CHAPTER TEN

THE "SHEDDING" OF LEGAL AID SOCIETY CASES TO 18-B PANEL ATTORNEYS AFTER ARRAIGNMENT

We have already documented the manner of the Legal Aid Society's shedding of cases at arraignment.[1108] This chapter examines post-arraignment case shedding, which occurred when judges substituted 18-B Panel attorneys after the Society's attorneys failed to appear or to undertake essential lawyering tasks. Substitution occurred despite the fact that the Society had arraigned a defendant and assumed responsibility for all subsequent representation. It also occurred when new appointments in non-conflict of interest cases were made in Supreme Court.

We first measure the extent to which the Legal Aid Society maintained representation in cases referred to it "for all purposes" at arraignment, and the extent to which it accepted new non-conflict cases that later required the appointment of counsel. Next, we examine two mechanisms — related to the representation provided by Society staff attorneys — that led to the replacement of the Society's attorneys by 18-B Panel attorneys. Finally, we evaluate the Society's explanation for the substitution of Society staff attorneys by Panel attorneys.

I.
THE LEGAL AID SOCIETY'S MAINTENANCE OF ITS EXISTING CASELOAD AND ITS ACQUIRING OF ADDITIONAL NON-CONFLICT CASES

Under the tenets of the *1966 Plan*,[1109] the expected caseload of the Legal Aid Society should amount to the sum of: (1) those cases assigned to it "for all purposes" at arraignment and (2) new non-conflict cases requiring the assignment of counsel after arraignment. During the course of our in-court observations, we measured the extent to which the Society shed its expected

1108. *See, e.g., supra* TABLE 8-1, at 795.

1109. The *1966 Plan* and the Legal Aid Society's contract with the City specified that the Society was responsible for representing all eligible defendants absent actual conflict, other appropriate reason, or other good cause. *See* Agreement Between the City of New York and the Legal Aid Society (Aug. 6, 1966), reprinted *infra* app. 2(c), para. Second, at 933 [hereinafter 1966 Agreement]; Plan of the Association of the Bar of the City of New York, Bronx County Bar Association, Brooklyn Bar Association, New York County Lawyers' Association, Queens County Bar Association and Richmond County Bar Association (approved by the Judicial Conference of the State of New York, Apr. 28, 1966) (adopted pursuant to Article 18-B of the County Law) reprinted *infra* app. 2(b), art. I, at 925 [hereinafter 1966 Bar Association Plan]. They did not, however, enumerate what would satisfy the standard of "other good cause." *See id.*; *see also supra* text accompanying notes 393.

caseload to the 18-B Panel.[1110] The results are presented below:

TABLE 10-1: *Difference Between the Legal Aid Society's Expected and Observed Representation — the Shedding of Post-Arraignment Cases to 18-B Panel Attorneys*

Observed Case Sample	n	%
Expected Legal Aid Society representation (99 cases referred for all purposes at arraignment[1111] and 7 cases eligible for "new" assignment)	106	100.0
Legal Aid Society Relieved (7 single- and 3 multiple-defendant cases in which judges substituted 18-B Panel for all defendants)	10	9.4
New non-conflict cases eligible for Legal Aid Society representation to which 18-B Panel was assigned (4 single- and 3 multiple-defendant cases in which the Society's representative ("catcher") failed to volunteer or was overlooked when appointment of counsel was necessary)	7	6.6
Observed Legal Aid Society Representation (single- and multiple-defendant cases in which the Society provided representation for all purposes)	89	84.0

The table demonstrates that 16 percent (n=17) of the Legal Aid Society's expected post-arraignment workload was redistributed to the 18-B Panel.[1112] Of these cases, 76 percent (n=13) were pending indictments.[1113] Thus, the shedding of these cases directly increased the Panel's proportionate share of the Supreme Court workload.

