATIONAL STRUCTURE, DEMOGRAPHIC CHARACTERISTICS, AND WORK AND INCOME PATTERNS

When the *1966 Bar Association Plan* was adopted, two rationales were offered to explain why it was necessary to secure a role for the private bar in the representation of poor people. As we noted in Chapter Two, the first justification was that the participation of the private bar would guard against the institutionalization of the criminal bar and, to the extent that this was effective, would prevent the subjugation of the interests of poor defendants to those of the state.[747] This theory assumed that the financial independence of private attorneys qualified them to resist the "conflict of interest" inherent when the state paid for institutional defenders as well as for prosecutors of indigent criminal defendants.[748] The second rationale was that these private lawyers would volunteer on a pro bono basis and provide the same quality of representation to the poor in criminal cases as they did to fee-paying clients.[749]

In retrospect, it is difficult to see how anyone familiar with state criminal practice could have seriously entertained these two beliefs. There was no empirical evidence to suggest that private lawyers had ever participated at the trial level in New York City courts on a pro bono basis to an extent sufficient to justify these expectations. Furthermore, it became clear that certain 18-B Panel attorneys depended on court assignments for their livelihood, and saw Panel work as a viable type of law practice. In 1975, a decade after the introduction of the *1966 Plan*, the Subcommittee on Legal Representation of the Indigent reported that some attorneys "relied on [P]anel clients for 50 percent or more of their practice."[750] The Subcommittee also reported that while Panel work was a permanent source of income for some attorneys, it provided a service for those leaving the Legal Aid Society and the District Attorney's office, easing them into private practice by helping them meet start-up costs

747. *See supra* notes 370-72 and accompanying text.

748. The notion of the necessity of financial independence from the state enabled the organized bar (and those who opposed the public defender) to argue that only private defender agencies, with state funds, were court-assigned attorneys who would provide truly adversarial advocacy to indigent defendants. *See supra* note 369. *See also* Stewart, *The Public Defender System is Unsound in Principle*, 32 J. OF AM. JUDICATURE SOC'Y 115 (1948); Stewart contended that "[a]n independent bar is one of those necessities taken for granted—so much so that an encroachment is not at first recognized as such. A lawyer is not an advocate any longer, or should not be after he is elected judge. I say a lawyer is no longer a defense lawyer after he becomes a public defender."

749. *See supra* notes 362-363 and accompanying text.

750. Office of Court Administration of the State of New York, Advisory Committees on Court Administration, Subcomm. on Legal Representation of the Indigent and Limited Income Groups, Report on the Legal Aid Society and the 18-B Panels at 33 (Circulating Draft Aug. 1975) [hereinafter 1975 Report on the Legal Aid Society and on the 18-B Panels].

until they built reputations as private practitioners and attracted fee-paying clients.[751]

In this chapter we measure the extent to which the 18-B Panel fulfilled national standards for a "coordinated assigned counsel system."[752] We provide data on demographic characteristics of Panel attorneys and document the emergence of a core group of Panel "regulars" who accounted for a substantial majority of the assignments referred to, and compensation paid to, Panel attorneys.

In order to understand whether the 18-B Panel fulfilled national standards for "coordinated assigned counsel sytems,"[753] we first measured the extent to which experienced members of the private bar, who were competent in the practice of criminal law, substantially participated in Panel work.[754] Through an analysis of our questionnaire, we provide data on the law practice of Panel attorneys: the age, sex, and race profiles of Panel attorneys in comparison to their Legal Aid Society counterparts; and the prior work experience and educational background of Panel attorneys. We next examine whether the rotational case assignment system distributed cases evenly among Panel attorneys or whether most assignments were concentrated among a core group of career Panel defenders.[755] Through an analysis of over 10,000 attorneys

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751. *Id.* at 8.

752. *See* AMERICAN BAR ASS'N, STANDING COMMITTEE ON ASS'N STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROVIDING OF DEFENSE SERVICES, Standard 5-1.2, at 5.8, Standards 5-2.1-2.3, at 5.23-30 (1980) [hereinafter 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES]; *see also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 150-51 (1967) [hereinafter 1967 PRESIDENT'S COMMISSION REPORT]; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Standard 13.15, at 282-83 (1973) [hereinafter 1973 NAC STANDARDS AND GOALS]; NATIONAL LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS, FINAL REPORT (1976) [hereinafter 1976 NLADA GUIDELINES]; *see also supra* text accompanying notes 460-63; *but see supra* notes 396, 415 and accompanying text.

753. *See supra* note 752.

754. *See* 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 752, Standard 5-2.2, at 5.26.

> Assignments should be distributed as widely as possible among the qualified members of the bar. Every lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be included in the roster of attorneys from which assignments are made.

Id. See also supra 471 and accompanying text; 1976 NLADA GUIDELINES, *supra* note 752, Guideline 2.15, at 509; which states:

> [The] administrator should solicit all members of the practicing bar in the area to be served by the system. The administrator should appoint all of those attorneys who display a willingness to participate in the program and manifest the ability to perform criminal defense work at a competent level.

755. *See* 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 752, Standard 5-2.3, at 5.28.

> As nearly as possible, assignments should be made in an orderly way to avoid patronage and its appearance, and to ensure fair distribution of assignments among all whose names appear on the roster of eligible lawyers. Ordinarily, assignments should be made in the sequence that the names appear on the roster of eligible lawyers. Where the nature of the charges or other circumstances require, a lawyer may be

control cards, we provide data on the work and income patterns of Panel attorneys for the ten year period between 1973 and 1984. Before turning to an empirical analysis, we provide qualitative data on the operation of the rotational assignment system in the First Department (New York and Bronx Counties). The description which follows results from our field observation of assignment practices in the administrator's office.[756]

I.
THE OPERATION OF THE ROTATIONAL ASSIGNMENT SYSTEM

Under the *Bar Association Plan* pursuant to Article 18-B, designation of counsel by the administrator "shall be rotated on each [P]anel. . . in accordance with the listing of the [P]anel until an attorney is reached who is available for service."[757]

The 18-B Panel's rotational system was based on an alphabetical card-index. Three rotations operated according to attorney certification: homicide, felony, and misdemeanor.[758] When a case was telephoned to the administrator's office by a court clerk, the defendant's name, location, charge, the court part, and other details were entered on an original order form. The forms were arranged into piles: those for Bronx County were split according to homicide, felony and misdemeanor; in New York County (Manhattan), misdemeanors were placed in one pile; felony cases were placed in one of six piles according to the parts of the "complex system."[759] For both counties, the cases were arranged chronologically with the closest adjourned date at the top of each pile. The assignment clerk had to ensure that those cases at the top of the pile (especially where the adjourned date is the next court-working date)

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selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

See also supra note 472 and accompanying text; 1976 NLADA GUIDELINES, *supra* note 752, Guideline 2.16, at 509-10, which suggests that administrators should adhere to the following goals:

(a) The cases should be distributed in an equitable way among the panel members to ensure balanced workloads through a rotating system with allowances for variance when necessary;

(b) The more serious and complex cases should be assigned to attorneys with a sufficient level of experience and competence to afford proper representation.

756. The description of the rotational system which follows results from our direct field observation, between September and October 1984, of the administrator's assignment practices in the First Department.

757. Plan of the Association of the Bar of the City of New York, Bronx County Bar Association, Brooklyn Bar Association, New York County Lawyers' Association, Queens County Bar Association and Richmond County Bar Association (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. III(3), at 927 [hereinafter 1966 Bar Association Plan].

758. *See* Presiding Justice of the Supreme Court of the State of New York, Appellate Division, First Department, General Requirements for Certification to the Indigent Defendants' Legal Panels in the Appellate Division, First Department (undated) (promulgated pursuant to N.Y. COMP. CODES R. & REGS tit. 22 § 612.6 (1980); *see also supra* note 593 and accompanying text; 1966 Bar Association Plan, *supra* note 757, art. II, at 925.

759. *See supra* FIGURE 1, at 588 and text accompanying at 586-87.

had a lawyer assigned to cover the case in court. At intervals, the assignment clerk pulled out several cards from the top of the rotation and placed a call to the first listed lawyer in order to assign a case for the relevant county and court part (various notations on each card indicated whether the lawyer was assigned to a particular court part). However, this "rotational" system did not result in an even distribution of cases among Panel lawyers nor in assigning lawyers to particular court parts, as designed. Instead, some lawyers were assigned very few cases, others were assigned many.

Cases were not commonly assigned on a case-by-case basis. Very often a lawyer was assigned several cases (3-5 is common) at a time. Although the number of cases assigned to a lawyer was noted on the index card, along with the date of the assignment, this did not appear to be a critical influence on subsequent assignments. The number of cases assigned was, instead, dependent upon two factors: (a) the need for a lawyer, and (b) the lawyer's willingness to take more than one case. "Need" was based on the degree of urgency perceived by the assignment clerk. Even early in the day, and even where a relatively small number of cases was concerned, the need for a lawyer was often perceived as "urgent".

