CHAPTER SIX

THE LAWYERING PRACTICES OF 18-B PANEL ATTORNEYS[805]

In this chapter we consider the extent to which 18-B Panel attorneys meet national standards for the defense function.[806] We first examine the development of the attorney-client relationship. One measure of this relationship is whether defendants represented by Panel attorneys are continuously respresented by the same attorney from arraignment through final disposition.[807] Other indicators useful in analyzing whether Panel attorneys fulfill their obligations as defense lawyers are the extent to which Panel attorneys interview their clients,[808] engage in investigation,[809] and make pre-trial mo-

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805. We do not mean to suggest by the title and subject matter of this chapter that the quality of representation provided to poor people evident from our analysis of the 18-B compensation vouchers and our obversation of the lawyering services provided by 18-B Panel attorneys, *see infra* pp. 750-71, was markedly different from that provided by Legal Aid Society staff attorneys. The quality of indigent representation we observed in New York County was fairly constant, regardless of whether the attorney was a member of the 18-B Panel or the staff of the Society. Although we were unable to quantitatively evaluate the lawyering tasks undertaken by all Society staff attorneys, because of the restrictions placed upon us by the Society's management, *see supra* pp. 701-04, the quality of lawyering provided by Society staff attorneys falling within our observation sample was quantified, to some extent, in our empirical analysis of the Society's "case shedding" practices, *see infra* chs. 8 & 10.

806. *See generally* AMERICAN BAR ASS'N, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION (1980) [hereinafter 1980 ABA STANDARDS FOR THE DEFENSE FUNCTION]; AMERICAN BAR ASS'N, STANDING COMMITTEE ON ASS'N STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROVIDING OF DEFENSE SERVICES (1980) [hereinafter 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES]; NATIONAL LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS, FINAL REPORT (1976) [hereinafter 1976 NLADA GUIDELINES].

807. *See* 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 806, Standard 5-5.2, at 5.53, which provides:

> Counsel should be provided at every stage of the proceedings, including sentencing, appeal, and postconviction review. Counsel initially provided should continue to represent the defendant throughout the trial court proceedings.

See also 1976 NLADA GUIDELINES, *supra* note 806, Guideline 5.11, at 520. *See supra* text accompanying notes 467-69.

808. *See* 1980 ABA STANDARDS FOR THE DEFENSE FUNCTION, *supra* note 806, Standard 4-3.2, at 4.32, which provides:

> As soon as practicable the lawyer should seek to determine all relevant facts known to the accused. In so doing, the lawyer should probe for all legally relevant information without seeking to influence the direction of the client's responses.

See also 1976 NLADA GUIDELINES, *supra* note 806, Guideline 5.10 at 519; *supra* text accompanying note 478.

809. *See* 1980 ABA STANDARDS FOR THE DEFENSE FUNCTION, *supra* note 806, Standard 4-4.1, at 4.53, which provides:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admis-

tions related to protecting their client's constitutional rights.[810]

We also consider the 18-B Panel attorney's scrutiny of the state's case. In particular, we examine whether Panel attorneys conducted interviews which might have revealed the facts of the case and any potential legal defense; whether attorneys undertook an independent investigation of the facts by discovering the identity of potential witnesses, interviewing witnesses, and visiting the crime scene; whether they used the services of investigators and experts; and whether they prepared pre-trial motions, including motions for dismissal of the charges and suppression of the evidence. Finally, we consider the extent to which Panel attorneys attempted to develop a coherent theory of defense before advising the defendant whether to plead guilty.[811] Our specific areas of inquiry include whether the attorneys prepared for trial, effectively negotiated with the prosecution regarding guilty plea offers, and consulted with defendants regarding the available plea options.

Although the adequacy of representation provided by 18-B Panel attorneys has been questioned in the past, previous inquiries were based on impressionistic data which did not permit a systematic analysis of the quality of Panel representation. In 1975, the Office of Court Administration's Committee on the Legal Representation of the Indigent inquired into the quality and adequacy of representation provided by Panel attorneys;[812] in 1982, the Committee on Criminal Advocacy of the City Bar Association addressed the same issue.[813] These inquiries identified specific shortcomings, among them the failure to communicate with defendants, to obtain adequate knowledge of the

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sions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

See also supra text accompanying note 479.

810. *See* 1980 ABA STANDARDS FOR THE DEFENSE FUNCTION, *supra* note 806, at Standard 4-3.6(a), at 4.45, which provides:

> Many important rights of the accused can be protected and preserved only by prompt legal action. The lawyer should inform the accused of his or her rights forthwith and take all necessary action to vindicate such rights. The lawyer should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

811. *Id.* at Standard 4-6.1, at 4.70, which provides:

> A lawyer may engage in plea discussions with the prosecutor, although ordinarily the client's consent to engage in such discussions should be obtained in advance. Under no circumstances should a lawyer recommend to a defendant acceptance of a plea unless a full investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

See also supra text accompanying note 480.

812. *See* Office of Court Administration of the State of New York, Advisory Committees 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 at 15-19 (Circulating Draft Aug. 1975) [hereinafter 1975 Report on the Legal Aid Society and the 18-B Panels].

813. *See* Association of the Bar of the City of New York, Committee on Criminal Advocacy, Resolution at 2 (June 9, 1982) [hereinafter 1982 Criminal Advocacy Resolution].

facts and circumstances, and to appear and effectively represent the client in court as required.[814] In the absence of empirical data, however, the committees were unable to estimate "the actual degree of dissatisfaction" with Panel representation.[815]

The administrative mechanisms set up by the screening committees to remove attorneys and process complaints about their conduct were also of limited value in estimating the extent of incompetent representation.[816] In the first thirteen months of its existence, the First Department's Office of Projects Development received only fifty-eight complaints, which concerned fifty-five 18-B Panel attorneys. The Office acknowledged that these complaints did not reflect the full extent of attorney incompetence:

> Many attorneys do not want to complain about the work of fellow members of the legal profession . . . . Although defendants will not hesitate to complain out of any sense of loyalty to the attorney, they may have the attitude that nothing will be accomplished and therefore do not bother to complain.[817]

We found no judge, prosecutor, or defense attorney who had confidence in the capacity of the complaint system to identify or remedy incompetent representation.[818]

In light of the need for a systematic inquiry into the quality of 18-B Panel representation, we devised two strategies for measuring the extent of attorney competence against national standards for the criminal defense function.[819]

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814. *See* 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 812, at 16-18; 1982 Criminal Advocacy Resolution, *supra* note 813, at 2.

815. *See* 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 813, at 16-17. *See also* 1982 Criminal Advocacy Resolution, *supra* note 813, at 2. Impressionistic data also appear in the literature. *See, e.g.*, R. HERMANN, E. SINGLE & J. BOSTON, COUNSEL FOR THE POOR 80-110 (1977) [hereinafter COUNSEL FOR THE POOR]. The authors of *Counsel for the Poor* interviewed a group of judges, prosecutors, defense lawyers and defendants to determine their opinions regarding attorney performance. *Id.* at 80-99. They also used statistical methods to examine the effect of attorney type on case outcome and found that "type of attorney had very little bearing upon the outcome of the case." *Id.* at 106.

816. *See* 1982 Criminal Advocacy Resolution, *supra* note 813, at 2.

817. Office of Projects Development, Appellate Division, First Dep't, Interim Report Number Four 47 (Oct. 31, 1975) [hereinafter 1975 Interim Report Four].

818. Our finding that judges and bar associations in New York City are reluctant to remove court-assigned attorneys for incompetence is consistent with the findings of the most recent nationwide study of indigent defense systems. *See* R. SPANGENBERG, B. LEE, M. BATTAGLIA, P. SMITH & A. DAVIS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY, FINAL REPORT 17 (1986) [hereinafter 1986 CRIMINAL DEFENSE SYSTEMS STUDY].

819. Studies of the competence of indigent legal defense in other jurisdictions have also measured attorney performance against objective legal standards. *See generally* Nagel, *Effects of Alternative Types of Counsel on Criminal Procedure Treatment*, 48 IND. L.J. 404 (1973); D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT (1968); L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965); Note, *Providing Counsel for the Indigent Accused: The Criminal Justice Act*, 12 AM. CRIM. L. REV. 789 (1975).

Other research designs have evaluated the type of attorney (e.g., court-assigned, institutional staff, retained) according to the outcome of cases. *See, e.g.*, Getelman, *The Relative Per-*

Our primary strategy entailed a quantitative analysis of over 14,000 Panel attorney vouchers claiming compensation for defense services rendered.[820] Because Panel attorneys used these vouchers to claim the tasks they performed for each defendant, a computer analysis of the vouchers yields quantitative data about the lawyering services regularly provided by Panel attorneys.

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formance of Appointed and Retained Counsel in Arkansas Felony Cases — An Empirical Study, 24 ARK. L. REV. 442, 446 (1971). *See generally* COUNSEL FOR THE POOR, *supra* note 815, at chs. 6-7; Houlden, *Qualified Cost Comparisons of Private Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176 (1985); Nardulli, *"Insider" Justice: Defense Attorneys in the Handling of Felony Cases*, 77 J. CRIM. L. & CRIMINOLOGY 379 (1986). Other research designs have examined the difference in sentencing according to the type of attorney. *See, e.g.*, Lehtinen, *The Relative Effectiveness of Public Defenders and Private Attorneys*, 32 NLADA BRIEFCASE 13, 17 (1972). Others have evaluated the differences in defendants' attitudes toward different types of attorneys. *See generally* J. CASPER, AMERICAN CRIMINAL JUSTICE (1972); O'Brien, *The Criminal Lawyer: The Defendant's Perspective*, 5 AM. J. CRIM. L. 283 (1977).

820. For a description of the voucher sample, *see supra* pp. 708-09; *supra* note 731, TABLE. During the period covered by the voucher analysis, statutory caps limited compensation to $1500 for capital offenses, $750 for other felonies, and $500 for all other crimes. *See* Act of 1978, c. 700, § 1, 1978 N.Y. Laws 878. Throughout this chapter, we analyze the lawyering tasks claimed by 18-B Panel attorneys according to charge severity (e.g., homicide, other felony, misdemeanor violation) and not according to method of disposition (e.g., trial, plea, etc.). *See* In-Court Activity Form (App. Div. 1st Dep't), Out-of-Court Activity Form (App. Div. 1st Dep't), and Case Disposition Form, reprinted *infra* app. 1(c), at 914. Our analysis pertains to Panel attorneys' performance in their assigned cases regardless of how each case was resolved. For the purposes of our analysis, multiple-charge cases were classified according to the most severe offense category. In *Table A*, the number of cases for which attorneys claimed compensation is broken down according to category of offense. Note that most Panel assignments were felony cases (56.5 percent).