Not only did the Legal Aid Society shed cases to the 18-B Panel, it failed to take any additional non-conflict cases. On every occasion that we observed a Panel attorney relieved of a non-conflict case in Supreme Court, the replacement was by another Panel attorney, not a Society attorney. Citywide data corroborate our observations. In Supreme Court in 1984, the Society was re-

1110. Our observation sample tracks the Society's post-arraignment representation in cases in which it agreed to assume ongoing case responsibility and in those in which it would be expected to provide representation, in the first instance, after arraignment ("new cases"). The term "new cases" refers to defendants who required representation after arraignment because (1) the defendant was unable to pay a reasonable attorney's fee after initially retaining the services of a private attorney; (2) an 18-B Panel attorney was relieved in a non-conflict case for which the Society was eligible to provide representation; or (3) the defendant was not arraigned in Criminal Court but instead was prosecuted on an indictment in Supreme Court and required the appointment of counsel.

1111. *See supra*, TABLE 8-1 at 795.

1112. *Table 10-1* does not account for the full extent of shedding, since many of the sample cases were still in the calendar parts of Supreme Court when our observations ceased. Replacement that took place thereafter is not shown in the *Table*.

1113. Sixty-five percent (n=11) of the seventeen were single-defendant cases, while 35% (n=6) were multiple-defendant cases.

lieved of 2,964 clients while the Panel was assigned 5,405 clients.[1114]

1114. *See supra* TABLE 7-1, at 779; REPORT UCS-195 at 2 (1984) (18-B 1st Dep't). The Society has maintained that, in 1984, it accepted 5,394 "new" assignments in Supreme Court as a result of 18-B Panel attorneys having been relieved and their cases having been transferred to the Society:

> In fiscal 1985, a total of 5,579 *new* Supreme Court felony assignments to the Society were made, constituting 38 percent of our pending felony caseload. In 1984, Division attorneys were assigned to 5,394 cases in the Supreme Court as a direct result of the termination of representation by privately retained or 18-B counsel. While the researchers may accuse the Society of making "no effort to acquire new felony cases," the facts are otherwise. Indeed the authors have misread who it is that is 'shedding' cases.

Legal Aid Society, Reply Memorandum to McConville and Mirsky Draft Report 20-21 (Oct. 1, 1985) [hereinafter 1985 Reply Memorandum] (emphasis in original). The Society argued that our study "accuses [them] of having a policy of shedding felony cases *while ignoring the thousands of 18-B cases [they] assume each year in the Supreme Court.*" Letter from Arthur L. Liman, President of the Legal Aid Society, to the Committee on Criminal Advocacy of the Association of the Bar of the City of New York (Oct. 3, 1985) [hereinafter Oct. 1985 Liman Letter] (emphasis added). The Society's position is contradicted by the observations depicted in TABLE 10-1, by those noted above, *see infra* pp. 845, 847, 848, and by the Society's own policy of referring all multiple-defendant cases involving the potential for conflict to the 18-B Panel. *See supra* text accompanying notes 503-04. Further, in response to questions posed by the Criminal Advocacy Committee at its meeting of October 22, 1985, *see supra* note 721, regarding the origin of the 5,000 cases claimed as *new* assignments by the Society, the Attorney-in-Charge of the Society's Criminal Defense Division made statements contrary to the Reply Memorandum and the President's response of October 3, 1985. The Attorney-in-Charge stated that the Society's new assignments in Supreme Court originated almost entirely from the termination of *retained* counsel rather than from the Panel, and that Society attorneys had been instructed not to accept cases in which the Panel had been relieved. *See* McConville & Mirsky, Defense of the Poor in New York City: A Response to the Reply Memorandum of the Legal Aid Society (Nov. 7, 1985) [hereinafter 1985 Response]. The Administrative Judge of Criminal Court in New York County, himself a former supervisor of the Society, told the Subcommittee at a meeting during the week of October 7, 1985, that Society attorneys do not accept cases in which the Panel is relieved.

In an effort to reconcile the apparent contradiction, the Legal Aid Society subsequently acknowledged that the 18-B Panel *was* assigned single-defendant cases in non-conflict situations. Legal Aid Society, Additional Reply Memorandum to McConville and Mirsky Draft Report at 22 (Jan. 3, 1986) [hereinafter 1986 Additional Reply Memorandum]. These cases, the Society contended, were returned to the Society in Supreme Court by the Panel once an indictment was obtained. However, in the whole of our court observations in New York County (where the Society maintained that most, if not all, of such non-conflict Panel cases originated), not a single non-conflict case was ever assigned to the Society as a result of the termination of Panel representation.