A. Reactive Dependency

Under the rotational system, five to ten calls were made for each pile of cases, but what happened, thereafter, was to a large extent dependent upon how and whether the 18-B Panel attorneys returned the calls. Many of the lawyers had an answering service or a tape answering machine; some had a dropoff address with a message service. Others had no organizational support (they worked from an "office on the fly" or an "office on the run") and were difficult to reach in times of great need. The unpredictable responses of the attorneys and the clerk's reaction to their calls contributed to the uneven distribution of cases among Panel attorneys. We observed the following interactions between the assignment clerk and Panel attorneys:

Lawyer's Response		Clerk's Action
Too busy/Do not want cases	—	Rotation card to back of pack
Can do another day	—	Assign case for future day
Agree to take case(s)	—	Assign case(s), return card to back of pack
Do not call for week or so	—	Card put to back of pack; mark in pencil as "pass"; take card out if lawyer rings, erase pencil and assign.

The "rotational system" was, therefore, highly reactive and, in a real sense, work was distributed to those attorneys who were organized and able to take advantage of the assignment system.

B. Discretionary Displacement

The rotational assignment system was dominated by the need to place a lawyer alongside every defendant; assigning lawyers to particular court parts is secondary. Obstacles in the way of assignment were, therefore, removed or overcome.

Although the index cards were ordered in rotation, the lawyers were not always called in this order. The assignment clerk would often displace a lawyer (moving the card to the back of the rotation without any call being made) because:

(a) The lawyer asked not to be contacted over a given period.[760]

(b) The clerk exercised discretion and did not call the lawyer where a notation on the lawyer's card indicated a number of recent "passes" (where the lawyer has been offered a series of assignments but has not taken any).

(c) The clerk expedited matters where the need was deemed urgent. For example, a call was placed to a lawyer, but if the telephone was not answered within three rings another lawyer, next in order, was called.

Thus the "court complex" system in New York County (whereby attorneys were assigned to particular court parts in order to reduce the number of courtroom appearances) was secondary. Lawyers were regularly asked to take cases in court parts to which they were not assigned to ensure the presence of a lawyer alongside each indigent defendant. Even potential conflicts of interest were often overlooked.

We observed that in Criminal Court, the assignment clerk's perception was that if she had three assignments to make in one court part, and one 18-B Panel attorney was already assigned to two cases, the third case might as well be assigned to the same attorney, irrespective of any conflicts.[761] No consideration was given to matching attorneys with cases based on complexity of the case or the demonstrated competence of the Panel attorney (assignment clerks, in any event, were unfamiliar with criminal practice and the background and competence of Panel attorneys). The primary administrative concern, therefore, was to assign a lawyer, any lawyer, to insure that every case was "covered" by an attorney.

In order to determine the effect that the rotational assignment system had on the structure of the 18-B Panel, the attorneys it attracts, and the effect it had on attorneys' work and income pattern, we turn to an empirical analysis of the responses Panel attorneys made to our questionnaire survey, and the record of case assignments contained in over 10,000 control cards.

760. This practice was not, in fact, discouraged by the assignment clerk when the lawyer was considering leaving the 18-B Panel because of work elsewhere. It was administratively easier for the clerk to make a note on the card not to contact an attorney for a period of time than it was for the lawyer to leave the 18-B Panel and then seek to be readmitted later.

761. *But see supra* text accompanying notes 502-03, which describes the Legal Aid Society's policy, since 1971-72, of automatically declining representation of more than one co-defendant in a multiple-defendant case. *See also supra* note 505.

II. DEMOGRAPHICS

A. *Local Practice of 18-B Panel Attorneys*

In our questionnaire we sought to determine whether the 18-B Panel really did involve successful private attorneys with experience in trial practice and the resources to provide pro bono representation in serious criminal cases, as was claimed by the organized bar in 1965.[762] Because we felt that the uneven distribution of cases by the administrator's assignment system might be of less concern if the attorneys it attracted were the elite lawyers of the bar rather than marginally subsistent single practitioners, we asked Panel respondents to describe their law practice in terms of the proportion of assigned cases to fee-paying cases, and whether they were single practitioners or members of a firm.

Over 40 percent of First Department 18-B Panel attorneys who responded to our survey said that indigent representation accounted for more than half of their practice.[763] For this group, Panel assignments were a means of livelihood, not of public service.[764] Furthermore, these lawyers were generally not in an organized legal practice, such as a large firm, which would absorb the costs of representing the poor. Indeed, as *Table 5-1* shows, most survey respondents indicated that they were single practitioners:

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762. *See supra* notes 747-48.

763. TABLE: *Assigned Cases as a Percentage of 18-B Panel Attorneys' Criminal Practice*

	Time		Case-Load	
	n	%	n	%
Less than 5 percent	57	15.9	55	15.6
5% less than 50%	151	42.2	145	41.2
50% or over	150	41.9	152	43.2
Don't know	14	—	20	—
	372	100.0	372	100.0

Our empirical findings are consistent with an earlier study of court-assigned counsel undertaken statewide by the New York State Bar Association. *See* Spiegler, Ding, & Mendelson, *Report to the Committee on Legal Representation of Indigents in the Criminal Process*, New York State Bar Ass'n, 91-92, 97 (1980) [hereinafter 1980 Spiegler Report]. The earlier study found that for 32 percent of the assigned counsel surveyed in New York City, 18-B Panel practice constituted at least 50 percent of their criminal practices. Elsewhere in New York State, for 40 percent of those attorneys accepting court assignment, 18-B practice constituted over 50 percent of their criminal work. *Id.*

764. In order to discover the extent to which the 18-B system functioned as a pro bono or public service system, we asked attorneys whether they always asked for compensation and, if not, the reasons why they did not. The answer to these questions are set out in TABLES A and B:

TABLE A: *Whether 18-B Panel Attorneys Always Seek Compensation in Assigned Cases*

	n	%
Yes	130	35.4
No	237	64.6
Don't Know	5	—
	372	100.0

TABLE 5-1: *Organizational Structure of 18-B Panel Attorney Law Practice*

	n	percent
Single practitioner	230	62.7
Single practitioner who is often assisted by another admitted to the 18-B Panel	24	6.5
Member of a firm, none of whose other members is on the 18-B Panel, and who handles all 18-B work without assistance	43	11.7
Member of a firm, none of whose other members is on the 18-B Panel, but who is often assisted by another attorney who is admitted to the Panel	2	0.6
Member of a firm, with one or more other attorneys who are members of the 18-B Panel	68	18.5
Not known	5	—
	372	100.0

As *Table 5-1* indicates, almost 70 percent of 18-B Panel respondents practiced on their own.[765]

B. Age and Longevity

Another indicator of the involvement of the private bar in 18-B Panel practice is the age and longevity (years of services) of those who volunteer for court assignments. Prior to the establishment of institutional defense, reformers criticized assigned counsel as being unrepresentative of the bar and being comprised of newer attorneys and older lawyers who depended upon this work

TABLE B: *Reasons Why Compensation Is Not Always Sought*

Reason	n	%
Sum involved too inconsequential	189	79.7
Paperwork problems	48	20.3
Representation required too inconsequential	179	75.5
Another lawyer already assigned	177	74.7
Defendant absconded/fled	84	35.4
Take some cases pro bono	51	21.5
Other	10	4.2

The almost 80 percent of the attorneys who did not ask for compensation because the sum was too inconsequential may be viewed as performing a public service.

765. This finding is consistent with the results of a national study undertaken in 1978 sampling nine cities. That study revealed that of the private criminal practitioners surveyed, about 51 percent practiced law on their own, 30 percent in an office of their own, and 21 percent in shared office space. The remainder were partners in law firms. P. WICE, CRIMINAL LAWYERS 97 (1978). *See also* A. PARTRIDGE & G. BERMANT, THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS 36 (1978), where the authors concluded that "the likelihood that a lawyer will perform inadequately is substantially greater if he practices alone than if he practices with others, and . . . it tends to decline as the size of the office increases."

for a livelihood.[766] Our survey results revealed that few Panel attorneys were under the age of thirty. A significant percentage (26 percent) of Panel attorneys, however, were over the age of fifty, with several over the age of seventy and even eighty.[767] In contrast, the Legal Aid Society staff attorneys had a much younger profile, primarily because the Society hires recent law graduates who rarely intend to remain more than three to five years.[768]

TABLE 5-2: *Age Characteristics of 18-B Panel and Legal Aid Society Staff Attorneys With Full Caseload Responsibilities*

	Panel Attorneys		Society Staff Attorneys	
	n	percent	n	percent
Under 25 years	0	0.0	4	1.6
25 to 30	11	3.0	90	36.7
30 to 40	157	43.1	112	45.7
40 to 50	103	28.3	29	11.8
50 and over	93	25.6	10	4.1
Not known	8	—	1	—
	372	100.0	246	100.0

The age differences can be closely tied to the relative commitment of each group of attorneys to continuing in their present form of practice. While some 18-B Panel attorneys indicated that their Panel service may terminate in the immediate future, the overwhelming majority (71.5 percent) intended to remain. For them, the Panel was the functional equivalent of a career defender's office.[769]

766. *See supra* text accompanying notes 64-75, 173-75. The dependency on court-assigned fees is not unique to state court practice. Since the adoption of the Criminal Justice Act, 18 U.S.C. § 3006A (1964), this characteristic of court-assigned private attorneys has been noted in federal jurisdictions. For example, in the District of Columbia, one commentator noted, "many of those who remain in CJA work for longer periods do so not out of choice but out of necessity . . . ." R. HERMANN, E. SINGLE & J. BOSTON, COUNSEL FOR THE POOR 133 (1977) [hereinafter COUNSEL FOR THE POOR].