TABLE A: *Breakdown of Categories of Violations Covered by the 18-B Panel Attorney Vouchers*

Charges	Number of Cases	Percent
Homicide	303	2.2
Other Felony	8289	54.3
Misdemeanor	5159	36.9
Violation	89	0.6
Special Proceeding	140	1.0
Don't Know	139	—
Total	14,119	100.0

In *Table B*, the number of cases is broken down according to method of disposition.

TABLE B: *Breakdown of Methods of Disposition Covered by the 18-B Panel Attorney Vouchers*

Disposition Method	Number of Cases	Percent
Jury Trial	581	4.1
Non-Jury Trial	182	1.3
Plea	6998	49.8
Other Disposition	4821	34.3
Attorney Relieved	1410	10.0
Sentence	72	0.5
Don't Know	55	—
Total	14,119	100.0

"Other Disposition" includes dismissal, adjournment in contemplation of dismissal, withdrawn complaint, transfer to family court, and issuance of bench warrant after defendant absconded. *See* Case Disposition Form, *reprinted infra* app. 1(c), at 914.

Our second strategy involved observing 18-B Panel attorneys in New York County while they represented 124 defendants on four hundred and one calendar dates.[821] We hypothesized that, at a minimum, competent representation requires the establishment of an attorney-client relationship. One measure of an attorney-client relationship is whether the same attorney represents the defendant at arraignment and at all subsequent court appearances. We determined the frequency with which the attorney designated to represent a particular defendant appeared on all required calendar dates.

Our study of 124 defendants' cases also served two additional functions with respect to the data we acquired through our voucher analysis. First, the time we spent in court observing 18-B Panel attorneys and defendants allowed us to gather data on the quality of lawyering services provided by Panel attorneys. We compared these data with the results of our voucher analysis of the lawyering tasks claimed by Panel attorneys with the understanding that conclusions based on analysis of the vouchers alone would not reveal the full extent of lawyering tasks neglected by Panel attorneys. Second, our presence in court allowed us to test the accuracy of in-court voucher claims. We discovered overclaiming in 27 percent of the vouchers.[822] Thus, the vouchers overstate the extent of lawyering tasks performed by Panel attorneys.[823]

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821. *See supra* pp. 709-10.

822. To test the accuracy of the voucher claims, we analyzed claims for in-court activities in completed cases that fell within our court observation sample, as of May 1985. *See supra* note 823. We tracked our sample of cases from arraignment in Criminal Court through several dates in Supreme Court, and compared the dates claimed by Panel attorneys for court appearances, with the actual appearances that we observed. We were present in court whenever these cases were called and knew whether a given Panel attorney was present. We found that slightly over 27 percent of the claims submitted were for court "appearances" at which the Panel attorneys were not present.

823. With the assistance of a Subcommittee of the Council of Judicial Associates of the New York State Bar Association, we surveyed all judges charged with verification and approval of attorney compensation claims in New York City. The overwhelming majority of judges criticized the process as inadequate or worse. Judges said that it was impossible to assess the accuracy of claims made for out-of-court activities. In addition, sometimes judges could not check in-court activity because of the lack of records. Expressing representative criticism of the verification and authorization process, one judge stated:

> The present method . . . does little to minimize padding . . . . Since the claimants believe that the fixed rates are unconscionably low, the claimed hours reflect the compensation the claimants believe they deserved rather than what they are statutorily entitled to. The vouchers are submitted secure in the expectation that the claims will go unchallenged . . . . [I]f the disposition was favorable to the defendant, *e.g.*, acquittal or dismissal, the file is sealed and not even attendance is checked." (Judge 11).

According to another judge:

> The judge has no way of knowing the accuracy of the hours spent or the reasonableness of the bill. This is certainly true of out-of-court hours. With respect to in-court activity, rarely does a judge keep track of the hours spent on each case . . . . I must emphasize that judges do not know what they are certifying and to ask them to engage in such empty procedures is inappropriate. (Judge 31).

A third judge admitted that he rarely pays attention to the voucher. "Since the attorney is

I.
THE DEVELOPMENT OF THE LAWYER-CLIENT RELATIONSHIP

A. Discontinuous Representation

To determine whether 18-B Panel attorneys in our sample of observation cases provided continuous representation, we noted the extent to which the attorneys with ultimate case responsibility — the "designated" attorneys — appeared in court on the required dates. We counted an attorney as having appeared only when she was present when her client's case was called. If a substitute attorney, whether another Panel attorney or a Legal Aid Society staff attorney, appeared instead, we recorded it as a non-appearance. *Table 6-1* shows the significant discontinuities in representation among the Panel lawyers in our observational sample:

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required to certify its accuracy and since I have no independent means of verification, no idea of what would be 'appropriate,' I let the clerk check the arithmetic."

Because of their inability to verify attorneys' claims, judges rarely reduce Panel attorneys' claimed compensation, as the *Table* illustrates.

TABLE: *Judicial Practice in Allowing or Disallowing Compensation Claims*

Court Practice	Number of Claims	Percent
Claim Allowed in Full	13,765	97.5
Small Cut (under $15) in In-Court Claim	13	0.1
Large Cut (over $15) in In-Court Claim	40	0.3
Small Cut (under $15) in Out-of-Court Claim	9	0.1
Large Cut (over $15) in Out-of Court Claim	31	0.2
Small Cut (under $5) in Expenses	118	0.8
Large Cut (over $5) in Expenses	129	0.9
Several items cut by large amounts (over $15)	14	0.1
TOTAL	14,119	100.0

In the absence of meaningful judicial and administrative verification, the voucher form itself has actually "taught" some attorneys how to claim. Fifteen to twenty Panel attorneys have established claims systems which they apply uniformly to all their cases, without regard to the gravity of the charge. For instance, some always claim for "visiting the scene of the crime" and for "investigation," several always charge for "legal research," and some claim to engage in "correspondence" on every case. It is implausible that all of these attorneys always engage in the activities for which they claim.

But the existence of a direct relation between performance and the level of financial rewards indicates that underclaiming is rare, and that 18-B Panel attorneys' efforts in assigned cases are probably commensurate with the statutory compensation limits. *See generally* E. LAWLER, PAY AND ORGANIZATIONAL EFFECTIVENESS 152-53 (1971). An attorney whose compensation is governed by a statutory cap may act as if she were being paid by the piece, i.e. the case, and she will cease working on the case as the time allocated approaches the maximum compensation permitted by statute. *Id.* This was confirmed by our analysis of the compensation claimed in over 13,800 vouchers. *See infra* TABLE 11-1, at 860, in which the mean claim for out-of-court activities amounted to four hours per case, and 94% of all cases resulted in guilty pleas or other non-trial disposition. *See supra* note 820, TABLE B.

TABLE 6-1: *Continuity of Representation from Arraignment to Disposition by 18-B Panel Attorneys*

	Number of required court appearances	Number of appearances by designated attorney	Number of non-appearances by designated attorney	Overall appearance rate (%)
Overall sample from Arraignment to Disposition ...	401	233	168	58.1
Single Defendant Cases from Arraignment to Disposition	112	64	48	57.1
Multiple Defendant Cases from Arraignment to Disposition	289	169	120	58.5

As *Table 6-1* reveals, the Panel attorney designated to represent the defendant did not appear in over 40 percent of required court appearances. Out of 63 arraignments, the designated Panel attorney appeared on only 18 occasions, or 29 percent of the time. In 20 percent of all required appearances, no attorney appeared for the defendant. The substitution of one lawyer for another resulted in 174 different attorneys appearing for 131 defendants. These substitute attorneys, whether other Panel lawyers, associates of the designated attorney, or Society staff attorneys, were unfamiliar with the client and the client's case.[824]

Five arraignment practices effectively defeated continuity. First, because the 18-B Panel administrator assigned only one Panel attorney to an arraignment session, no more than a single 18-B defendant in each multiple-defendant case could have received continuous representation. Second, the Panel administrator allowed the Panel attorney at arraignment to represent one or more defendants "for arraignment only"; in other words, a Panel attorney was not required to represent a defendant beyond arraignment.[825] Third, in the event that the 18-B Panel attorney assigned to an arraignment session did not appear, the Legal Aid Society represented all co-defendants "for arraignment

824. This method of counting overstates, to some extent, the failure of the designated attorney to appear on required court dates because of systemic defects in the 18-B arraignment system and deficiencies in the arraignment process which extend beyond the actions of any designated Panel attorney. *See infra* text accompanying notes 825-27. *Compare infra* TABLE 10-2, at 843, which shows that the post-arraignment Panel attorney appearance rate was 63.6 percent (excluding 64 arraignments) *with* the overall appearance rate for designated Panel attorneys (excluding arraignments) of 58.1 percent shown in *Table 6-1* above.

825. *See supra* notes 603-04 and accompanying text. Under the "arraignment only" system, therefore, an attorney can elect not to provide continuous representation. If the attorney so elects, the case will go back to the Appellate Division for reassignment to another attorney. By contrast, if an attorney is willing to undertake arraignment assignments "for all purposes," the attorney can increase her income by acquiring cases at arraignment in addition to those assigned rotationally by the administrator. The extent to which attorneys in New York County and the Bronx engaged in independent case-building of this kind is shown in the *Table* below:

only." Fourth, even when a Panel attorney was present, the Society may have elected to appear for all defendants and have co-defendants reassigned to a Panel attorney for the next adjourned date.[826] Fifth, the Panel attorney may

TABLE: *Percentage of 18-B Panel Attorneys Who Kept Cases at Arraignment for Continuous Representation*

	Number of Cases and Percentage of Attorneys			
For All Purposes (continuous)	Number of Attorneys	% 1983	Number of Attorneys	% 1984
0	44	14.1	38	12.1
1- 9	128	41.2	131	41.9
10-19	82	26.4	73	23.3
20-29	32	10.3	36	11.5
30-39	6	2.0	13	4.1
40-49	7	2.3	8	2.6
50-59	4	1.3	5	1.6
60-69	1	0.3	5	1.6
70-79	1	0.3	0	0.0
80-89	2	0.6	0	0.0
90 or over	4	1.3	4	1.3
	311	100.0	313	100.0

As the *Table* demonstrates, some attorneys (44 in 1983, 38 in 1984) did not pick up any cases at arraignment in which they provided continuous representation; they merely provided "arraignment only" representation. The greatest concentration of attorneys (128 in 1983, 131 in 1984) provided continuous representation, from arrraignment on, in between one and nine cases per year. When compared with the number of arraignment shifts to which 18-B Panel attorneys were assigned, *see infra* TABLE 8-2, at 798, and the number of cases Panel attorneys arraigned at any given shift, *see infra* pp. 863-64, the statistics on cases in which continuous representation was provided indicate that the vast majority of Panel representation at arraignment was on a per diem ("arraignment only") basis.