We have categorized the Legal Aid Society's "new" cases after reviewing the Society's internal accounting practices, as they are depicted within the Monthly Caseload Activity Reports, *see supra* pp. 704-11, the responses made by the Society to our Draft Report, *see* 1986 Additional Reply Memorandum, *supra*, at 21-22, and Letter from Archibald R. Murray, Executive Director of the Legal Aid Society, to Committee on Criminal Advocacy of the Association of the Bar of the City of New York (Oct. 22, 1985) [hereinafter Oct. 1985 Murray Letter]. We concluded that the Society's "new" cases fall into the following five categories: (1) Internal reassignments which totaled 1899 in Supreme Court for the calendar year 1984. These occurred when a defendant represented by the Society had been rearrested and arraigned by a second Society attorney. Following the arraignment, the case was "reassigned" to the staff attorney who initially represented the defendant. The arrest and reassignment were counted as two "new" assignments in the Society's internal accounting system. (By contrast, the Society reported only "net" assignments to the Office of Court Administration; this is a number ob-

II.
LAWYERING PRACTICES OF LEGAL AID SOCIETY STAFF ATTORNEYS WHICH ACCOUNTED FOR THE POST-ARRAIGNMENT SHEDDING OF SOCIETY CASES ASSUMED "FOR ALL PURPOSES"

Our court observations revealed that the Legal Aid Society's promise of vertical representation[1115] (one attorney is matched with a defendant for all appearances) was largely unmet in practice. Against the failure of the Society's management to set caseload caps,[1116] staff attorneys necessarily evinced low appearance rates and a style of lawyering marked by the absence of a firm attorney-client relationship.[1117] Thus, the redistribution of the Legal Aid So-

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tained after subtracting the Society's reassignments from new assignments and carryovers.) (2) Direct indictments involving defendants who were not arraigned in Criminal Court and required assignment in Supreme Court following the return of an indictment. (Office of Court Administration sources revealed, however, that most direct indictment cases were represented by retained counsel and not by the Society. The total city-wide direct indictments for 1984 was 1,598. Information provided by OCA, October-November 1985.) The remaining categories are: (3) defendants who were previously represented by the Society and returned on old bench warrants; (4) probation violations in cases where a defendant had been previously represented by the Society; and (5) probation violations for defendants who were previously represented by a retained or 18-B Panel attorney. The Society could represent this final category of defendants when it appeared that the former attorney was unlikely to appear and no actual conflict existed to representation.

1115. *See supra* text accompanying note 553.

1116. *See supra* text accompanying notes 564-67, 612-14, 673. The caseload problem of staff attorneys was apparent in the Legal Aid Society's 1985 request to New York City to fund additional staff-attorney lines. *See* Legal Aid Society, Budget Submission to the City of New York for Fiscal Year 1986 (Jan. 28, 1985) [hereinafter 1986 Legal Aid Budget]. There, the Society argued that its attorneys' current caseload had exceeded acceptable limits:

> Evaluation of that caseload by any modern standard; American Bar Association, Attorney General's National Advisory Commission or the National Commission Guidelines for Defender Services, would support a conclusion that individual attorney caseloads and workload could exceed the capacity for timely, effective, productive representation in the near future, requiring immediate remedial action.

Id. at 1.

1117. *See* TABLE 10-2, at 843, TABLE 10-3, at 844; and *infra* text accompanying notes 1120-23 (Cases 0-56, S-67, S-66, S-76). The Legal Aid Society's management contended that the average caseload per staff attorney rose from 52.7 cases in July 1981 to 66.4 cases in July 1984. Legal Aid Society, Budget Submission to the City of New York for Fiscal Year 1987, at 9 (rev. Mar. 17, 1986) [hereinafter 1987 Legal Aid Budget]. This case-count does not distinguish, however, between attorneys with differing certification status. *See supra* note 717. Nor does it include any credit for time spent by each attorney on arraignment and "catch" assignments. *See infra* note 1128 and accompanying text. When these assignments are included, the Society's management acknowledges that "the average caseload rises precipitously to 100 cases" per attorney. 1986 Legal Aid Budget, *supra* note 1116, at 1.