767. Some attorneys volunteered their specific age beyond the categories requested in our questionnaire survey, and others provided their ages in conversations during our courtroom observations. Since the survey questionnaire did not seek a precise age beyond the category "over 50 years old" we are unable to quantify the number of attorneys over age 70.

768. *See infra* FIGURE 2, at 724. The Legal Aid Society employs approximately seventy-five supervisors without casehandling responsibility. *See supra* text accompanying note 666; *infra* note 1183 and accompanying text. Ninety-five percent of supervisory attorneys responding to our questionnaire (35 of 37) stated that they intended to remain with the Society for the foreseeable future. Hereinafter, when reference to "Legal Aid society staff attorneys" or "casehandlers" is made, we do not refer to the supervisors who do not have casehandling responsibilities.

769. Our analysis of "inactive" and "active" attorneys, *see infra* TABLE 5-14, at 735; TABLE 5-16, at 737; TABLE 5-17, at 739; TABLE 5-18, at 740; *see infra* FIGURE 3, at 742; *infra* pp. 736-42, documents the extent to which the 18-B Panel was used as a stepping stone to private practice or was dominated by career defenders. Our findings indicate that those who have left Panel practice and become inactive, *see infra* pp. 736-737, dropped out too quickly to justify the

TABLE 5-3: *Intention of 18-B Panel Attorneys to Remain Active in Indigent Defense*

	n	percent
For the foreseeable future	248	71.5
Only in the medium term	47	13.5
For only a little while longer ...	52	15.0
Don't know.....	25	—
	372	100.0

In contrast, responses by the Legal Aid Society staff attorneys revealed a marginally more transient group among case-handlers.

TABLE 5-4: *Intention of Legal Aid Society Staff Attorneys to Continue With the Society*

	n	percent
For the foreseeable future	158	66.7
Only in the medium term	52	21.9
For only a little while longer.....	27	11.4
Don't know	9	—
	246	100.0

A more dramatic difference in longevity between attorneys from both defense entities is evident when statistics for Legal Aid Society staff attorneys were broken down according to years of service.

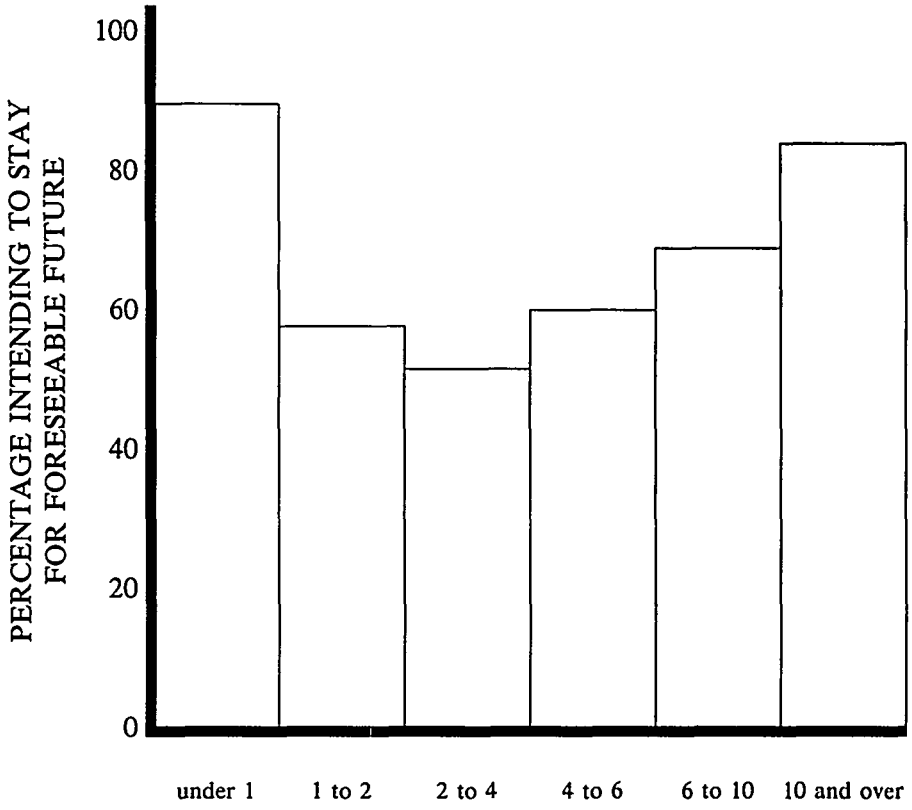
As *Figure 2* shows, a large percentage of Legal Aid Society staff attorneys had no intention of staying with the Society for more than four years.[770] The desire to stay was most marked among those with the shortest and longest

impressions of the authors of *Counsel for the Poor* that the Panel system acts as a stepping stone to a fee-paying private practice or as a means of reputation building. COUNSEL FOR THE POOR, *supra* note 766, at 133.

770. A number of studies have documented the "burnout" rate associated with institutional defense. The authors of *Counsel for the Poor* noted in 1977 that Legal Aid Society lawyers "simply reach[ed] a point where [they] have to leave." The reason ascribed for the burnout was that "nobody pretends that justice is being done . . . . [This] becomes insupportable and demoralizing to many lawyers . . . ." COUNSEL FOR THE POOR, *supra* note 768, at 84. *See also* Wice & Suwak, *Current Realities of Public Defender Programs*, 10 CRIM. L. BULL. 165 (1974), where the authors found that in five of nine institutional defense systems investigated, half of the attorneys had less than three years experience. *See also* Platt & Pollock, *Channeling Lawyers: The Careers of Public Defenders*, 9 ISSUES IN CRIMINOLOGY 1, 15-16 (1974). The authors describe the Alameda County Public Defender Office (serving Oakland and Berkeley, California), which attorneys look on as a source of specialized training, as "temporary and instrumental" but no more. Of 64 public defenders that served between 1927 and 1969, only eight made a career out of it. Of the 58 public defenders serving as of May, 1971, only five "seriously intended to remain in the Office as a career." *Id. But see* L. MCINTYRE, THE PUBLIC DEFENDER, THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 82 (1987), in which the author concluded that in Cook County "public defending is one of the most stable practice contexts for new lawyers" because 65.8 percent of the 471 lawyers hired by the public defender between 1960-1970 were still in the office at the end of their third year. *Id.*

FIGURE 2:

PERCENTAGE OF LEGAL AID SOCIETY
CASE-HANDLING STAFF ATTORNEYS INTENDING
TO REMAIN WITH THE SOCIETY,
BY YEARS OF EXPERIENCE



tenures.[771] Conversely, the intention to leave was strongest in the middle range.

Our findings are in sharp contrast to tenure profiles of attorneys at the turn of the century. Then, assigned counsel were said by reformers to be either newly qualified lawyers whose tenure was short-lived, or courthouse regulars who made a career of court appointments.[772] By contrast, the Voluntary Defenders' Committee was comprised chiefly of former prosecutors who made a career of criminal law practice.[773] Our research shows it is presently the Legal Aid Society's staff which is characterized by a continuing supply of newly qualified attorneys, most of whom intend to leave within two to four years of being hired.[774] On the other hand, very few recently admitted lawyers were represented on the 18-B Panel, while a substantial majority were career defenders who intended to accept court assignments into the foreseeable future.

C. Race

The race of the lawyers representing the defendant population has changed over the last eighty years. In the early part of the twentieth century many of assigned counsel, like the defendant population, were of recent immigrant origin. In contrast, the Voluntary Defenders' Committee was comprised of former prosecutors whose racial and cultural backgrounds more nearly resembled the Anglo-American traits of elite lawyers.[775] After *Gideon*, civil

771. Research on institutional defense has shown that, for the most part, defendants are represented by inexperienced lawyers who may be highly motivated, or defenders who may have "a tendency to stagnate" or who may have difficulty earning a living outside an institutional setting. *See* Wice & Suwak, *supra* note 770, at 161, 165-66.

772. *See supra* text accompanying notes 71-75, 173-75.

773. *See supra* notes 226, 228 and accompanying text.