Research on discontinuous representation (replacement) of indigent defense counsel has for the most part attributed the phenomenon to organizational features of indigent defense systems and to judges' demands that lawyers be assigned to particular courtrooms. *See* S. SINGER, B. LYNCH & K. SMITH, NLADA FINAL REPORT OF THE INDIGENT DEFENSE SYSTEMS ANALYSIS PROJECT 53 (1976) [hereinafter 1976 INDIGENT DEFENSE SYSTEMS ANALYSIS PROJECT]; Wice, *Meeting the Gideon Mandate: A Survey of Public Defender Programs*, 58 JUDICATURE 400, 406-07 (1975); Wice, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161, 172 (1974); Graham, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Observations*, 18 UCLA L. REV. 636, 649 (1971).

The analysis of the Chicago Public Defender's Office undertaken by Gilboy and Schmidt, is typical of the findings of research on discontinuous representation. The authors reported that 47 percent of defendants were represented by different public defenders at different stages of the proceedings. Gilboy & Schmidt, *Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants*, 70 J. CRIM. L. & CRIMINOLOGY 1, Table 1, at 6 (1979). *Id. See also supra* note 496. Feeley describes the same phenomenon in his study of public defenders in New Haven:

> The public defender appearing with the arrestee at arraignment is not necessarily the public defender who will eventually be assigned .... He is simply the person assigned to cover the arraignments of all public defender clients in the 'pit' that day. It can be several days later before these new cases are assigned to a specific attorney, which may be the reason for the longer period between appearances. An assigned public defender may not know about his client's continued detention until they meet for the first time at the scheduled second appearance.

M. FEELEY, THE PROCESS IS THE PUNISHMENT 213 (1979).

826. For a discussion of the Legal Aid Society's appearance practices at arraignment, *see infra* p. 802-03, 806-14; *infra* notes 931-34 and accompanying text.

have been certified only for misdemeanor representation and thus have been ineligible to represent felony cases beyond Criminal Court.[827]

After arraignment, attorney substitution was a function of the appearance practices of particular 18-B Panel attorneys and the willingness of judges to appoint substitutes for absent or "unacceptable" attorneys. One or more court dates may have passed before the Panel administrators were informed of the need to assign a successor. Some attorneys frequently missed court appearances, and some developed reputations among judges for incompetence.[828] Other felony-certified Panel attorneys did not accept misdemeanor assignments and disliked having to appear in Criminal Court. Many of these attorneys failed to appear until their felony case was placed on the Supreme Court calendar. Moreover, some Panel attorneys accepted so many assignments that they were unable to appear on every court date. When these attorneys failed to appear, other Panel attorneys or Legal Aid Society staff attorneys may have appeared for them without assuming any case responsibility.

One significant consequence of 18-B Panel attorneys' discontinuous representation was that information essential to elementary familiarity with a case often did not reach a successor attorney. Predecessor attorneys often gathered oral and written information without passing it along to successor attorneys. The Panel attorney who represented the defendant at arraignment received the complaint, the pre-trial release report, and the defendant's criminal record; the attorney designated to represent the defendant after arraignment may have failed to receive these papers because the first lawyer discarded them. The successor attorney often lacked basic knowledge of the facts of the case, which she could have learned from court records or from conferences with the judge, prosecutor, investigating officer and others present at earlier stages of the proceedings.[829]

The following summaries of our observations illustrate the consequences of discontinuous representation.[830] In each case, an 18-B Panel attorney was assigned to provide representation beginning at arraignment in Criminal Court.

1. The defendant was charged with two sales of a controlled substance to an undercover agent. A Panel attorney represented the defendant at arraignment. When the lawyer appeared at the defendant's initial appearance in Supreme Court, the calendar judge stated that the attorney was "an incompe-

827. See *infra* text accompanying note 835. For a description of 18-B Panel felony and misdemeanor certification criteria, *see supra* note 593.

828. *See infra* text accompanying notes 831, 833.

829. Panel attorneys were completely dependent on such information because of their failure to engage in independent investigation and discovery. *See infra* pp. 758-64; *infra* TABLE 6-3, at 763.

830. To maintain guarantees of anonymity and confidentiality and to avoid identification of judges, attorneys or defendants in our sample of cases, consistent with our original commitment to all participants, *see supra* text accompanying note 710, we deleted minor details or altered them without affecting the substance of any case descriptions. Throughout, we identify cases by numbers utilized during the research without reference to official docket numbers.

tent" whom he would not permit to appear in his courtroom. The judge replaced this attorney with another Panel attorney who happened to be sitting in the courtroom. After a brief bench conference, the second attorney advised the defendant to plead guilty to a felony charge, and the defendant followed this advice.[831]

2. The defendant was charged with acting in concert with an unapprehended individual who allegedly displayed a gun and stole money from the complainant during a robbery. The defendant claimed that she was an innocent bystander. After a Panel attorney represented the defendant "for arraignment only," the administrator reassigned the case to a successor Panel attorney, who did not appear until the matter was calendared in the Supreme Court approximately one month later. At that appearance, the defendant indicated that she previously desired to testify in the Grand Jury to explain her presence at the scene of the crime. She stated that she had not asserted her right to testify because of lack of representation in Criminal Court. The judge denied the motion because the defendant failed to show that her testimony would have been sufficiently material to have effected the outcome of the grand jury proceedings.[832]

3. The defendant was charged with the sale of a controlled substance. A Panel attorney represented the defendant for arraignment only, after which the Panel administrator reassigned the defendant to a successor Panel lawyer. The second attorney appeared in Criminal Court and spoke briefly with the defendant. When the successor attorney failed to appear on the first calendar date in Supreme Court, the calendar judge immediately replaced him with a third Panel attorney. After a brief bench conference, and without speaking to the defendant or engaging in any investigation, the third Panel attorney advised the defendant to plead guilty. The defendant accepted this advice and was sentenced to one and a half to three years. When asked why the second Panel attorney was replaced by the third, the calendar judge replied, "Mr.Y (the third attorney) was here and Mr. X (the second attorney) was not, so I relieved Mr. X and appointed Mr. Y."[833]

4. The defendant was charged with the sale of a controlled substance to an undercover agent. The defendant was prosecuted as a persistent felon and therefore faced a possible life sentence. A Panel attorney with only misdemeanor certification represented the defendant at arraignment and continued with the case in Criminal Court. On the second date, the prosecutor offered a misdemeanor plea with a sentence of one year. The judge warned that if the defendant, a predicate felon, failed to accept the plea, the case would be presented to the grand jury and the defendant would be indicted and charged with criminal sale of a controlled substance in the fifth degree, a felony carrying a mandatory minimum sentence of two to four years. Despite this admo-

831. Case 006.
832. Case 008.
833. Case 044.

nition, the Panel attorney advised the defendant not to plead guilty. The attorney made the following statement to the defendant:

> Look, it's only eight valium. . . . They won't indict you because they have too many other cases in the sweep. If you went upstairs [to the Supreme Court] it could be worse, but they won't. I want to see a lab report and hear that they have officers to give evidence. We'll see what happens next time.

On the adjourned date, the defendant was indicted and charged with criminal sale of a controlled substance in the fifth degree. Thereafter, when the case was transferred to Supreme Court, the misdemeanor certified Panel attorney was relieved by and replaced with a felony certified attorney.[834]

5. The defendant was held in pre-trial detention and was charged with robbery. A Panel attorney represented the defendant for arraignment only. The successor Panel attorney appeared on one occasion in Criminal Court, but failed to appear on three of four dates in Supreme Court. On two of those dates, an associate of the successor attorney who was not a member of the Panel appeared. She was unfamiliar with the facts of the case and could do no more than seek an adjournment. She never communicated with the defendant. On the third date, a different associate of the successor attorney appeared. Although admitted to the Panel, she too was completely unfamiliar with the case. This attorney (the fourth since arraignment) disappeared prior to the call of the case, at which time the case was adjourned and the defendant continued in detention.[835]

6. The defendant, charged with criminal sale of a controlled substance to an undercover agent, was represented by a Panel attorney for arraignment only. Thereafter, the case was reassigned to a successor Panel attorney. The second attorney failed to appear in Criminal Court. When the court clerk asked who her attorney was, the defendant presented a note bearing the name of the Assistant District Attorney. When the successor Panel attorney finally appeared in Supreme Court, she immediately held a brief conference with the judge and prosecutor without consulting with the defendant. During the conference, the attorney turned from the bench to the defendant and declared, "[t]wo to four is the best you can get."[836]

These cases demonstrate the direct relationship between discontinuous representation and ineffective assistance. The defendant who is not provided continuous representation may suffer any of four types of prejudice. First, without an attorney to argue for a reduction in bail,[837] the defendant may

834. Case 046.

835. Case S-2.

836. Case S-75.

837. New York law permits a defendant to obtain a de novo review of a bail determination made at arraignment in Criminal Court. *See* N.Y. CRIM. PROC. LAW § 210.35(4) (McKinney 1982).

needlessly remain in jail from one adjourned court date to the next.[838] Failure to establish an early attorney-client relationship precludes bail review, and the bail set by the arraigning judge is likely to remain in effect throughout the proceedings.[839] Second, an unrepresented defendant is unable to give the prosecutor notice of her intention to testify before the grand jury.[840] In most Panel cases there is no defense lawyer to consider presenting the defendant's

838. Our voucher analysis revealed that bail applications before the reviewing court were made in only 11.3 percent of all homicide cases and 7.3 percent of other felonies; *but see* 1980 ABA STANDARDS FOR THE DEFENSE FUNCTION, *supra* note 806, Standard 4-3.6, at 4.45. Standard 4-3.6 requires counsel to attempt to obtain the release of the accused immediately upon appointment. The commentary to Standard 4-3.6 states that "[n]ot only is this essential to the accused's immediate freedom . . . but it is also directly related to a favorable disposition of the case." *Id.*, Commentary, at 4.46.

The disadvantages suffered by defendants detained in pre-trial detention are well documented. A 1965 University of Pennsylvania Law School Study led by Caleb Foote showed that only 20 percent of jailed defendants in New York City were acquitted, while 31 percent of defendants released on bail were acquitted. The grand jury dismissed approximately 24 percent of the cases against defendants released on bail but only 10 percent of the cases against jailed defendants. Finally, jailed defendants were given suspended sentences in approximately 13 percent of the cases while defendants released on bail received suspended sentences in slightly more than 54 percent of the cases. Foote, *A Study of The Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 726-727 (1958). *See also*, GOLDFARB & RANSOM, A CRITIQUE OF THE AMERICAN BAIL SYSTEM, 40-43 (1965). Ten years later a similar study of New York City bail practices found that the imprisonment rate for jailed defendants charged with major felony offenses was 88 percent while the imprisonment and prison rate for bailed defendants was 57 percent. *See* COUNSEL FOR THE POOR, *supra* note 815, at 223, Table C-15.