Some attorneys, as was indicated above, took a greater share of the workload than others. *See supra* TABLE 8-5, at 807, TABLE 8-6, at 808, app.3, at 935 and TABLE 8-7, at 812. For these attorneys, caseloads may have posed particularly acute problems. The following extracts from our field notes collected from May 1984 to November 1985 illustrate this:

Attorney A

"They [management] don't want you to know what is going on. At the moment my caseload is about eighty. It has never been as low as sixty and has been up to a hundred and over. It has

ciety's caseload to the 18-B Panel took place against the backdrop of a highly discontinuous system of Society representation. While some staff attorneys, particularly those who had been with the Society for only a few years, exhibited a high degree of commitment to their clients, others evidenced little or no preparation and neglected to form or maintain an attorney-client relationship. Attorneys in the latter group frequently failed to arrange for a colleague to cover when they were unable to appear. These attorneys gave calendar judges reason to believe that they were not serious about providing continuous representation. When they failed to appear in Supreme Court, judges turned to available 18-B Panel attorneys, the only available alternative.[1118]

The following four case summaries, drawn from our observation sample, illustrate the circumstances under which judges substituted 18-B Panel attorneys for the Legal Aid Society's designated staff attorney:[1119]

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gotten a little better lately because we have had new lawyers coming in. A lot of my cases are misdemeanors and these don't require as much work as the felonies, but it is far too high. And defendant's rights are not a popular issue."

Attorney B

[In conversation with one of the authors] Attorney: "I received the questionnaire [sent to all Legal Aid attorneys] and I was suprised at how few questions there were. Surprised but pleased!"

Researcher: "Originally it was longer but we had to drop certain questions to attorneys."

Attorney: "Oh yeah? What questions?"

Researcher: "We asked a question on caseload but the Society is now going to give us an institutional response."

Attorney: "That's because they don't want the truth to emerge."

Researcher: "What caseload do you have?"

Attorney: "Mine is around eighty to ninety at the moment. That's better than it has been. I've had over a hundred and some people do have over a hundred now."

Researcher: "What determines it?"

Attorney: "A lot of it is how many people you have in your [section]. At the moment we have quite a few and this means that I'm on intake [at arraignment] about three times a month. Not long ago I was on intake five times a month and when that happens your caseload really goes up."

1118. Recognizing the implications of the "rise to a cadre of mediocre lawyers who wait in the courtroom in hopes of receiving an appointment," AMERICAN BAR ASS'N, STANDING COMMITTEE ON ASS'N STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROVIDING OF DEFENSE SERVICES, Commentary to Standard 5-2.1, at 5.24 (1980) [hereinafter 1980 ABA STANDARDS FOR PROVIDING DEFENSE SERVICES] (emphasis added). *See also supra* note 470. The American Bar Association has provided that, "[e]xcept where there is a need for an immediate assignment for an *temporary representation*, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made." *Id.* at Standard 5-2.1, at 5.23. Other studies have encountered the same practice of judicial appointment of available courthouse regulars. For example, it was reported in 1973 that one-third of responding judges "sometimes" assign cases on the basis of an attorney's presence in the courtroom, 11% do it "frequently," and 7% said that they "frequently" assign attorneys who are both in the courtroom and on file with the court. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE 43 (1973). *See also* H. SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT 91 (1966); Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 9-10 (1973).

1119. In two additional cases, the Legal Aid Society's attorneys were relieved and 18-B Panel attorneys substituted for reasons that were not apparent to us. In one, defendants A and B were indicted and charged with criminal sale of a controlled substance to an undercover agent. At arraignment in Criminal Court, defendant A was assigned to the Society and defend-

1. Defendants A and B were indicted and charged with robbery. Both defendants were represented at arraignment by the Legal Aid Society, which chose to remain with defendant A. The Society's designated attorney frequently failed to appear on required calendar dates and had acquired a reputation among judges for non-appearance. The attorney failed to appear on her client's behalf in Criminal Court, and was absent when the case first appeared in Supreme Court. The Supreme Court calendar judge immediately relieved the Society and appointed an 18-B Panel attorney.[1120]