774. A change in the longevity patterns of the Legal Aid Society's staff attorneys began in the 1940's. *See* H. TWEED, THE LEGAL AID SOCIETY, NEW YORK CITY 1876-1951 at 21, (1954). "Prior to 1940, all attorneys employed by the Society were regarded more or less as permanent employees." They remained with the Society "for considerable periods of time, until the low salaries" forced them to resign. *Id.* By 1950, the staff of "[t]he main office consisted of some twenty lawyers, a few of whom were the senior attorneys with years of experience and the majority of whom were younger advocates. . . ." Donovan, *The Young Lawyer at the Legal Aid Society*, 50(1) LEGAL AID REV. at 6 (1952). To determine the extent to which the Society had become a transient organization after 1940, we analyzed *The Legal Aid Review* from 1950 to 1959 to determine the tenure of the Society's staff attorneys in its Criminal Court's Branch. Our analysis revealed that of those staff attorneys (n=11) on staff as of June 1950, seven were still with the Society at the start of 1959, five remained as staff attorneys, one was an investigator, one was an assistant attorney-in-charge. Of those who were appointed after 1950, 66.6 percent had left the Society by the fall of 1959. Of those hired between 1950 and 1952, all had left the Society by the fall of 1955. Of those hired between 1950 and 1953, 92 percent had left by the spring of 1957. Of those hired between 1950 and 1954, 89.5 percent had left by the spring of 1957. Of those hired between 1950 and 1955, 82.6 percent had left the Society by the spring of 1957. Finally, in the late 1960's and early 1970's, staff turnover reached 25 percent each year until 1974 when it declined to 10 percent. *See* LEGAL AID SOCIETY, 1973-1975 ANNUAL REP. (1974). Thus, by 1977-78, 43 percent of staff attorneys had less than two years of service and 83 percent had less than five year service. *See* LEGAL AID SOCIETY, 1977-78 ANNUAL REP. 22 (1978).

775. *See* J. AUERBACH, UNEQUAL JUSTICE 50, 52 (1976); *supra* text accompanying note

rights activists questioned the continued dominance of white lawyers in the institutional defense of poor people, many of whom were black and hispanic.[776] In response, the National Legal Aid and Defender Association, in its *Guidelines For Legal Defense Systems,* recommended that indigent defense providers recruit attorneys from minority groups who are "substantially represented" in the defendant population.[777]

In our questionnaire survey, we sought to determine to what extent the Legal Aid Society staff and 18-B Panel contained members of minority groups represented in New York City's defendant population. At the outset of our research, over half of all the defendants in New York City's criminal courts were black and one third were hispanic.[778] In contrast, our survey showed that there were very few minority attorneys in both the Panel and the Society.

TABLE 5-5: *Race of 18-B Panel Attorneys and Legal Aid Society Staff Attorneys*

	Panel Attorneys		Society Staff-Attorneys	
	n	percent	n	percent
White.....	337	93.1	209	86.4
Black	13	3.5	18	7.4
Hispanic	12	3.0	10	4.1
Asian	0	0.0	5	2.1
Not Known	10	—	4	—
	372	100.0	246	100.0

The 18-B Panel only assigned attorneys who volunteered for court assign-

73; *Prospectus, The Voluntary Defenders Committee,* NYLJ Mar. 19, 1917, at 1, col. 2, 4 [hereinafter *Prospectus*]; *Notes and Abstracts: The Voluntary Defenders Committee,* 8 J. CRIM. L. & CRIMINOLOGY 278, 282 (1917-18) [hereinafer *The Voluntary Defenders Committee*]; *supra* note 228 and accompanying text. This similarity of backgrounds resulted in a certain mobility between the staff, and Directors and members of the Committee. By contrast, the modern Legal Aid Society Board of Directors is largely dominated by elite "Wall Street lawyers" with few ties to the current staff. *See* LEGAL AID SOCIETY 1976-85 ANNUAL REPORTS, REPORTS OF THE BOARD OF DIRECTORS (1976-85); *infra* text accompanying note 1301. For documentation of a similar class stratification between staff and directors in civil legal aid, see J. KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 46-47 (1982).

776. In *Lawyers for the Poor Can't Win, reprinted in* R. LEFCOURT, LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS at 132 (1971), Lefcourt voiced the objection of many activists and those interested in the civil rights movement with the racial structure and composition of the Legal Aid Society in New York City.

> Aside from a federal grant in 1967 to operate several additional Civil Branch offices, the Society had made little effort to relate its Criminal Branch to the Black and Puerto Rican communities. It has made only token gestures in the recruitment of women and nonwhite attorneys and in their appointments to high administrative positions and to the Board of Directors.

Id.

777. *See* 1976 NLADA GUIDELINES, *supra* note 752, Guideline 5.9, at 519.

778. *See supra* note 12 and accompanying text.

ments. It was not required to engage in affirmative action and minority attorneys appeared to have little enthusiasm for Panel service. The result, as *Table 5-5* demonstrates, was an extremely small representation of minorities among Panel attorneys. By contrast, the Legal Aid Society had recently made affirmative efforts to recruit members of minority groups. Although *Table 5-5* indicates that few Society attorneys were drawn from minority groups, the numbers were increasing.

TABLE 5-6: *Percentage of Minorities Among Legal Aid Society Staff Attorneys, By Years of Service*

Years of Service	Percentage of Minority Members
Less than 2 years	18.1
2 - 4 years.....	14.0
4 - 6 years.....	8.3
6 - 10 years	8.3
10 years or more.....	10.3

D. Sex

The effect of the Legal Aid Society's affirmative action policy may also be evident in the changing gender differences between the Society's staff attorneys and 18-B Panel attorneys. Ninety percent of Panel attorneys were male; the Society had nearly three times as many women (28.2 percent) case-handlers.[779] Women comprised a higher proportion of the Society's new recruits. Approximately 36 percent of those with less than two years of service were women while only 12 percent of those with more than ten years of service were women.[780]

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779. TABLE: *Sex of 18-B Panel Attorneys And Legal Aid Society Staff Attorneys*

	Panel Attorneys		*Legal Aid Society Staff Atty's*	
	n	*%*	*n*	*%*
Male	*334*	*90.3*	*176*	*71.8*
Female	*36*	*9.7*	*69*	*28.2*
Not Known.....	*2*	—	*1*	—
	372	*100.0*	*246*	*100.0*

780. TABLE: *Percentage of Women Among Legal Aid Society Staff Attorneys, By Years of Service*

Years of Service	Percentage of Women
0 – 2 years.....	35.8
2 – 4 years.....	28.8
4 – 6 years.....	37.5
6 – 10 years.....	19.4
10 years or more.....	11.8

E. Prior Work Experience & Certification

The national standards for indigent defense services now mandate that court-assigned lawyers be trained in criminal law.[781] We looked at the qualifications of 18-B Panel attorneys and Legal Aid Society staff attorneys as an indicator of the extent to which this standard was met. Our questionnaire survey, therefore, sought data on Panel attorneys' prior work experience and the certification process applicable at the time of admission to the Panel. All but a handful (5.4 percent) of Panel attorneys had experience in handling criminal cases prior to admission to the Panel. However, for many, the previous practice was not with the Legal Aid Society or the district attorney's office where lawyers receive supervision and monitoring of their performance. Only 55 percent of the survey respondents had been previously employed by a prosecution or defender agency.

TABLE 5-7: *Prior Work Experience of 18-B Panel Attorneys*

Prior Work Experience	Yes		No	
	n	percent	n	percent
Handled Criminal Cases.....	350	94.6	20	5.4
Worked for Legal Aid/P.D. ...	102	27.5	269	72.5
Worked for D.A.	103	27.8	268	72.2

Proportionately fewer Legal Aid Society staff attorneys (32.8 percent) reported handling criminal cases before joining the Criminal Defense Division. However, a substantial number had served as interns either with a defender agency or a private criminal practitioner and a small number had prior trial or appellate experience in another branch of the Society.[782]

We were unable to establish whether, in the case of the Legal Aid Society, women were being specially recruited or whether gender differences between younger and older attorneys were a function of the Society having suffered a disproportionate loss of women among older staff attorneys or an increased interest in public interest law by women.

781. *See* 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 752, Introduction, at 2; *see also* text accompanying notes 457-58.

782. Similarly, in a study of defenders in Cook County, Lisa McIntyre found that the "bulk of public defenders hired each year tend to be young, newly credentialed lawyers with little experience in the practice of law." L. MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 80 (1987). In a survey of 60 former public defenders who had served between 1960 and 1979, she found that 68 percent said that public defending was their first law related job after passing the bar exam and an additional 15 percent said that although they had held other jobs, they had done so only while waiting for a space in the public defender's office to open up. *Id.* Of the 20 attorneys still practicing as public defenders that she interviewed, 80 percent said that it was their first job since being admitted to the bar. *Id.*

TABLE 5-8: *Prior Work Experience of Legal Aid Society Staff Attorneys*

Prior Work Experience	Yes		No	
	n	percent	n	percent
Internship with Criminal Law Practitioner	122	44.8	123	50.2
Trial or Appellate Experience in other Legal Aid Society Division	42	17.1	203	82.9
Handled Criminal Cases	113	32.8	132	67.2

All newly-admitted Legal Aid Society staff attorneys received a four week basic training program which familiarized them with the practice of criminal law in New York City. This program included teaching relevant case law and statutory provisions, and simulating the role of defense counsel in various proceedings. Additionally, the Society's training unit exposed attorneys who had been on staff less than thirty months to a trial advocacy program based on the model devised by the National Institute of Trial Advocacy.[783]

By contrast, many of the 18-B Panel attorneys lacked supervised training or experience. These deficiencies were neither identified at the point of certification to the Panel,[784] nor remedied by the certification process.[785] Of the Panel attorneys in the First Department who had continued to handle assignments since 1982, fully 51 percent were certified before 1979, the year of the inception of the Central Screening Committee, prior to which there were no

783. *See* LEGAL AID SOCIETY, 1985 ANNUAL REPORT 31-32 (1985).