The New York City experience is consistent with the results of a nationwide sample which revealed that 60 percent of all defendants who pleaded guilty while detained received a sentence of incarceration, compared to only 21 percent of those released pending disposition. *See* 1976 INDIGENT DEFENSE SYSTEMS ANALYSIS PROJECT, *supra* note 827, at 196-97.

839. By contrast, research has shown that defense attorneys are more effective at bail proceedings if they provide representation beginning at arraignment. FAZIO, WEXLER, FOSTER, LOWY, SHEPPARD & MUSSO, EARLY REPRESENTATION BY DEFENSE COUNSEL FIELD TEST 28 (1984) [hereinafter EARLY REPRESENTATION].

> Under normal or control conditions, indigent defendants were either not represented during bail setting, or . . . were provided only nominal representation. Therefore, judges routinely set bail relying on the prosecutor or the pretrial program, but rarely on the defense attorney. With ERDC [early representation] an attorney would represent the position of the defendant and could offer information with regard to community, family, employment ties, and other matters concerning the defendant. The judges responsible for bail setting agreed that the information provided by the test attorneys, when taken together with that available from other sources, enabled them to make better and more informed bail decisions . . .

Id.

840. New York law grants a defendant against whom a complaint is lodged in Criminal Court the absolute right to testify before the grand jury, provided the state is given written notice of his intention. N.Y. CRIM. PROC. LAW § 190.50(5) (McKinney 1982).

After the filing of an indictment, and once an 18-B Panel attorney appears, a non-testifying defendant has the burden of showing that she should be allowed to reopen the proceedings to testify before a grand jury. The defendant must persuade the court that she intended to testify and had material evidence to offer but was deprived of the opportunity because she remained unrepresented and was not aware of her rights before the grand jury. If the defendant sustains her burden, the indictment is dismissed and the case is presented to another grand jury with the benefit of the defendant's testimony. N.Y. CRIM. PROC. LAW § 210.35(4) (McKinney 1982). Judges, however, before whom defendants made post-indictment applications to testify during

testimony to the grand jury.[841] Third, when a defendant remains unrepresented until after indictment, the most fruitful opportunity for investigation is missed. After witnesses testify before the grand jury, they are more likely to be inhibited by secrecy concerns and therefore less likely to cooperate in the defense investigation. Fourth, discontinuous representation contributes to defendants' disorientation and alienation. Defendants shuttle back and forth between pre-trial detention and the courtroom without knowing who their attorneys are[842] or what will happen next. Their foremost desire — to terminate the proceedings — adds to the pressure to plead guilty.[843]

II.
INTERVIEWING AND COUNSELING

Although 18-B Panel attorneys have numerous opportunities to interview their clients,[844] they rarely did so. Voucher claims for compensation reveal that Panel attorneys recorded having interviewed their clients in jail in only 19.2 percent of homicide cases; they recorded office interviews in only 6.3 percent of the homicide vouchers. Panel attorneys did not record any interview whatsoever with the defendant in three quarters of the homicide vouchers. In non-homicide felony cases, jail interviews were claimed in only 5 percent of the vouchers, and office interviews in 13 percent of the vouchers; in 82 percent of non-homicide felony cases, no interview was recorded. The proportionate number of interviews claimed in misdemeanor cases was lower still, as *Table 6-2* shows.

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the course of our observation sample, were reluctant to grant the defendant's motion and thereby interrupt the regular processing of the case from arraignment until final disposition.

841. For an example of the consequences of a lack of representation when a case is pending before a grand jury, *see, e.g., supra* text accompanying note 832.

842. *See, e.g., supra* text accompanying note 836.

843. The process by which guilty pleas are arrived at has had exhaustive consideration in the literature. For a discussion of the effects of case pressure, manipulative defendants, timid prosecutors, incompetent lawyers, undercompensation and the like on the incidence of guilty pleas, *see* A. BLUMBERG, CRIMINAL JUSTICE 73-94 (1967); Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 111 (1968); J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 92-100 (1972); Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1259 (1975). Our historical research on the establishment of the institutional defender, *see supra* pp. 602-10, and the Voluntary Defenders' Committee, *supra* pp.617-23, has demonstrated that plea capitulation has a much longer history than was earlier assumed; it is not simply a response to modern case pressure, incompetent lawyering, and the like. *See also supra* note 249.

844. In New York City, incarcerated defendants may be interviewed at the City jail or at the courthouse. In New York County, for example, attorneys may use a specially designated telephone number to contact the correctional authorities, who will produce the defendant for interviewing at the designated location in the courthouse at a time convenient for the attorney. All attorneys are provided with special prison passes with photo identification.

TABLE 6-2: *Percentage of Cases Containing a Claim for Interviewing the Defendant*

	Percentage of Cases in Which a Claim Was Made		
Interview Location	Homicide	Other Felony	Misdemeanors
Jail	19.2	4.6	1.1
Office	6.3	13.0	9.1
Total Interviews	25.5	17.6	10.2

Our observations confirm that client interviews were rare. Panel attorneys generally spoke only briefly with defendants, either in the court pens just before the defendant's case was called or in the courtroom while the defendant stood before the judge.[845] Few defendants in the court pens knew the identity of their attorneys[846] or the status of their cases. They typically reported that they had had no discussion with a defense attorney since arraignment.[847] We observed that when a basic question regarding the defendant's background and prior criminal record arose during bench conferences, attorneys were unable to respond and repeatedly turned to their clients for the information.

An attorney who fails to conduct an in-depth interview with a defendant cannot provide competent representation.[848] First, the attorney is unable to

845. The absence of structured interviews is not uncommon in the modern history of indigent defense systems. *See* J. CASPER, *supra* note 843, at 106. The results of Casper's study of defendants represented by the public defender in Connecticut are similar to our own observations:

> The typical defendant reported that he spent a total of five to ten minutes conferring with his attorney, usually in rapid, hushed conversations in the courthouse. Thus, a man who may receive five or ten years prison spends five or ten minutes with a man who is supposed to supply the 'guiding hand of counsel,' to insure that his rights are exercised and protected, to make certain that the 'noble idea' of a fair trial is protected.

Id.

846. *See supra* text accompanying note 836.

847. *See supra* text accompanying notes 832, 835, 836. In 1980, 18-B Panel administrators in New York City reported that defendants complained most often about "insufficient jail visits, insufficient consultation time, and unresponsiveness to letters and phone calls . . . ." Spiegler, Ding & Mendelsohn, *Report to the Committee on Legal Representation of Indigents in the Criminal Process*, New York State Bar Ass'n 129 (1980) [hereinafter 1980 Spiegler Report]. The most recent national study found that a lack of consultation is endemic to indigent defense systems. "In a large percentage of cases, counsel appointed to represent the indigent accused fail to interview their detained clients prior to the time that they next appear in court." N. ALBERT-GOLDBERG, M. HARTMEN, W. O'BRIEN, P. HOULDEN & S. BALKIN, NATIONAL DEFENDER INSTITUTE, THE PLIGHT OF THE INDIGENT ACCUSED IN AMERICA, EXECUTIVE SUMMARY 30 (1985) [hereinafter EXECUTIVE SUMMARY, PLIGHT OF THE INDIGENT]. By contrast, research has demonstrated that early representation, including early consultation, can "break the cycle of mutual distrust which exists between felony defendants and their public defenders." EARLY REPRESENTATION, *supra* note 839, at 25.

848. The national standards are unequivocal on the importance of interviewing the client at the earliest possible time. *See supra* note 808. In New York, inadequate consultation can lead to a finding of ineffective assistance. *See, e.g.*, People v. Simmons, 110 App. Div. 2d 666, 666, 487 N.Y.S.2d 396, 398 (2d Dep't 1985) (defense attorney conducted "a single 15 to 20

present a coherent theory of defense or provide well-considered advice. Second, the defendant is precluded from involvement in the progress of the case; guilty plea dispositions are arranged without any meaningful participation by the defendant.[849]

III.
SCRUTINY OF THE STATE'S CASE

A. Discovery and Personal Investigation

New York State Criminal Procedure Law entitles the defendant, upon demand, to discovery of her statement and that of any co-defendant, scientific reports, tangible evidence, and a rudimentary bill of particulars.[850] However, the defendant has no statutory right to pre-trial disclosure of the identity of witnesses.[851] Pre-trial disclosure of the identity of witnesses is left to the judge's discretion.[852] To invoke a court's discretion, an attorney ordinarily must submit and argue a written motion which provides a factual and legal basis for relief.[853] The application must demonstrate the materiality of the witnesses' testimony and the prejudice which would result if disclosure is not ordered.[854] A similar standard governs motions to compel the prosecution to divulge evidence that the defendant believes to be exculpatory.[855]

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minute interview with his client some five months prior to trial . . . ."). *See also* Avery v. Alabama, 308 U.S. 444, 446 (1940) (assignment system must allow the defense attorney to consult with the defendant). After *Avery*, the circuits have held that court-assigned defense attorneys have an obligation to consult with their clients. *See, e.g.*, Braxton v. Peyton, 365 F.2d 563, 564 (4th Cir.), *cert. denied*, 385 U.S. 939 (1966); Isble v. United States, 611 F.2d 173 (6th Cir. 1979).

849. Minimal participation of indigent defendants in their own case dispositions has been described elsewhere in the literature, *see generally* Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4-9 (1971); Sudnow, *Normal Crimes: Sociological Features of the Penal Code and Public Defenders Offices* 12(3) SOC. PROB. 255, 265-69 (1965). Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15, 19-24 (1967); Wilkerson, *Public Defenders as their Clients See Them*, 1 AM. J. CRIM. L. 141, 142-43 (1972).

850. *See* N.Y. CRIM. PROC. LAW § 240.20 (McKinney Supp. 1987). In New York, inadequate discovery may be grounds for a finding of ineffective assistance. *See* People v. Butler, 94 App. Div. 2d 726, 462 N.Y.S.2d 263, 264 (2d Dep't 1983).

851. Article 240 of the Criminal Procedure Law, which is the statutory law of discovery in New York State, refers only to disclosure of "property," which term does not include the indentity of witnesses. Bellacosa, Practice Commentary accompanying N.Y. CRIM. PROC. LAW § 240.10 (McKinney 1982). Moreover, there is no federal constitutional right to routine discovery of the identity of witnesses. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

852. *See* People v. Lynch, 23 N.Y.2d at 271-72, 244 N.E.2d at 34-35, 296 N.Y.S.2d at 334-335.

853. *See* N.Y. CRIM. PROC. LAW § 240.40(1)(a) (McKinney Supp. 1987).