2. The defendant, a persistent felony offender facing a life sentence, was indicted and charged with assault. The Legal Aid Society was assigned at arraignment to represent her for all purposes. The designated attorney failed to appear in Criminal Court. When she appeared in Supreme Court, she was unfamiliar with the case and the defendant. After a brief bench discussion with the calendar judge, the attorney informed the defendant that if she pled guilty he could expect a sentence of 7½ to 15 years. The defendant immediately requested that the attorney be relieved, complaining that the attorney had not undertaken an investigation or in other ways worked on the case. The attorney did not respond to the defendant's contentions. The calendar judge appointed an 18-B Panel attorney.[1121]

3. The defendant, a persistent felony offender, was indicted for robbery. The Legal Aid Society was assigned at arraignment. The designated attorney appeared in Supreme Court, having carried out no investigation. At a bench conference, the judge noted that one of two prosecution witnesses had failed to identify the defendant at a lineup. The judge also indicated that, while the case had potentially triable issues, he would impose a sentence of between five and eight years on a guilty plea.

The Legal Aid Society's attorney then informed the defendant, in open court, that five to eight years was the best deal she would receive. When the defendant refused to plead guilty, the attorney stated "for the record" that the plea and sentence offer were "reasonable". When the defendant protested, the Society attorney asked to be relieved. The calendar judge then relieved the Society's attorney and appointed an 18-B Panel attorney.[1122]

4. The defendant was indicted on charges of robbery. The Legal Aid Society was assigned to represent the defendant at arraignment in Criminal Court. When the case was calendared in Supreme Court, the designated attorney was absent, the Society was relieved and an 18-B Panel attorney substi-

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ant B was assigned to a Panel attorney. After the second Criminal Court appearance, the Society was relieved of A; a Panel attorney was substituted. Thereafter, the Panel represented both defendants for all purposes. (Case S-24) In the other case, the defendant was indicted and charged with assault. The Society was assigned to represent the defendant in Criminal Court. On the next adjourned date, the Society was relieved and the Panel substituted for all purposes. (Case S-87)

1120. Case 0-56.

1121. Case S-67.

1122. Case S-66.

tuted. When we asked the reason, the calendar judge told us that the Society attorney was a "dinger": an attorney who neither engaged in case preparation nor appeared when required.[1123]

Because failures of the Legal Aid Society's designated staff attorneys to appear often led to substitution of an 18-B Panel attorney and an increase in the Panel's proportionate share of the Supreme Court caseload, we analyzed the post-arraignment appearance rates of Society staff attorneys in our sample. An appearance occurred when the attorney designated to represent the defendant for all purposes appeared in the court part when the case is called. For purposes of comparison, *Table 10-2* includes the appearance record of Panel attorneys.

TABLE 10-2: *Post-Arraignment Appearance Rates for Both Defense Entities*

	Number of required court appearances	Number of appearances by designated attorney	Number of occasions when designated attorney failed to appear	Overall appearance rate (%)
Legal Aid Society	232	121	111	52.2
18-B Panel	338	215	123	63.6

Table 10-2 illustrates that, while the appearance rates of Legal Aid Society and 18-B Panel attorneys were both low, the Society's rate is computed to be 18.1 percent lower than their Panel counterparts.[1124] In single-defendant cases, post-arraignment, Society attorneys appeared at a rate of 65.7 percent, while the Panel's rate was lower at 55.7 percent. However, the Society's appearance rate in multiple-defendant cases lagged behind the Panel's by 38.9 percent, as *Table 10-3* shows:

1123. Case S-76.

1124. The Legal Aid Society has hypothesized that its overall low appearance rate was, in part, a function of calendar practices in multiple-defendant cases. According to the Society, calendar judges and court personnel advanced multiple-defendant cases at the behest of 18-B Panel attorneys, in the absence of the Society's attorneys. 1986 Additional Reply Memorandum, *supra* note 1114, at 7-9. In a letter attached as Exhibit B to its Additional Reply Memorandum, the Society contended that "multiple defendant cases presented a greater risk of non-appearance than single defendant cases (*i.e.*, one of several attorneys gets the case called; all other attorneys are deemed absent)." Letter from I. Goldart, Legal Aid Society, to D. Faust, of Calculogic (Nov. 6, 1985) [hereinafter Nov. 1985 Goldart Letter].