784. Some 18-B Panel survey respondents were particularly critical of the certification process and the qualifications of Panel attorneys who had been admitted early on. Their concern related not only to the absence of relevant previous work experience, but also to sheer incompetence. The following quotations taken from our survey questionnaire make the point well:

Attorney 77

Many attorneys who previously handled negligence cases immediately applied and were accepted to the 18-B Panel and, with no or very limited experience in the area of criminal law, began to "represent" defendants who would have been better off with no attorney at all. Also, many landlord-tenant attorneys with no criminal law experience began to "handle" criminal cases. A true miscarriage of justice.

Attorney 528

It's truly a disgrace that the current system allows many clearly incompetent practitioners — both young and old — to remain on the Panel. If plans are being made to better screen new applicants, I strongly suggest it starts with a rescreening of those currently on the Panel.

Attorney 542

With rare exceptions judges do nothing when 18-B counsel who are clearly inadequate appear before them. For obvious reasons, it is very difficult for a co-counsel to do anything, but some mechanism for ridding the Panel of its clinkers should be found.

Attorney 680

The Panel must weed out mediocre members: it discourages others to be associated with them. When good performers drift away they must be encouraged to participate anew.

785. The certification experiences of our survey respondents upon admission to the 18-B Panel in the First Department are as follows:

standardized procedures for certification.[786] As a result, some of the attorneys who came onto the Panel during this time had no experience in the practice of criminal law and were not provided with a basic training program to enable them to represent indigent criminal defendants competently.[787]

TABLE: *Certification Process for the 18-B Panel, First Department: The Views of Attorneys*

Procedure Followed/ Determination Made	Yes		No		Don't Know or Don't Recall	
	n	%	n	%	n	%
I was interviewed by an experienced lawyer.....	197	61.4	124	38.6	51	—
I was asked to go before the Screening Committee.....	51	15.5	278	84.5	43	—
I was asked to attend an Instruction Course.....	37	10.9	304	89.1	31	—
I was asked to take a co-counsel program	35	10.2	309	89.8	28	—

The failure to interview almost 40 percent of 18-B Panel attorneys in the First Department is indicative of the fact that the Central Screening Committee began its functions in 1979 and did not seek to recertify the existing Panel. *See supra* text accompanying note 600. However, the rate of interviews in the First Department is far better than elsewhere in the state. In 1980, the New York State Bar Association reported that only 1 percent of Panel attorneys outside New York City had been interviewed prior to admission to the Panels. 1980 Spiegler Report, *supra* note 765, at 97. The New York State Bar Association survey reveals that as of 1980, 78 percent of the responding Panel attorneys in New York State (exclusive of New York City) arranged Panel admission by telephone, or qualified simply by maintaining an office or residence in the county. Only 21 percent reported even having to submit an application in writing. 1980 Spiegler Report, *supra* note 765, at 97-98. This experience is consistent with the national trends. The most recent national survey, undertaken in 1984, found that in 43 percent of all counties, every attorney who volunteered for 18-B Panel service was accepted. R. SPANGENBERG, B. LEE, M. BATTAGILA, P. SMITH & A. DAVIS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY, FINAL REPORT 17 (1986) [hereinafter 1986 CRIMINAL DEFENSE SYSTEMS STUDY].

While we did not survey 18-B Panel attorneys in the Second Department, interviews with Bar Association representatives during April and May 1985 revealed that the Brooklyn Bar Association and Queens Bar Association continued to certify applicants through their criminal courts committee. These committees were more informal than the Central Screening Committees and relied heavily on the subjective judgment of committee members rather than the quantitative standards adopted by the First Department.

786. *See* text accompanying note 592. Of the questionnaire respondents, over 54 percent were admitted prior to 1979, when the Central Screening Committee was established:

TABLE: *18-B Panel Respondents, By Year of Admission to the Panel*

Date of Admission	n	%
1966 – 1969	75	20.4
1970 – 1978	128	34.9
1979 – 1984	164	44.7
Don't know	5	—
	372	100.0

787. Our respondents revealed that very few had been asked to attend an instructional course or take a counsel training program. *See supra* note 785, TABLE. The failure of the profession to fund sources that would provide trained qualified attorneys to represent the poor is well-documented by researchers and other commentators. A 1985 study undertaken by the National Defender Institute found that the "majority of indigent defense systems employing private counsel provide no training for the attorneys." 2 N. ALBERT-GOLDBERG, M. HART-

The absence of quality control (*i.e.*, basic training and supervision, or experience requirements) in the certification of 18-B Panel attorneys was most pronounced in the first group admitted to the Panel. Of these attorneys, certified between 1966 and 1969, 55.3 percent said they were not interviewed, and another 24 percent could not recall being interviewed. Of the attorneys certified between 1970 and 1978, 22.7 percent were not interviewed, and 17.1 percent did not recall. Of *all* sample respondents, only 15.5 percent had been required to appear before a full screening committee to demonstrate their competence and qualifications.[788]

F. Education

The tendency among 18-B Panel attorneys to gain experience on the job, rather than to receive formal criminal defense training before they began defender work, was also apparent in their academic backgrounds. Panel members generally had weaker classroom training than their Legal Aid Society counterparts. Of all survey respondents, 27 percent of Panel attorneys had not

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MAN, W. O'BRIEN, P. HOULDEN & S. BALKIN, NATIONAL DEFENDER INSTITUTE, THE PLIGHT OF THE INDIGENT ACCUSED IN AMERICA 68 (1985) [hereinafter 2 PLIGHT OF THE INDIGENT]. *See* N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR at 2 (1982); *see also* COUNSEL FOR THE POOR, *supra* note 766, at 20-23; Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811, 835-36 (1976). *See generally* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 FORDHAM L. REV. 227 (1973), *cited in* S. KRANTZ, D. ROSSMAN, P. FROYD & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES 272-73 (1976); Watson, *On the Low Status of the Criminal Bar: Psychological Contributions of the Law School*, 43 TEX. L. REV. 289, 292-93 (1964-65).

The *NLADA Guidelines* recommend that a "[p]rovision should . . . be made for attorneys who are willing to learn criminal defense work . . . to be inducted into the program upon completion of an appropriate training regime." 1976 NLADA GUIDELINES, *supra* note 752, Guideline 2.15, at 509. The commentary to ABA Standard 5-2.2 suggests that when interested attorneys lack sufficient skill in criminal defense they should undergo an apprenticeship before they become regular court-assigned counsel. 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 752, Standard 5-22, at 5.26, Commentary at 5.27. *See also* Qualifications for Practice Before the United States Courts in the Second Circuit, Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, *Practice in the Second Circuit*, 67 F.R.D. 159, 188 (1976), which recommends that applicants to be court-assigned attorneys in the federal courts be required to assist in the preparation of an attend the hearings of four proceedings.

Although we do not intend to dwell upon the failings of individual Panel attorneys, we simply note that any degree of scrutiny or review could identify some attorneys who are not fit to undertake the representation of indigent criminal defendants. Occasionally, the case reports reveal attorney inadequacies. *See, e.g., People v. Rivera*, 107 Misc. 2d 544, 435 N.Y.S.2d 510 (1981), where a New York County court set aside the conviction of a defendant whose senile court-assigned attorney waived the opening statement, conducted cross-examination to no apparent purpose and, in summation, referred to the wrong charge. The court found that "[a]lthough there are many capable octogenarians practicing before this court, unfortunately defendant's trial counsel is not one of them." *Id.* at 547, 435 N.Y.S.2d at 512.

Similar examples of gross incompetence among court-assigned private attorneys may be found in the literature. *See, e.g.*, H. SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT 1, 95 n.7 (1966).