854. *See* People v. Andre W., 44 N.Y.2d 179, 185-86, 375 N.E.2d 758, 762, 404 N.Y.S.2d 578, 581 (1978).

The right to discover the identity of a material witness "must be balanced against a founded fear that such discovery might lead to intimidation of the witness or the influencing of his testimony." 44 N.Y.2d at 186, 375 N.E.2d at 762, 404 N.Y.S.2d at 582.

855. *See id.* at 184-85, 375 N.E.2d at 761, 404 N.Y.S.2d at 581; *see* United States v. Bagley, 105 S. Ct. 3375, 3380 (1985).

Our observations reveal that prosecutors did not ordinarily disclose the identities of non-police witnesses or search their files for exculpatory evidence. Nonetheless, 18-B Panel attorneys expended little effort on discovery motions to compel disclosure. Discovery motions were claimed in only 7.9 percent of all homicide cases, in 6.4 percent of other felony cases, and in 2.6 percent of all misdemeanor cases in the voucher sample.[856] Because Panel attorneys infrequently engaged the defendant in an in-depth interview, and usually neither conducted their own investigation nor used the services of investigators,[857] it appeared that Panel attorneys' knowledge of witnesses was based primarily on the prosecution's bench conference summary of the state's case (the "write-up").[858] While a cursory reading of the prosecutor's write-up may have informed the defense of the outline of a witness's testimony, other facts which related to the witness's perceptive abilities and possible biases did not appear on the outline and thus necessitated a formal written discovery motion to disclose the names and whereabouts of witnesses.

The failure of 18-B Panel attorneys to seek witnesses' identities is further substantiated by the low proportion of attorney investigations claimed in the voucher sample.[859] Of the major offense categories, only weapons and narcot-

856. Similar results were obtained in a 1985 study of 18-B Panel attorneys in Schenectady, New York undertaken by the New York State Defenders Association. The study found that the majority of court-assigned attorneys engaged in little, if any, discovery of the prosecution's evidence. Court-assigned attorneys were asked if they requested certain discovery documents obtainable in felony cases. Fifty-seven percent responded that they failed to obtain a copy of the defendant's statement, while 43.5 percent indicated that they failed to obtain a copy of the defendant's criminal record. Moreover, 73.9 percent indicated that they did not inspect the physical evidence in the case, and 66.7 percent did not obtain the results of tests conducted by the state. NEW YORK STATE DEFENDERS ASS'N, PUBLIC DEFENSE SERVICES IN SCHENECTADY COUNTY — AN ASSESSMENT OF THE ASSIGNED COUNSEL PROGRAM 64 (Mar. 1984) [hereinafter 1985 NYSDA SCHENECTADY REPORT].

857. For a discussion of frequency of interviews, *see supra* TABLE 6-2, at 759; *supra* pp. 757-58. For a discussion of 18-B Panel attorneys' use of investigative and expert services, *see infra* TABLE 6-3, at 763; *infra* pp. 761-64.

858. Counsel's failure to test the government's evidence and reliance upon prosecutors' brief summaries have been addressed in the literature. "[I]n the typical case, both the prosecution and the defense must form an impression of facts from a cold file, a sketchy (and sometimes illegible) police report, and a hurried conference with the complainant or the accused . . . . Under these circumstances, and these *are* the circumstances of mass-production justice, plea bargaining can be little more than a shot in the dark." Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 144 (1986) (emphasis in original).

859. In *Strickland*, the U.S. Supreme Court declared that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691 (1984). *But see supra* note 421 and accompanying text; *see also* U.S. v. Baynes, 622 F.2d 66, 69 (3d Cir. 1982)("[T]he failure to investigate a critical source of exculpatory evidence may present a case of constitutionally defective representation."); Hawkman v. Parratt, 661 F.2d 1161, 1169 (8th Cir. 1981) ("[A] reasonably competent attorney will ordinarily conduct an in-depth investigation of the case which includes an independent interviewing of witnesses."); Rummel v. Estelle, 590 F.2d 103 (5th Cir. 1979) (failure to investigate factual basis of state's charges and to conduct interviews with witnesses may constitute negligence).

The New York Court of Appeals has also identified the duty to investigate as part of the attorney's responsibility to provide "meaningful representation." People v. Bennett, 29 N.Y.2d

ics cases typically lack non-police witnesses.[860] While investigations will not always reveal the identities of witnesses, and while potential witnesses are not always willing to speak with a defense attorney, the mere possibility that investigation will not be successful should not preclude efforts to locate and interview witnesses.[861] In our sample, however, an attorney investigation was claimed in only 27.2 percent of all homicide cases, in 12.2 percent of other felony cases, and in 7.8 percent of misdemeanor cases. Given this infrequency of attorney investigations, it is not surprising that Panel attorneys rarely recorded having interviewed civilian witnesses. Witness interviews were claimed in only 21 percent of all homicide cases, and in 4.2 percent of other felony cases.[862]

In some cases involving eyewitness identification, a lawyer's knowledge of the crime scene may be crucial to her assessment of witnesses' capacity to observe and recall. In most cases, such a visit helps the defense attorney to understand the state's case. Yet 18-B Panel attorneys claimed to have visited the scene of the crime even less frequently than they claimed to have interviewed witnesses. In over 88 percent of all homicide cases, and in 96 percent of other felony cases, no visit was recorded.[863]

Our observations confirm that 18-B Panel attorneys failed to pursue discovery and investigation. Written motions seeking the identities of witnesses were filed infrequently, and when filed were routinely denied for insufficiency; oral argument on the identity of witnesses material to the outcome of a case virtually never occurred. When asked whether they had had the "opportunity" to conduct an independent investigation, Panel attorneys regularly stated that there had been no opportunity unless and until the defendant pleaded not guilty and insisted upon a trial.[864]

462, 466, 280 N.E.2d 637, 639, 329 N.Y.S.2d 801, 804 (1972). In *Bennett*, the court reversed a conviction because it found counsel "so completely unfamiliar with either the facts or the law bearing on his client's case as to doom the defense to a failure." *Id.* at 466-67, 280 N.E.2d at 638, 329 N.Y.S.2d at 803.

860. Weapons and narcotics arrests typically result from observations made by police officers, rather than from civilian complaints. The identities of police witnesses, who routinely decline defense interviews, are provided by the New York County District Attorney's office as part of "voluntary disclosure." By contrast, the identity of civilian witnesses is routinely withheld unless the defendant successfully invokes the court's discretion. *See supra* notes 852-54 and accompanying text.

861. Moreover, an attorney may seek compensation even for an unsuccessful effort. *See* N.Y. COUNTY LAW § 722(b) (McKinney Supp. 1987).

862. The 1980 study of 18-B Panel attorneys in Schenectady revealed a similar pattern: in 98 percent of the 296 cases examined, attorneys did not contact any defense witnesses; in 96.9 percent of the cases, defense counsel did not interview a prosecution witness. *See* 1985 NYSDA SCHENECTADY REPORT, *supra* note 856, at 62-63.

863. The Schenectady study revealed that 22 of 28 court-assigned lawyers failed to visit the crime scene in the felony case to which they were most recently assigned. Seventeen of twenty-one failed to visit the crime scene in their most recent misdemeanor assignment. *Id.* at 65.

864. While this practice clearly does not constitute competent representation and falls below national standards, *see supra* note 811, it has been reported elsewhere in the literature on

B. *Use of Investigators and Other Experts*

The lack of attorney investigation would be less troubling if 18-B Panel attorneys engaged the services of outside investigators or experts.[865] Panel attorneys are not provided with a staff of investigators or experts, but may, with court consent, hire such specialists on a case-by-case basis.[866] Our survey questionnaire of Panel attorneys showed that most did not avail themselves regularly of the investigative and expert services permitted by statute.[867] One in ten attorneys reported that they had *never* used investigators or experts, and only one in five reported that they regularly used these services.

TABLE 6-3: *Use of Investigative or Expert Services by 18-B Panel Attorneys*

	Number	Percentage
Never used	40	10.9
Occasionally	248	67.4
Regularly	80	21.7
Don't know	4	—
Total	372	100.0

Of the 18-B Panel respondents who never or only occasionally reported

plea bargaining. *See, e.g.*, Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 843, at 1259.

865. Lawyers who do their own investigative work, however, may find themselves "in the untenable position of either taking the stand to challenge [the witnesses'] credibility if their testimony conflicts with statements previously given, or withdrawing from the case." *See* 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES, *supra* note 806, Standard 5.1-4, at 5.18. The Commentary to Standard 5-1.4 explains that "[t]he quality of representation at trial, for example, may be excellent and yet valueless to the defendant if the defense requires the assistance of a[n] . . . expert and no such services are available." *Id.* at 5.20. Moreover, if attorneys do their own investigative work, they necessarily "deny their clients the time and attention necessary for research and consideration of legal issues." NEW YORK STATE DEFENDERS ASSOCIATION, THE USE OF EXPERT AND INVESTIGATIVE SERVICES IN DEFENSE OF THE POOR: A PRIMER FOR NEW YORK STATE 11 (Aug 1985) [hereinafter 1985 NYSDA PRIMER]. In *Ake v. Oklahoma*, the Supreme Court ruled that the fourteenth amendment encompasses a right to a state-funded independent psychiatrist for indigent defendants on a showing of materiality. Ake v. Oklahoma, 470 U.S. 68, 74 (1985). The Court's due process analysis suggests that an indigent criminal defendant may have a constitutional right to the services of other types of experts as well. *See* Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of* Ake v. Oklahoma, 84 MICH. L. REV. 1326 (1986).

866. *See* N.Y. COUNTY LAW § 722(c) (McKinney 1987); *see supra* note 361; *supra* text accompanying note 396.

867. N.Y COUNTY LAW § 722(c) (McKinney 1987). The 1985 Schenectady study revealed a similar pattern of underutilization of experts. All of the 29 court-assigned lawyers surveyed in that study responded that they had not used an investigator on their most recently assigned and disposed felony case. *See* 1985 NYSDA SCHENECTADY REPORT, *supra* note 856, at 32-33. All but two said they never used an investigator. Forty-three percent said that they simply never needed one. In addition, 58 percent said that they had not used an expert in the last five years. *Id.* Similar results obtained from a study of assigned counsel under the Criminal Justice Act, 18 U.S.C. § 6030a(e)(3) (1965), which also imposes a $300 compensation limit on the use of investigators and experts. *See* COUNSEL FOR THE POOR, *supra* note 815, at 134. *See infra* note 877 and accompanying text.

having used investigative or expert services, 74 percent stated that cases usually do not require such services.[868] This response suggests that 18-B Panel attorneys' failure to seek the services of investigators and experts is an essential ingredient of New York City's cost-efficient criminal justice system that relies on guilty pleas and other non-trial dispositions to resolve the vast majority of cases.[869]

The voucher analysis confirms that 18-B Panel attorneys employed experts infrequently.[870] While the state relies upon the testimony of medical examiners to establish the cause of death in every homicide case, often supplementing that testimony with other forensic evidence, Panel attorneys consulted with experts in only 17 percent of all homicide cases. Moreover, Panel attorneys claimed for expert consultation in only 2 percent of all other felonies, despite the importance of forensic evidence to the state's case. Panel attorneys' underutilization of expert and support services reinforces their dependence on information derived from the prosecutor.