Our observations belie the Legal Aid Society's contentions. When multiple-defendant cases were called in the absence of the Society's designated attorney, it was because the Society attorney had not appeared during the court session or communicated with the court or the Society's "catcher". *See infra* note 1133 (Case S-69) and accompanying text. Clerks were hesitant to call cases unless all attorneys were present, and would do so only after several hours, when the whereabouts of the Society's designated attorney remained unknown. By contrast, single-defendant cases were often not called until the end of the court day, or until a designated attorney appeared or was substituted. This difference accounts for the Society's better post-arraignment appearance rate in single defendant cases.

TABLE 10-3: *Post-Arraignment Appearance Rates in Multiple-Defendant Cases for Both Defense Entities*

	Number of required court appearances	Number of appearances by designated attorney	Number of occasions when designated attorney failed to appear	Overall appearance rate %
Legal Aid Society	127	52	75	40.9
18-B Panel	234	157	77	67.1

The differential appearance rate between the two entities in multiple-defendant cases was a significant factor in the replacement of the Legal Aid Society's attorneys by 18-B Panel regulars.[1125] The relative presence of Panel attorneys and the comparative absence of the Society's staff attorneys, in cases in which both defense entities were assigned co-defendants, served as a constant reminder to calendar judges that they could expedite case dispositions by substituting a Panel regular.

III.
THE ROLE OF LEGAL AID SOCIETY "CATCHERS"

When the Legal Aid Society staff attorney designated to provide continuous representation did not appear, another staff attorney was designated to stand in. These substitute attorneys, commonly known as "catchers", assumed no ongoing case responsibilities.[1126] Our observations revealed that the

1125. If we include arraignment appearances, the Legal Aid Society appeared at an overall rate of 54.5% in multiple-defendant cases while the 18-B Panel appeared at a rate of 58.5%. These rates are in sharp contrast to the Society's *post*-arraignment appearance rate in multiple-defendant cases of 40.9% reported in TABLE 10-3, at 844. The Society's overall appearance rate in multiple-defendant cases is assisted by the fact that the Society's designated attorney in virtually every such case was present at arraignment. Overall the Panel appearance rates suffer because of the systematic defects in the Panel arraignment system and Society arraignment practices. *See supra* text accompanying notes 826-28; *supra* note 825, TABLE.

1126. The "catcher" system arose after 1974, when the Legal Aid Society abandoned stage representation and instituted a policy of vertical continuity, giving a single attorney sole responsibility for a case from arraignment until final disposition. *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 4 (Circulating Draft, Aug. 1975) [hereinafter 1975 Report on the Legal Aid Society and the 18-B Panels]; *see also supra* notes 562-63 and accompanying text. To deal with the demand for representation in new assignments and the problems created by the absence of designated attorneys and to reduce the likelihood that the Legal Aid Society would be relieved of a case when the designated attorney failed to appear, the Society assigned one or more attorneys from each complex to the calendar parts as "catch" lawyers. The catcher was expected to have each absent attorneys file, or a note containing information about each case, and any necessary requests. The advantages of this system were spelled out by the Society as follows:

> Each day each Criminal Court all-purpose part and each Supreme Court calender part has a lawyer assigned to it by the Society. That lawyer, known as the "catch lawyer" is

catcher played a role in almost all of the Society's Criminal Court cases. Although catchers were unfamiliar with cases and unknown to the clients for whom they appeared, and rarely, if ever, spoke with the defendant or consulted with her family, they frequently attempted to dispose of cases through guilty pleas.