788. *See supra* note 785, TABLE.

taken a criminal procedure course in law school, as compared with less than 10 percent of Society staff attorneys. Almost 56 percent of Panel attorneys had not taken a clinical or advocacy course; only about a third of Society staff attorneys had not taken such a course. Although criminal practice courses sponsored by bar associations and others were available to Panel attorneys, fewer than half had ever attended one. Yet, a study undertaken in the federal courts concluded "there [are] certain courses without which probability of competence in advocacy [is] extremely remote." Among these courses were criminal procedure and trial advocacy.[789]

TABLE 5-9: *Prior Educational Experience of 18-B Panel Attorneys and Legal Aid Society Staff Attorneys*

Educational Experience	Panel Attorneys				Society Attorneys			
		Yes		No		Yes		No
	n	percent	n	percent	n	percent	n	percent
Clinical Courses at Law School	164	44.2	207	55.8	165	67.3	80	32.7
Criminal Procedure Courses at Law School	271	73.0	100	27.0	222	90.6	23	9.4
Criminal Practice Course (Bar Assoc.)	163	44.1	207	55.9	n/a	—	n/a	—

The deficit in education relating to criminal defense skills was most pronounced in the subset of career 18-B Panel defenders. For example, of those admitted to the Panel between 1966 and 1969, 85 percent were without clinical and advocacy training, compared to only 41 percent of those admitted since 1979. Similarly, some 46 percent of those admitted between 1966 and 1969 had never taken a criminal procedure course, compared to only 20 percent of those admitted after 1979. Since courses which focus on lawyering skills have been offered only relatively recently at law schools, it is not surprising that 56 percent of Panel attorney respondents had not benefitted from this experience. While almost all (91 percent) of the youngest age group (25-30) have taken such courses, 27 percent (n=100) of all respondents had not taken a criminal procedure course in law school.[790]

789. *Practice in the Second Circuit*, 67 F.R.D. 159, 168 (1976).

790. The deficiency in formal training of the core group of career 18-B Panel defenders is consistent with the national experience. In 1973, *The Other Face of Justice* revealed that "three-fourths of the reporting attorneys have never attended a seminar or short course to keep abreast of new developments in criminal law and procedure." NATIONAL LEGAL AID AND DEFENDER ASS'N, THE OTHER FACE OF JUSTICE 44 (1973) [hereinafter OTHER FACE OF JUSTICE].

TABLE 5-10: *Percentage of 18-B Panel Attorneys With Prior Educational Experience, By Year of Admission*

Date Admitted	Clinical Advocacy	Criminal Procedure	Criminal Practice
1966-1969	15.1	53.4	28.8
1970-1978	42.5	75.6	39.4
1979-1984	59.0	80.1	54.4

Similarly, among Legal Aid Society attorneys there was a strong relationship between years of service with the Criminal Defense Division and educational experience. Those attorneys who had been with the Society longest had least exposure to clinical and criminal procedure courses, as *Table 5-11* demonstrates:

TABLE 5-11 *Percentage of Legal Aid Society Staff Attorneys With Prior Educational Experience, By Years of Service With the Criminal Defense Division*

Years of Service	Clinical	Criminal Procedure
0-2 years	81.1	96.8
2-4 years	72.9	96.6
4-6 years	58.3	95.8
6-10 years	63.9	85.9
10 years or more	22.1	70.6

The Office of Projects Development had earlier attempted to compensate for the failure of the certification system to train and prepare 18-B Panel attorneys properly by providing a series of criminal practice lectures.[791] These lectures sought to familiarize Panel attorneys with basic issues of criminal procedure, evidence, trial preparation, and witness examination. Although these programs continued under the auspices of the Appellate Division, of those attorneys we surveyed (372), only 182 (49 percent) expressed an awareness of these programs.[792] Attorneys admitted to the Panel since 1979 were more likely both to be aware of these programs and to participate in them. Awareness and

791. *See supra* text accompanying note 536.

792. This is all the more regrettable because 75 percent of those who were aware of the program attended a class between 1982 and 1985, and, of those who participated, 97 percent said that they found it helpful.

We asked the 18-B Panel attorneys what kind of continuing legal education they would value. The answers are set out in the following *Table.*

TABLE: *Kind of Program/Support 18-B Panel Attorneys Would Welcome in the Continuing Legal Education Field*

(i) Advocacy Course

Yes		No		Don't Know	
n	%	n	%	n	%
191	54.0	163	46.0	18	—

attendance by older attorneys, statistically most in need of the programs, was lower. Indeed, our analysis revealed that of all 18-B Panel respondents, only 6.7% of the attorneys certified between 1966-69 ever attended a continuing education program, compared to 10.8% of those certified between 1970-78. *Table 5-12* provides the attendance rate of 18-B Panel attorneys who were aware of the continuing education program, according to their year of admission to the Panel.

TABLE 5-12: *Attendance Rate of 18-B Panel Attorneys Aware of Continuing Legal Education Programs*

Year Admitted	Aware of Programs	Attendance	
	n	n	%
1966-1969	40	25	62.5
1970-1978	56	40	71.4
1979-1984	86	70	81.4

Legal Aid Society and 18-B Panel training experiences diverge, despite the fact that national standards for a coordinated system recommend that both be effectively trained.[793] Almost all Society staff attorneys participated in a Society-sponsored training program involving lectures, simulations, group discussions, and supervised field work. *Table 5-13* sets out the details of the Society training experience in New York City.

(ii) Lectures Updating New Legal Developments

Yes		No		Don't Know	
n	%	n	%	n	%
282	79.7	72	20.3	18	—

(iii) Newsletter Digesting Recent Cases/Statutes

Yes		No		Don't Know	
n	%	n	%	n	%
362	91.6	30	8.4	16	—

793. ABA Standard 5-1.4 states: "The plan should also provide for the effective training of defenders and assigned counsel." 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 752, Standard 5-1.4, at 5.18. The commentary explains that "[t]o meet the need for training, programs should be established for both beginning and advanced practitioners and should emphasize legal subjects as well as effective trial techniques." *Id.*, Commentary at 5.21.

Similarly, the NLADA *Guidelines* recommend that "[r]easonable attendance at training programs should be required of attorneys in order to remain on the panel . . . . Assigned counsel should be encouraged to periodically attend other criminal law-related seminars in addition to the regular formal training programs." 1976 NLADA GUIDELINES, *supra* note 752, Guideline 5.8, at 518-19.

TABLE 5-13: *Number of Legal Aid Society Staff Attorneys Who Have Undergone Training Program*

	Staff Attorneys	
	n	percent
Undergone Training Program	223	93.3
Not Undergone Training Program...	16	6.7
Don't Know.....	7	—
	246	100.0

III.
WORK AND INCOME PATTERNS AMONG 18-B PANEL ATTORNEYS

In order to gain an understanding of the rotational assignment system's effect on the activity level of 18-B Panel attorneys, the distribution of cases among attorneys, and the compensation they received, we analyzed the control cards in the First Department from 1973 to 1984.[794] Control cards record each case assigned to a Panel attorney, the date of the assignment and the amount of compensation, if any, paid to the attorney.

To measure the activity level of 18-B Panel attorneys, we divided the First Department into two groups: 1) those who took cases after January 1, 1982 (the year of the Legal Aid Society staff attorney strike), and 2) those who had stopped taking cases by 1982. We labelled the subgroup that continued to take cases "active," and those that had stopped "inactive." The breakdown is set out in *Table 5-14.*[795]

TABLE 5-14: *Activity of 18-B Panel Attorneys*

	First Department	
	n	percent
Active.....	789	60.6
Inactive.....	514	39.4
	1303	100.0

Thus, about 60 percent of all attorneys who were 18-B Panel members during the 1973 to 1984 period were still taking assignments after the start of

794. Because the analysis of the control cards extended back a full 10 year period it provided an excellent picture of the work and income patterns of the First Department 18-B Panel. *See supra* pp. 707-08. Although the Appellate Division holds attorney records back to the commencement of the assigned counsel plan, the period 1974-1984 does in fact represent the overwhelming bulk of assignments undertaken by the Panel since 1966. *See supra* TABLE 3-1, at 665; TABLE 3-2, at 678; note 570, TABLE; TABLE 3-3, at 690.

795. *Table 5-14* excludes five attorneys where it was not possible to classify the attorney as "active"/"inactive" or as working in an identifiable county. It also excludes any attorney whose sole case-handling activity was for appellate cases.

1982. Although activity levels among "actives" varied, many of them took on all cases that they were asked to defend, as demonstrated by the large sums they earned in compensation. Conversely, a substantial majority of "inactives" never achieved a high level of indigent assignments at any point in their careers. The hypothesis that two distinct attorney groups existed, one continually active and the other never more than sporadically active, was confirmed when we examined the income generated by Panel attorneys from indigent case assignments.[796] *Table 5-15* sets out the Panel attorneys' case assignment income for 1974-1984.

TABLE 5-15: *18-B Panel Attorneys' Income from Indigent Cases, First Department, 1974-1984*[797]

Total Case Assignment Income

$	n	Total percent
0	52	4.0
1– 999	157	12.1
1,000– 9,999	373	28.7
10,000– 19,999	167	12.8
20,000– 49,999	265	20.3
50,000– 99,999	184	14.1
100,000–149,000	72	5.5
150,000–199,999	22	1.7
200,000–249,999	8	0.6
250,000–299,999	3	0.2
	1303	100.0

Table 5-15 reveals a broad spectrum of incomes derived from 18-B Panel work: a few attorneys were able to secure substantial incomes over a long period, while a significant minority claimed little or no compensation. *Table 5-16* breaks down incomes for "active" and "inactive" attorneys.