When 18-B Panel attorneys did decide to engage such services, they encountered two formidable obstacles. First, judicial approval was needed to obtain the services of an investigator or expert.[871] When we surveyed Panel lawyers to find out why they rarely use investigative services, 23.6 percent responded that court consent was difficult to obtain.[872] Second, because the

868. The reasons given for not using investigative and expert service are summarized in the *Table* below:

TABLE: *Reasons 18-B Panel Attorneys Used Investigative or Expert Services Infrequently*

Reason	Yes		No		Don't Know	
	n	%	n	%	n	%
Most cases don't require such services.....	208	74.0	73	26.0	7	—
Obtaining court consent is difficult.....	66	23.6	214	76.4	8	—
Adequate investigators/experts hard to find	166	58.5	118	41.5	4	—
Other reasons	26	—	—	—	—	—

869. *See supra* text accompanying notes 10-11, 13-14. An alternative explanation for the failure to pursue discovery and to engage in an independent investigation is that these omissions are a by-product of routinized case processing. Sudnow, for example, describes the reliance of public defenders on "normative" features of the case, *i.e.*, its similarity to other cases. Sudnow, *supra* note 849, at 266-69. Because defenders presuppose the guilt of their clients, they consider the facts of a given case only in terms of its typicality; they do not inquire into the merits of each defendant's case. *Id.*; *see infra* note 1275 and accompanying text.

870. The voucher analysis of the use of investigators and experts by 18-B Panel attorneys was consistent with 1984 citywide data collected by Panel administrators. In 23,361 Panel assignments in the First Department, 15,593 of which involved defendants originally charged with felonies, there were only 783 requests for investigative and expert services. Likewise, in 13,000 Panel assignments in the Second Department, 7,623 of which involved defendants originally charged with felonies, there were only 243 such requests. Information provided to the authors by the Panel administrators for the First and Second Departments, Spring 1985.

871. *See supra* note 866 and accompanying text.

872. *See supra* note 868, TABLE. Similar reasons for the under-utilization of investigators and experts were reported by the New York State Defenders Association:

> Judges, aware of the limited ability and desire of counties to pay for support services for criminal defendants, routinely deny or restrict support services every day.... The

maximum compensation allowable by statute had remained at the $300 level set in 1965,[873] it was difficult to find professionals willing to serve. For example, since the passage of Article 18-B in 1965, the average hourly fees for psychiatric experts have risen to $145 for trial preparation, $150 for reports, and $175 for court testimony.[874] This increase in fees at a time when the statutory compensation has remained the same may explain the underutilization of psychiatric services, which can be discerned from the overall pattern of requests by Panel attorneys for psychiatrists and other experts:[875]

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result is an atmosphere where attorneys resign themselves to doing their own investigation or no investigation, to doing without experts and limiting or foregoing entirely the auxiliary services.

See 1985 NYSDA PRIMER, *supra* note 865, at 14; *see also* EXECUTIVE SUMMARY, PLIGHT OF INDIGENT, *supra* note 847, at 24.

873. *See* Act of 1965, c. 878; 1965 N.Y. Laws 878; N.Y. COUNTY LAW § 722(c) (McKinney Supp. 1987). Attorneys' hourly fees and caps have increased twice since then, *see* Act of 1978, c. 700, 1978 N.Y. Laws 878; Act of 1985, c. 315, 1985 N.Y. Laws 315, but the cap for auxilliary services has not been raised.

874. NATIONAL FORENSIC CENTER, 1986 GUIDE TO EXPERTS' FEES 19 (1986) [hereinafter 1986 GUIDE TO EXPERTS' FEES].

875. By comparison, the Legal Aid Society has its own body of investigators as well as a range of support services. The Society is not subject to any compensation limits on the use of investigators or experts. *See supra* text accompanying note 389. The Society's Criminal Defense Division employed 100 investigators, who responded to 20,220 requests by staff attorneys for investigations. LEGAL AID SOCIETY, 1984 ANNUAL REPORT 37 (1984).

Our questionnaire survey of Legal Aid Society staff attorneys asked about their use of investigators and experts. Their responses revealed a greater frequency of use of investigative and expert services than that of Panel attorneys. *See supra* TABLE 6-3, at 763. The following *Table* sets out the attorneys' responses.

TABLE: *Use of Investigative or Expert Services Within the Legal Aid Society Criminal Defense Division*

	Case Handlers		Supervisors	
	n	%	n	%
Never used	1	0.4	1	2.7
Occasionally used	62	25.3	3	8.1
Used very often	182	74.3	33	89.2
Don't know	1	—	0	—
	246	100.0	37	100.0

Staff attorneys provided detailed comments relating to the quality of investigative services available to Society attorneys. They were not universally impressed by the quality of the Society's in-house investigations. Many said that they tried to do their own investigation. Some observed that investigators' services were often neither prompt nor thorough. Others, like their 18-B Panel counterparts, maintain that many cases do not require investigation. *See supra* note 867, TABLE. The following statements from our questionnaire survey illustrate the views of staff attorneys on the Society's in-house investigators and experts.

Attorney 58

Our experts are generally not terribly useful and the investigations are usually done wrong. I prefer when possible to do them myself.

Attorney 121

Investigative services are not reliable or thorough — usually reports are returned either incomplete or completed in a cursory fashion.

Attorney 465

Many cases do not require investigations. Investigators are often incompetent. Sometimes it's better to do it yourself. High case-load prevents complete work-up on some cases.

TABLE 6-4: *Use of Psychiatrists by 18-B Panel Attorneys, First Department, 1983-1984*

Year	Number of Cases	Total Cost
1983	133	$75,463
1984	143	$77,498

TABLE 6-5: *Use of Other Experts by 18-B Panel Attorneys, First Department, 1983-1984*

Year	Number of Cases	Total Cost
1983	95	$41,624
1984	122	$98,754

The comments of 18-B Panel attorneys in response to our mail questionnaire illustrate this problem. One lawyer noted that "[e]xperts are almost impossible to get at the 18-B rates. I have gone through as many as 15 ballistics experts before I finally begged one to take the case at such a low rate . . . ."[876] According to another Panel lawyer, "[W]hen a case does require expert services such as a doctor it is almost impossible to get one at 18-B rates. The $300 limit set by 722(c) of the county law is ridiculous."[877]

C. *The Preparation of Pre-Trial Motions*

National standards require criminal defense attorneys to engage in pretrial motion practice to adequately protect defendant's constitutional rights, which may have been violated by investigative acts of the state or misconduct in the initiation of the prosecution.[878] An attorney's failure to engage in meaningful motion practice may result in a finding of ineffective assistance.[879] New York law allows defense counsel to make written motions challenging,

876. Panel Attorney 75.

877. Panel Attorney 304.

878. *See* 1980 ABA STANDARDS FOR DEFENSE FUNCTION, *supra* note 806, Standard 4-3.6, at 4.45; *supra* note 810 and accompanying text.

879. The Supreme Court recently held that a claim of ineffective assistance may arise from the failure to file a motion to suppress tangible evidence. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). The Court found ineffective assistance even though the motion at issue related to a fourth amendment claim, which the Court's abstention doctrine would normally bar from habeas review. *Id.* at 2582-87 (citing Stone v. Powell, 428 U.S. 465 (1976)). *See supra* note 337. Other federal courts have found ineffective assistance arising out of the failure to move to suppress tangible evidence under the fourth amendment. *E.g.*, Riley v. Wyrich, 712 F.2d 382 (8th Cir. 1983); United States v. Easter, 539 F.2d 663 (8th Cir. 1976).

Decisions in New York courts have resulted in similar holdings. *See, e.g.*, People v. Andrew S., 108 App. Div. 2d 935, 485 N.Y.S.2d 828 (failure to seek suppression of defendant's statement and failure to object to police officer's hearsay testimony); People v. Detling, 73 App. Div. 2d 937, 423 N.Y.S.2d 509 (2d Dep't 1979) (failure to move to suppress both tangible evidence and defendant's statement); People v. Wagner, 104 App. Div. 2d 457, 479 N.Y.S.2d 66 (2d Dep't 1984) (failure to move to dismiss indictment for legal insufficiency of evidence and failure to move to suppress tangible evidence); People v. Sinatra, 89 App. Div. 2d 913, 453 N.Y.S.2d 729 (2d Dep't 1982) (failure to make motion to suppress weapon and failure to request examination to determine defendant's fitness to stand trial); People v. Simms, 55 App.

inter alia, the continued prosecution of the defendant,[880] the sufficiency of grand jury evidence,[881] and the introduction of the state's evidence.[882] Motions also serve to test the state's case in the same ways that trials do: motions can force prosecutors to demonstrate the strength of their evidence;[883] motions may even compel prosecutors to consider reducing charges or abandoning the prosecution altogether.[884]

Given the importance of the constitutional issues involved, and the strategic opportunities provided by motion practice, defense lawyers might be expected to file motions supported by considerable legal research and adequate factual allegations. Motions seeking to suppress evidence or dismiss charges do not warrant a hearing unless a bona fide factual dispute appears on the face of the motion papers.[885] Yet, the voucher sample reveals that 18-B Panel attorneys consistently failed to claim for written motions in 74.5 percent of all homicide cases and 80.4 percent of other felonies. Similarly, Panel attorneys made no claim for legal research in approximately 60 percent of homicide cases and in 76 percent of other felony cases.

TABLE 6-6: *Percentage of Cases Containing a Claim for Legal Research and Written Motions*

	Percentage of Cases in Which a Claim Was Made		
Type of Information	Homicide	Other Felony	Misdemeanors
Legal Research	38.7	23.3	20.4
Written Motions Filed ..	25.5	10.6	7.8

The failure to make pretrial motions raising a bona fide factual issue when seeking the suppression of evidence can have significant consequences for the outcome of a criminal case. First, in homicides cases, the prosecution frequently relies upon the defendant's inculpatory statement.[886] The introduction of such evidence raises issues related to voluntariness and waiver of

Div. 2d 629 (2d Dep't 1982) (failure, inter alia, to file a timely motion to suppress identification testimony).