796. The overall income reported in the control cards is that which has been derived from 18-B Panel assignments alone.

797. *Table 5-15* excludes five attorneys whose income or county could not be ascertained from the control cards. Compensation awarded for handling appellate work was excluded from all calculations. In computing the overall income, calculations were made to the nearest dollar and the totals are based upon claims processed by November 1984.

TABLE 5-16: *18-B Panel Attorneys' Income from Indigent Cases, Controlling for Activity Levels, First Department, 1974-1984*

Total Case Assignment Income	Active Attorneys		Inactive Attorneys	
$	n	percent	n	percent
0	25	3.1	27	5.2
1– 999	35	4.4	122	23.7
1,000– 9,999	146	18.5	227	44.2
10,000– 19,999	107	13.6	60	11.7
20,000– 49,999	204	25.9	61	11.9
50,000– 99,999	169	21.4	15	2.9
100,000–149,999	70	8.9	2	0.4
150,000–199,999	22	2.8	0	0.0
200,000–249,999	8	1.0	0	0.0
250,000–299,999	3	0.4	0	0.0
	789	100.0	514	100.0

Table 5-16 confirms in striking terms the overall picture of two subgroups with distinctly different work patterns. The vast majority of "inactive" attorneys (73.1 percent) received less than $10,000 compensation over the ten year period. On the other hand, "active" attorneys accounted for 94 percent of all 18-B Panel attorneys who received more than $50,000 over the same period. This income pattern suggests that "inactive" Panel attorneys never took more than a small number of cases during their Panel tenure, while the "active" Panel attorneys accepted a substantial number of assignments year after year.

A. "Inactive" Attorneys

We attempted to identify who the "inactive" attorneys were and what factors determined their work patterns during this period. Of all attorneys on the 18-B Panel before 1975, 59 percent had become inactive by the start of 1982.[798] These data suggest either that these attorneys had become inactive due to age, or had utilized the Panel as a transition to a fee-paying practice. The retirement hypothesis had only limited explanatory force, however, because the fall-out rate for *all* Panel attorneys was substantial. For example, of attorneys who joined the Panel in 1975 (n=84), 60.7 percent (n=51) had become inactive by the start of 1982, and of those who joined between January 1, 1975 and December 31, 1981 (n=518), 33.4 percent (n=173) were inactive by the start of 1982. Even if the analysis is restricted to that group which was admitted between January 1981 and December 1981 (n=79), 10.1 percent (n=8) had become inactive by the beginning of the next year. There also

798. The vast majority of inactive attorneys had been on the 18-B Panel prior to 1974. In the Bronx, of the total inactive pool of 142, 78.1 percent (n=111) had been on the Panel prior to 1975; in New York County, of the total inactive pool of 372, 75.2 percent (n=280) had been on the Panel prior to 1974.

seems to be little support for the hypothesis that the Panel acts as a staging ground for lawyers who build a reputation as criminal practitioners and then move on to fee-paying clients. The minimal participation of "inactive" attorneys while on the Panel suggests that other factors must be at work. It is more likely that lawyers use the Panel to supplement income for a short period, to obtain court experience, or to perform public interest pro bono work.

More pessimistic hypotheses are that some attorneys withdraw because they cannot make an adequate living as assigned counsel, or that the practice of criminal law, or representation of the poor, is distasteful. These hypotheses are forcefully supported by written observations made in response to our questionnaire by 18-B Panel attorneys. The following are representative samples:

> *Attorney 452*
> Indigent representation suffers from the same diseases that afflict retained representation. The difference is that you can console yourself with private practice fees in the latter alone. These diseases are: intolerable waits for your case to be called; meaningless adjournments; appalling quality of adversary and judge; a plea bargaining system that is mindless and heartless.
>
> *Attorney 693*
> The *greatest* problem is the time wasted in the calendar parts waiting for the cases to be called. It is routine to spend an entire morning or a minimum of two hours waiting for your case. If you are attempting to combine a healthy retained practice while giving service to indigents, the time called for by an 18-B case may be prohibitive. (Attorney's own emphasis).
>
> *Attorney 817*
> Court clerks are the biggest problem. They have the responsibility of calling cases and delay often intentionally to indicate dislike of the inmates or defendants. Lawyers are made to wait often without reason or cause solely to inconvenience the defendant population. . . . Both the judges and attorneys become bogged down by a very angry and often hostile element of city workers.
>
> *Attorney 760*
> I would be prepared to take more 18-B assignments if lawyers were not treated like cow dung by all court personnel including judges.
>
> *Attorney 851*
> The courts are so frustrating and time-inefficient, I decided to get off the Panel. Only a private client can pay for the agony.

B. "Active" Attorneys

Our analysis of 18-B Panel control cards also reveals a large proportion of attorneys who remained active. As of January 1982, attorneys certified before 1974 constituted nearly 30 percent of the active Panel members in the First Department. Of those who came onto the Panel after 1974, two-thirds were

still taking cases after 1982. It appears that far from being a staging post on the road to a more lucrative fee-paying practice, for this group, the Panel operates as a career defender's office albeit without a management or support structure.

This conclusion was confirmed by our analysis of the control cards measuring case load for 1983 and 1984[799] and income for 1983.[800] About 300 18-B Panel attorneys in the First Department (over one-third of the "active" group) were assigned twenty or more cases in each year by the Panel administrator. Of this group, 57 percent (n=182) in 1983 and 49 percent (n=140) in 1984 were assigned forty or more cases. Some obtained considerably more assignments. In 1983, following the Legal Aid Society staff attorney strike, 8 percent (n=24) were assigned ninety or more cases, with eight Panel attorneys receiving assignments in the hundreds.[801] In 1984, four Panel attorneys were assigned ninety or more cases; one attorney received 110 assignments and another 155.

TABLE 5-17: *Cases Assigned to Active 18-B Panel Attorneys by the Panel Administrator, First Department, 1983-1984*

Cases Assigned by the Panel Administrator	1983		1984	
	n	percent	n	percent
0	122	16.5	176	22.3
1-9	157	21.2	185	23.5
10-19	140	18.9	144	18.3
20-29	75	10.1	98	12.4
30-39	64	8.7	46	5.8
40-49	46	6.2	49	6.2
50-59	36	4.9	43	5.4
60-69	29	3.9	25	3.2
70-79	33	4.5	14	1.8
80-89	14	1.9	5	0.6
90 and over	24	3.2	4	0.5
	740	100.0	789	100.0

A similar picture emerged with respect to income. The case assignment

799. The 1984 data are not for the full calendar year, but over the period up to November 12, 1984, when our field observations commenced. The proportion classified as not taking assignments is thus slightly exaggerated because it includes a small group of attorneys admitted to the 18-B Panel after the start of 1984.

800. Because of the lag in the submission of compensation vouchers, we could not undertake an analysis of the per-attorney income for 1984.

801. A nationwide study of the equitable distribution of cases by assigned counsel programs revealed that, although 44% of assigned counsel counties distributed cases to cover three-fourths of their available lawyers, there were significant regional differences. For example, "cases are more likely to be assigned to fewer lawyers in larger [more populous] counties." 1986 CRIMINAL DEFENSE SYSTEMS STUDY, *supra* note 785, at 18.

income received by "active" attorneys for 1983 appears in *Table 5-18*.[802]

TABLE 5-18: *Case Assignment Income for Active 18-B Panel Attorneys, First Department, 1983*

Income	Attorneys	
$	n	percent
0	112	16.9
1– 999	57	8.6
1,000– 9,999	234	35.4
10,000–19,999	130	19.7
20,000–29,999	80	12.1
30,000–39,999	30	4.5
40,000–49,999	11	1.7
50,000–59,999	6	0.9
60,000–69,999	1	0.2
	661	100.0

Table 5-18 shows considerable unevenness in income distribution. While a majority (61 percent) received less than $10,000 a year case assignment income, a substantial minority (39 percent) earned $10,000 or more from 18-B Panel practice, with half of those attorneys earning over $20,000, and a small group earning even more substantial sums.[803] Of those Panel attorneys earning over $20,000, 38 percent had been "active" for at least seven years. These data further reveal the existence of a career defender group comprised of attorneys who generated considerable income by representing defendants in large numbers of cases.

In contrast, Legal Aid Society staff attorneys worked for a fixed salary and their incomes were not subject to caseload volume. The salary structure

802. In *Table 5-18*, "Active" is defined as having taken any 18-B Panel case after January 1, 1982, even if the attorney subsequently stopped taking cases or if no compensation was claimed during 1983. The attorney total is lower than that in *Table 5-17* dealing with case assignments because the income *Table* excludes all attorneys who came on to the 18-B Panel after January 1, 1983. This is so because: (a) in the case of those admitted to the 18-B Panel during calendar year 1983, many would not have submitted compensation vouchers for cases undertaken; and (b) those admitted after January 1, 1984, could not have earned any monies from Panel work in the 1983 calendar year.