880. N.Y. CRIM. PROC. LAW § 210.40 (McKinney Supp. 1987) (dismissal in the furtherance of justice).

881. N.Y. CRIM. PROC. LAW § 210.30 (McKinney 1982).

882. N.Y. CRIM. PROC. LAW § 710.20 (McKinney 1984) (suppression of tangible evidence, statements, in-court and out-of-court identification, blood tests, and wire tapping); N.Y. CRIM. PROC. LAW § 60.45 (McKinney 1981) (voluntariness of defendant's confession).

883. *See* M. FEELEY, *supra* note 825, at 251.

884. *Id.*

885. *E.g.*, N.Y. CRIM. PROC. LAW § 710.60(3) (McKinney Supp. 1987) (motion to suppress evidence); N.Y. CRIM. PROC. LAW § 210.45(5) (McKinney 1982) (motion to dismiss indictment).

886. The New York County District Attorney's Office regularly takes videotaped statements from homicide defendants. A video unit is located at a precinct and is available for taping; Assistant District Attorneys are assigned to respond to the precinct after a homicide defendant has been arrested. Copies of the tapes are provided to defense counsel.

Miranda rights.[887] Yet, claims for hearings on motions to suppress statements were made in only 14.9 percent of homicide cases in the voucher sample. Second, narcotics and weapons offenses accounted for 33.6 percent of all citywide indictments.[888] Because tangible evidence is often essential to proving these possessory offenses, issues of probable cause and reasonable suspicion are typically raised.[889] Nevertheless, claims for hearings on motions to suppress tangible evidence were made in only 1.5 percent of all non-homicide felony cases in our sample of vouchers. Third, robbery prosecutions accounted for 29.3 percent of all citywide indictments.[890] Eyewitness identification is often essential to proving the state's case and is normally proffered in the form of line up, show-up, or photo array.[891] Despite the evidentiary weight of eyewitness testimony and the New York statutory right to make pre-trial motions to suppress identification evidence,[892] claims for suppression hearings were made in only 2.1 percent of all non-homicide felony cases in our voucher sample.

Tables 6-7 and *6-8* reveal the failure of 18-B Panel attorneys to engage in meaningful motion practice. A judge may hear oral argument on any motion which raises an issue of law or fact. *Table 6-7* shows the infrequency with which claims for oral argument were made made following the filing of pretrial motions. If a motion contains a bona fide factual dispute, and not simply "boilerplate" language unsupported by factual allegations, the judge will grant a hearing in addition to allowing oral argument. *Table 6-8* reveals the infrequency with which claims for hearings were made in response to motions raising factual disputes.

887. Miranda v. Arizona, 384 U.S. 436 (1966). N.Y. CRIM. PROC. LAW, § 710.20 (McKinney 1984).

888. *See* DIVISION OF CRIMINAL JUSTICE SERVICES OF THE STATE OF NEW YORK, FELONY PROCESSING PRELIMINARY ANNUAL REPORT, INDICTMENT THROUGH DISPOSITION 8 (Jan.-Dec. 1984) [hereinafter 1984 FELONY REPORT].

889. The essential elements of the crime of possession of a dangerous drug are the presence of a controlled substance, physical or constructive possession, and knowledge of the nature of the substance possessed. *See* People v. Sierra, 45 N.Y.2d 56, 59-60, 407 N.Y.S.2d 669, 671, 379 N.E.2d 196, 198; People v. Reisman, 29 N.Y.2d, 278, 285, 327 N.Y.S.2d 342, 348 (1971). An essential element of the crime of possession of a firearm is the operability of the weapon, i.e., that it is not mechanically defective. *See* People v. Donaldson, 49 A.D.2d 1004, 374 N.Y.S.2d 169-70 (A.D. 4th Dep't 1975). Proof of both offenses, therefore, usually requires the seizure of the narcotics or weapon, which may give rise to a motion to suppress based upon lack of probable cause or reasonable suspicion. *See* N.Y. CRIM. PROC. LAW § 710(1) (McKinney 1984).

890. 1984 FELONY REPORT, *supra* note 888, at 8.

891. *See* N. SOBEL, EYE-WITNESS TESTIMONY 6-7 (1972). For a general analysis of the hazards of eyewitness identification, see E. LOFTUS, EYEWITNESS TESTIMONY 171-77 (1979).

892. N.Y. CRIM. PROC. LAW § 710.20(18)-(19) (MCKINNEY 1986).

TABLE 6-7: *Percentage of Cases Containing a Claim for Motions in Which Oral Argument Was Held*

	Percentage of Cases in Which a Claim Was Made			
Nature of Motion	Homicide	Other Felony	Misdemeanor	Violation
Inspect Grand Jury Evidence	12.9	5.6	0.5	0.0
Bill of Particulars/Discovery.....	7.9	6.4	2.6	0.0
Suppress Evidence	9.6	4.7	1.9	1.1
Controvert Warrant.....	2.3	0.4	0.2	0.0
Dismiss—Failure to Prosecute	1.3	2.4	2.1	1.1
Dismiss—Interest of Justice.....	0.7	0.7	1.0	2.2
Sever.....	1.7	0.6	0.0	0.0
Suppress Prior Conviction	3.6	1.0	0.3	0.0

TABLE 6-8: *Percentage of Cases Containing a Claim for Motions in Which a Hearing Was Held*

	Percentage of Cases in Which a Claim Was Made			
Nature of Motion	Homicide	Other Felony	Misdemeanor	Violation
Suppress Statements.....	14.9	1.9	0.5	0.0
Suppress Identification.....	8.9	2.1	0.2	0.0
Suppress Physical Evidence	2.6	1.4	0.6	0.0
Controvert Warrant.....	1.0	0.1	0.0	0.0
Competency	1.0	0.1	0.1	0.0
Suppress Defendant's Prior Convictions..	2.6	0.8	0.1	0.0

Our in-court observations also confirm that 18-B Panel attorneys almost invariably failed to engage in meaningful motion practice.[893] The motions

893. A 1980 statewide study of 18-B Panel attorneys similarly revealed that of the 405 case files examined, a motion was filed to suppress statements in only 1 percent of cases; a motion challenging the in-court and out-of-court identification of the defendant was filed in 0 percent of the cases. *See* 1980 Spiegler Report, *supra* note 847, at 143. Feeley also reported in a 1979 study of public defenders in New Haven courts that no motions were filed in 92 percent of all cases. M. FEELEY, *supra* note 825, at 252.

Our historical research, in-court observations, and voucher analysis revealed that New York City's cost-efficient criminal justice system, which is dependent upon an attorney's failure to seek an investigator, *see supra* note 869 and accompanying text, is also dependent upon the failure of defense counsel to file pre-trial motions (that is, to assert technical defenses). *See supra* text accompanying notes 152, 178, 243; *supra* note 160, TABLE A; *supra* note 159, TABLE A; *infra* TABLE 11-1, at 860; notes 1178-81 and accompanying text. *Cf.* Forster, *The Public Defender: Duty to Furnish Technical Defense*, 7 J. CRIM. L. & CRIMINOLOGY 592 (1916-17). Various additional explanations, however, have been offered. *See infra* note 1275 and accompanying text. *See also* Blumberg, *supra* note 849, at 22; M. HEUMANN, PLEA BARGAINING 62-66 (1978). Blumberg emphasizes the occupational quid pro quo in which defense counsel, in response to caseload pressures and to maintain collegial relationships with prosecutors and judges engage in a "work arrangement in which patterned, covert, informal breeches and invasions of 'due process' are institutionalized." Blumberg, *supra* note 849, at 22. Heumann argues that prosecutors and judges communicate their hostility to lawyers who make time-consuming motions, including motions to suppress, by imposing sanctions (e.g., refusal to plea bargain and

filed inevitably revealed counsels' lack of familiarity with the facts of the case; they also contained boilerplate language which failed to provide an adequate or accurate basis for granting a hearing or other relief. Attorneys rarely engaged in oral argument related to the legal issues raised in the motions, and judges consistently denied these motions for lack of an adequate factual basis.

IV.
THE DEVELOPMENT OF A COHERENT THEORY OF DEFENSE

A. Formulation of Defense Strategies

The calendar court atmosphere in which 18-B Panel attorneys represented indigent criminal defendants during our observation period stressed plea bargaining, rapid decision-making, and case movement. When a case was called, a brief bench conference was held at which the prosecutor presented her write-up. After the prosecutor informed the court of the charge to which she would accept a guilty plea, the judge would suggest a sentence based upon an outline of the state's evidence and the charge. When a defense attorney was unable to present a coherent case theory, either in opposition to or to mitigate the prosecution's case, there was little opportunity for negotiation or bargaining, much less for defense advocacy. Our observations revealed that, in the absence of an attorney's presentation of a coherent theory of defense, calendar judges treated defendants who were unwilling to accept the state's offer as recalcitrant. Judges sometimes threatened these defendants with a more severe sentence at the next court appearance.[894] In this atmosphere, during 1984, calendar courts disposed of over 57 percent of all final dispositions in Supreme Court during 1984, a percentage that rose to over 65 percent in 1985.[895]

To protect a defendant from capitulating to the state's initial offer, an attorney must be able to evaluate the prosecution's case effectively, present a reasoned alternative to the calendar court's offer to plead guilty, and impart meaningful advice to the defendant.[896] The lawyer must assess the quantity

unwillingness to engage in discovery), while cooperative attorneys who waive pre-trial motions are rewarded with attractive dispositions. M. HEUMANN, *supra*, at 62-66.

894. Blumberg describes the threat of coercive sanctions as a manipulative device utilized by judges to discipline lawyers into compliance with the goals of efficiency and maximum production. Once socialized in this way, lawyers accept the role of "agent-mediator" who " 'ties together' the seemingly disparate elements of police, prosecution and court organization to help them dispose of a voluminous case load." A. BLUMBERG, *supra* note 843, at 96; *see infra* note 1277. Heumann describes the threat of a more severe sentence as a sanction utilized by courts to coerce lawyers who "learn" that most defendants are "factually guilty and have no legal grounds to challenge the state's evidence." M. HEUMANN, *supra* note 892, at 61. For general analysis of the propriety of sanctions in plea bargaining, *see* Newman, *Issues of Propriety in Negotiated Justice*, 47 DEN. L.J. 367, 373-404 (1970).

895. Office of Court Administration of the State of New York, Supreme Court Criminal Term Disposition Report (1984) [hereinafter 1984 OCA Criminal Term Disposition Report].

896. *See supra* note 811; *see also* Bradbury v. Wainwright, 658 F.2d 1083, 1087 (5th Cir. 1981), *cert. denied*, 456 U.S. 992 (1982) ("Counsel must be familiar with the facts and the law in order to advise the defendant meaningfully of the options available . . . . This includes the

and quality of evidence in order to determine whether it is sufficient both to connect the defendant with the charge and to establish the requisite mens rea and actus reus for conviction. Furthermore, the defendant's testimony and that of any witnesses must be considered in order to determine whether a defense to the charge can be asserted. In short, an attorney advising a defendant on whether to accept a plea offer must analyze and prepare the case in much the same way that she would for trial.[897]

18-B Panel attorneys made voucher claims for trial preparation in only 44 percent of all homicide cases, in 15.4 percent of non-homicide felony cases, and in 10.3 percent of misdemeanor cases. This suggests that Panel attorneys failed to prepare for trial in the overwhelming majority of untried cases.[898] In 1984, over 80 percent of the Panel's final dispositions in Supreme Court and 99 percent of the final dispositions in Criminal Court occurred without the benefit of a trial.[899]

Our observational study confirms that 18-B Panel attorneys did not prepare for trial. For the most part, they seemed unable to respond to the prosecution's contentions and the judge's sentence recommendations with a theory of defense.[900] The Panel attorneys obtained only a sense of the typicality of the case's facts from the prosecutor's scant description.[901] This confirmed the attorney's unspoken assumption that the defendant was guilty and the reasonable alternative was to plead guilty.[902] Once an "acceptable" guilty plea was

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responsibility of investigating potential defenses so that the defendant can make an informed decision.").

897. Via v. Superintendent, 643 F.2d 167, 175 (4th Cir. 1981) ("Defense counsel who is unprepared to try a case is also inadequately prepared to advise his client intelligently to plead guilty and accept a plea bargain calling for a substantial sentence.").

898. In our voucher analysis, we found that only 5.4 percent of the claims were for trial. *See supra* note 821, TABLE B.

899. *See infra* TABLE 9-6, at 833; TABLE 9-7, at 833. The proportion of trial to non-trial dispositions for 18-B Panel attorneys, however, is in line with city-wide dispositions. In 1984, the Supreme Court, citywide, disposed of 30,279 indictments. Of these dispositions, 23,031 resulted from guilty pleas (76.1 percent), 3,082 from verdicts after trial (10.2 percent) and 3,534 from dismissal (11.7 percent). *See* Office of Court Administration of the State of New York Supreme Court, Caseload Activity Reports (1984) [hereinafter 1984 Supreme Court Caseload Activity Reports]. Similarly, in New York State, convictions accounted for 85.1 percent of all final dispositions during the same period. Of those convicted, 91.8 percent pleaded guilty. *See* 1984 FELONY REPORT, *supra* note 888, at 9.

900. For a discussion of the failure of defense attorneys to provide alternatives to pleading guilty, see Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths — A Dead End?*, 86 COLUM. L. REV. 9, 60-64 (1986).

901. *See* Sudnow, *supra* note 849, at 268, for a description of the "normative" features of case disposition in criminal courts.

902. The presumption of guilt which 18-B Panel attorneys imputed to indigent defendants was similar to the "defense" pioneered by cost-efficient institutional defenders in the early part of this century. *See supra* notes 152, 241 and accompanying text.

Other commentators have described a defense attorney's recommendation to plead guilty under these circumstances as "a reflection of the system's expectation in the attorney's approach to his client. Knowing that the criminal justice system is not geared to the presumption of innocence, the attorney simply offers his client the most rational course to adopt, particularly when multiple charges have been brought, as they invariably are." Atkins, *Prisoner Satisfaction*

offered, the Panel attorney usually counseled the defendant to accept it. These attorneys believed that to do otherwise under these circumstances would only result in an enhanced sentence at a subsequent calendar date.[903]

B. Representation of Sentencing Alternatives

Even where a defendant has one or more defenses available, she may make a strategic choice to plead guilty to avoid the risk of trial. When incarceration is a possibility, national standard's require that a defense lawyer explore sentence options.[904] Preparatory work should involve consultation with the defendant's family members and probation officers.[905] In addition, the attorney may seek to place the defendant in one of the diversion programs which provide alternatives to incarceration for defendants suffering from mental, alcoholic, or narcotics disabilities. Acceptance into any of these programs often requires the attorney to consult with program officials.[906] In New York, defense counsel is entitled to file a pre-sentence memorandum advocating mitigation and alternative sanctions; the memorandum, which becomes a part of the court record, must be considered by the judge before sentencing, and must also be considered by prison and parole authorities thereafter.[907]

Our analysis of 18-B Panel vouchers reveals that Panel attorneys rarely claimed remuneration for time spent preparing for the sentencing stage. Claims for consultation with members of the defendant's family were made in only 25.2 percent of homicide cases, in 12.4 percent of other felony cases, and in 4.9 percent of misdemeanor cases.[908] Claims for consultation with probation officers were made in no more than 3.3 percent of the cases in any offense category[909] and claims for consultation with representatives of any of the al-

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with Defense Counsel, 12 CRIM. LAW BULL. 427, 442 (1976); *see infra* note 1278 and accompanying text.

903. *See supra* text accompanying note 894.

904. "The lawyer for the accused should be familiar with the sentencing alternatives available to the court and should endeavor to learn its practices in exercising sentencing discretion." 1980 ABA STANDARDS FOR THE DEFENSE FUNCTION, *supra* note 806, Standard 4-8.1(a), at 4.102.

905. *See* United States v. Daniels, 558 F.2d 122, 127-28 (2d Cir. 1977).

906. "Whenever the nature and circumstances of the case permit, the lawyer for the accused should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies." 1980 ABA STANDARDS FOR THE DEFENSE FUNCTION, *supra* note 806, Standard 4-6.1, at 4.70.

907. N.Y. CRIM. PROC. LAW § 390.40 (McKinney Supp. 1987). Failure to bring mitigative evidence to the court's attention may result in the issuing of a writ of habeas corpus. *See Daniels*, 558 F.2d at 127-28.

908. Research has shown that defense attorneys' failure to interview defendants' family members and friends is a reality of indigent defense systems. *See* Wice, *supra* note 827, at 176. Attorneys are "cynical about using the client and family and friends as an alternative source of information" to that provided by the prosecution. "Given the presupposition of guilt, there is a general distrust of the client and anyone associated with him. In these circumstances, the attorney relies upon the completed probation report and prior criminal record of the defendant rather than on information from those with first hand knowledge of the defendant's background and character." *Id.*

909. The New York State 1980 study of assigned counsel reported that, of over thirty

ternative programs were made in less than 2 percent of the cases in all categories.[910] Panel attorneys' failure to explore sentence options is demonstrated by data drawn from the compensation vouchers, as shown in *Table 6-9*:

TABLE 6-9: *Percentage of Cases Containing a Claim for Pre-Sentencing Consultation Related to the Defendant's Background or Character*

	Percentage of Cases in Which a Claim Was Made			
Consultation With	Homicide	Other Felony	Misdemeanor	Violation
Defendant's family	25.2	12.4	4.9	7.9
Probation Officers	3.3	2.6	2.5	1.1
Alternatives Programs	1.3	1.8	1.2	1.1

The failure of 18-B Panel attorneys to obtain information about the background and character of the defendant and about available sentence alternatives was apparent from our in-court observations. Panel attorneys lacked familiarity with their clients and rarely provided the court with information on sentence alternatives. Moreover, Panel lawyers almost never filed pre-sentence memoranda. When a drug or alcohol program official did propose a non-incarcerative sentence for the defendant, it was almost always due to the initiative of the defendant and/or the program's representative without the involvement of the Panel attorney.

V.
CHAPTER SUMMARY

Defendants represented by 18-B Panel attorneys were unable to make informed decisions about the conduct of their own defense. The defendant's ability to make informed decisions depended on her familiarity with the available options. Attorneys cannot present available options to their clients when they fail to evaluate the facts and law. Panel attorneys were usually ignorant of the facts of their clients' cases; they rarely possessed either a comprehensive understanding of the state's case or a coherent defense theory. Hurried exchanges with the client in the courtroom and quick readings of the prosecution's write-ups were their sole sources of knowledge. Instead of preparing for trial, they sought negotiated dispositions.

Most compensated time (70.3 percent) was claimed for in-court activity,

directors of county probation departments in the state, the "majority . . . stated that they had very little contact with the defense bar and felt that if the attorneys worked more closely with the local probation department they could obtain alternative dispositions." *See* 1980 Spiegler Report, *supra* note 847, at 140.

910. Of 30 attorneys surveyed in the Schenectady study of 18-B attorneys "[o]nly one attorney contacted a social service agency in the hope that it would assist the court in determining a non-incarcerative sanction." 1985 NYSDA SCHENECTADY REPORT, *supra* note 856, at 87.

which consisted primarily of waiting for cases to be called, seeking adjournments, and entering guilty pleas.[911] 18-B Panel attorneys usually did not engage in other forms of in-court practice. Panel attorneys made pre-trial motions and participated in hearings only infrequently. In addition, Panel attorneys often failed to appear at scheduled court dates.

The balance of compensated time (29.7 percent) was claimed for out-of-court activity.[912] One of the most important findings to emerge from the voucher analysis is that in nearly 40 percent of the cases no out-of-court activity whatsoever was claimed.[913] 18-B Panel attorneys did not develop meaningful lawyer-client relationships, undertake independent factual or legal investigations, engage investigators or experts, or consult with the defendant's family or friends.

This state of affairs is the consequence of systemic failings endemic to New York City's indigent defense system and not solely the result of the 18-B Panel's lack of organization, supervision, and support. Panel attorneys failed to develop meaningful lawyer-client relationships because defendants are considered unimportant in non-trial dispositions. Panel lawyers are not removed from Panel service for failure to make court appearances because judges and Panel administrators, concerned more with efficiency than with preserving the adversarial process, are overly willing to substitute one attorney for another. Panel attorneys did not closely scrutinize the state's case or carry out investigations because case stereotypes govern their view of their clients' cases. In a system which disposes of 76 percent of all Supreme Court cases by guilty plea,[914] it is not surprising that attorneys made pre-trial motions, conducted hearings, developed coherent defense theories, and prepared for trial only infrequently. Because sentencing is often agreed upon at the time pleas are taken, Panel attorneys rarely consulted probation officials and those concerned with sentencing alternatives.

It is a fiction, under these circumstances, to presume that defense attorneys give advice that enables their clients to make informed decisions.[915] The typical 18-B defendant in our study was not represented by an advocate who by "prevailing professional norms" was able to make "the adversarial testing process work in . . . [each] particular case."[916] Instead, defendants were relegated to counsel whose role was that of a messenger who relays to the defendant news of her fate.

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911. *See infra* TABLE 11-2, at 860.

912. *Id.*

913. *Id.*

914. *See supra* note 14 and accompanying text.

915. *But see* Strickland v. Washington, 416 U.S. 668, 689 (1984), in which the Supreme Court adopted such a presumption and applied it to all defense counsel, whether retained or assigned. *See also supra* note 421.

916. Strickland v. Washington, 416 U.S. at 690.