803. The income dominance of a small group of court-assigned attorneys has been reported elsewhere. In 1977, one Los Angeles judge estimated that some assigned counsel might earn as much as $30,000-$35,000 a year exclusively from appointments to defend indigent defendants. COUNSEL FOR THE POOR, *supra* note 766, at 37. In Washington, D.C., it was reported that some CJA attorneys had been able to earn "$30,000 to $50,000 per year." Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 9 (1973). Similarly, in 1978, Wice reported from a survey of nine cities that court-assigned attorneys in Washington, D.C. who depend upon CJA work "for their livelihood . . . can usually make between $15,000 and $25,000 annually." *See* P. WICE, *supra* note 765, at 38.

of the Society, as of September 1984, and the numbers of attorneys at each grade within the Criminal Defense Division were as follows:

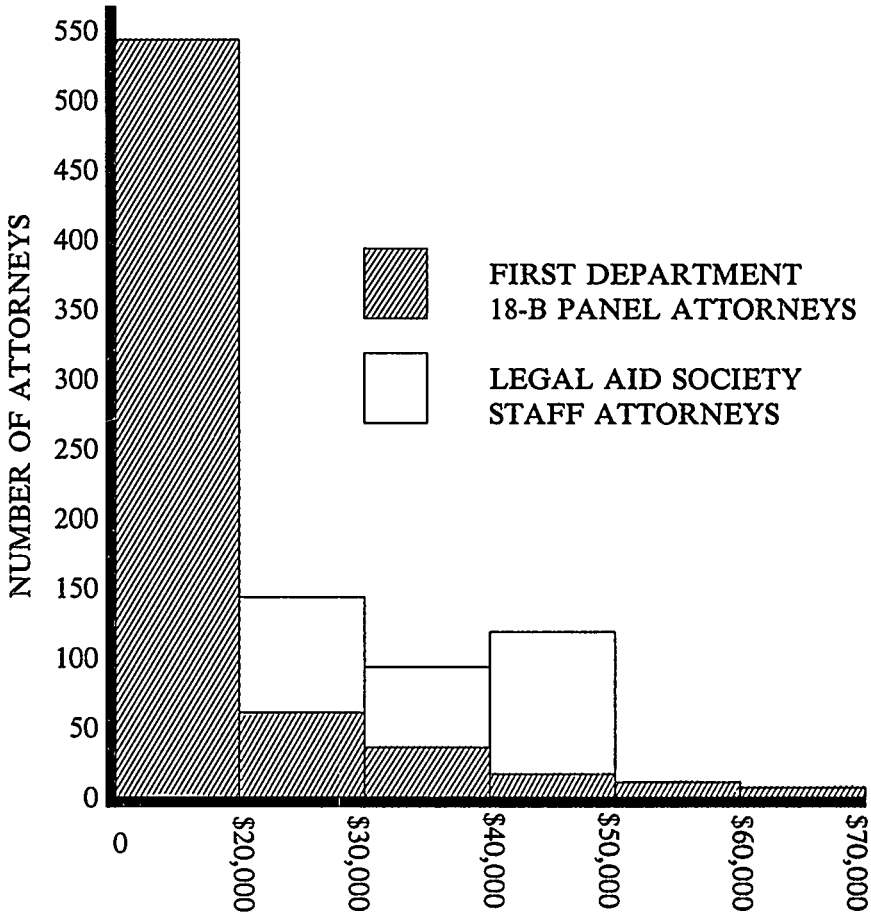
TABLE 5-19: *Salary Structure for Legal Aid Society Staff Attorneys, 1984*

Grade	$	Number
Law Graduate	20,475	7
Step 1	23,310	63
Step 2	26,145	55
Step 3	29,295	51
Step 4	32,550	29
Step 5	35,280	21
Step 6	37,170	15
Step 7	38,220	12
Step 8	39,165	22
Step 9	40,215	17
Step 10	41,265	9
Step 11	42,420	21
Step 12	43,470	16
Step 13	48,195	62

Figure 3 compares "active" 18-B Panel attorneys' incomes from indigent representation with Legal Aid Society staff attorneys' income for 1983-84.

FIGURE 3:

COMPARISON OF INCOME DISTRIBUTION BETWEEN LEGAL AID SOCIETY STAFF ATTORNEYS AND 18-B PANEL "ACTIVE" ATTORNEYS, FIRST DEPARTMENT, 1983-1984



It is apparent from *Figure 3* that staff attorneys at the bottom of the Legal Aid Society pay scale had a higher income from representing poor criminal defendants than most 18-B Panel attorneys. Nevertheless, many "active" Panel attorneys achieved income parity with Society staff attorneys, and some earned even more from their Panel work than did the highest paid Society staff attorneys.[804] The disparity is all the more dramatic because Panel attorneys also represented defendants in retained cases, while Society staff attorneys were barred from doing so.

Despite the possibility of a substantial income from case assignments, 18-B Panel respondents complained bitterly about the conditions under which they practiced. The following written comments by "active" Panel attorneys in response to our questionnaire survey echoed the type of concerns voiced by "inactive" Panel attorneys:

> *Attorney 4*
> The 18-B attorney is looked upon with scorn-bad image.
> *Attorney 678*
> Although there are shining exceptions, too many judges are rude and/or inconsiderate toward Panel attorneys.
> *Attorney 137*
> The 18-B lawyers are treated like dirt by the judges and the Assistant DA's.
> *Attorney 460*
> The court — especially Supreme Court calendar judges — have no consideration or respect for 18-B private practitioners. We must wait hours to have cases called. When sometimes ½ hour should be spent in court you have to wait 4 hours or more.
> *Attorney 703*
> Court personnel and judges often act disdainfully towards 18-B attorneys, as if all were just 'legal whores'. . .
> *Attorney 751*
> 18-B attorneys are not paid enough to take the level of abuse handed out by judges and court personnel. It takes hours to get a case called. Rikers Island is in the middle of nowhere. The city holds your money for 6 months. Court reporters never seem to get your minutes typed.

These expressions of anger, frustration and disgust suggest that "active" 18-B Panel attorneys felt trapped by the court-assignment system. They were deeply concerned precisely because they were career defenders.

804. The surpassing of salaried staff attorneys by private court-assigned attorneys in Washington, D.C. was also reported in *Counsel for the Poor.* In 1973, the Public Defender Service (PDS) of Washington, D.C. paid an inexperienced attorney $15,000 and the top staff attorney $27,000. COUNSEL FOR THE POOR, *supra* note 766, at 125. Meanwhile, until Congress imposed a limit of $18,000 on CJA attorneys' earnings commencing in July 1972, some CJA lawyers were earning at least $30,000 from their assignments. *Id.* at 127.

IV.
CHAPTER SUMMARY

National standards for coordinated assigned counsel systems envision the substantial participation of the private bar in the representation of poor people. This would be accomplished by assigning cases to as many attorneys as possible who have demonstrated competence in trial practice, criminal law and criminal procedure. Special efforts would be made to recruit minority attorneys. Cases would be distributed in an orderly manner and efforts would be made to ensure an even share of cases among attorneys certified for court assignment, taking into account differences in case complexity and the level of experience of each of the attorneys. Through such a rotational system, discrimination or patronage in the assignment of cases would be avoided. In this manner, the poor would be represented by reputable attorneys who were sensitive to their needs, rather than by courthouse regulars who depend on a large number of poor people's cases to support themselves.

Perhaps the most striking finding of our analysis of the 18-B Panel is the absence of the substantial participation of the private bar. The *Bar Association Plan*, in 1966, envisioned that cases not handled by the Legal Aid Society would be handled by pro bono attorneys under a system of rotational assignment. No one contemplated that these Panel attorneys might earn substantial sums or actually make a living from defending the poor. Twenty years later, however, it is clear that a core group of these attorneys do both. While elite lawyers from substantial law firms participate in the City Bar Association and serve on the Legal Aid Society Board of Directors, few, if any, are active members of the 18-B Panel. Indeed, our data demonstrate that the assignment system relied on solo practitioners who organized themselves to obtain court assignments and depended on them for a livelihood. While the work load and the range of case assignment income for "active" attorneys varied, a core group of career defenders took large numbers of assignments and received compensation equal to or greater than that received by full-time Society staff attorneys. However, these Panel regulars often lacked an office, secretarial and research support, adequate training and supervision. A substantial number had never had the benefit of supervised training. For many, certification meant little more than placement on the rotational list.

Minority groups which predominate in the defendant population were substantially underrepresented in the composition of both the 18-B Panel and the Legal Aid Society staff. The majority of Panel attorneys who intended to accept Panel assignments for the foreseeable future were white males between the ages of thirty and fifty; Society staff attorneys tended to be younger, with a greater proportion of minorities and women, yet they planned to remain with the Society for only three to five years.

The organized bar justified reliance upon a mixed institutional defender and assigned counsel system because of the contributions both entities could offer in defending the poor. The presence of the private bar was justified be-

cause its "training and experience," and continued independence would contribute to the welfare of the criminal justice system. These attributes would guard against the institutionalization of state criminal practice and serve to protect defendant's rights. The reality of 18-B Panel practice refutes every justification offered by the organized bar for the participation of these attorneys. The significant participation of a core group of Panel regulars who were dependent on court assignments for a livelihood demonstrates that the profession's standards for providing defense services are little more than legitimating rhetoric.