In Supreme Court, catchers were to provide representation for defendants who had not been arraigned in Criminal Court or whose case required assignment in Supreme Court. In addition, catchers were to substitute for the Society's designated attorney when that attorney failed to appear. Nonetheless, the presence of catchers in Supreme Court calendar parts was significantly less conspicuous than in Criminal Court. Their reluctance to substitute for other Legal Aid Society staff attorneys contributed directly to the referral of non-conflict cases to the 18-B Panel. Throughout our observations, catchers typically sat in the jury-box, and stood up only when the judge specifically addressed them. We never observed a catcher volunteer for appointment in a new non-conflict case.[1127] Moreover, when these attorneys did substitute for an absent colleague, they did so without vigor. They were disengaged from the defendant, unfamiliar with the case, and unable to provide the court with any information other than that contained in the often uninformative notes left by the designated attorney. Quite often, the catchers had neither a note nor any other information regarding the status of the case.

A number of attorneys with whom we spoke were reluctant to participate in a system that often required them to engage in "stand up" representation. The following quotations, taken from our field observations, illustrate the contempt some Legal Aid Society staff attorneys had for the catcher system:[1128]

Conversation with Legal Aid Society Staff Attorney "A": "I asked a Legal Aid attorney: 'What do you think of the catcher system?' He said: 'I don't like it. We have to all do it two or three times a month but I don't like it at all.' I said: 'Why not?' He replied: 'Because it is a sham. You cannot represent a person. He's asking for advice or wanting you to make a bail application and you don't know anything about the case. You can't get involved any

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available to pick up new assignments, represent clients returned on bench warrants and to appear on Society cases where the Society attorney assigned is unable to appear because of actual engagement on trial, illness or other justifiable absence. In most instances, the catch lawyer is only to advise the client and the court of the assigned Society lawyer's unavailability. However, the catch lawyer must also be prepared to take whatever steps may be necessary to protect the client's interest and alert the court to an appropriate adjourn date.

1985 Reply Memorandum, *supra* note 1114, at 31-32.

1127. This reluctance may have stemmed from the fact that under Legal Aid Society rules catchers were required to assume ongoing case responsibility in new assignments. The response that catchers made, similar to the "taking" practices of the Society's staff attorneys at arraignment as indicated in *supra* TABLES 8-4, at 806, TABLE 8-5, at 807, TABLE 8-6, at 808, and *infra* app. 3, at 930, TABLE 8-7, at 812, appeared to be a product of their own pre-existing caseloads, and of morale and motivational considerations.

1128. We recorded these notes in the course of our field observations November 1984 to May 1985.

more than that because it's not your case. The best you can do is to read out a message [from the designated attorney].' As we were talking the catcher was standing up to represent a young black defendant, and the defendant was protesting to the Judge that he wasn't getting any representation: 'I keep coming to court and my lawyer is never here. Every time I come the catcher stands up and I get sent back to prison for two or three weeks.' The Judge looked through the papers and said 'Mr. X is your lawyer.' The defendant said: 'I know he's my lawyer but I never see him.' The Judge said: 'Well, [the catcher] can give you his telephone number and you can call him.' He replied: 'I know his number and I do call him but he is always out.' (The staff attorney said to me at this point, 'that's true.') The defendant kept repeating that it was wrong to have this kind of system and that he was getting no representation and the Judge became increasingly uneasy and kept muttering, 'You'll just have to keep trying him' until [the catcher] intervened to say she would make a note on the file to call the defendant. At this point the attorney said to me, 'That's just it. Exactly. He doesn't have a lawyer right now, there's nothing that she [the catcher] can do. He's not represented; that's what's wrong with the catcher system. The whole thing is a facade, a pretense, it's not representation and that defendant knew it.' "

Statement of Legal Aid Society Staff Attorney "B": "I hate the catcher system. People abuse it. It is awful to do it and it encourages people not to show up. It makes representation a sham. You get people standing up on cases they don't know anything about. With the catcher system, the judges get dupes who can be bullied. They begin to expect that they can bully everyone. This makes it harder to fight when you are alone."

Statement of Legal Aid Society Staff Attorney "C": "Being a catcher is appalling. It's not representation especially in the AP [All Purpose] Parts [in Criminal Court]. There are just too many cases. If you have 160 or more cases on the daily calendar you've said it all. It's no longer a legal determination. It can't be. It's a bit easier on the 11th floor [Supreme Court] because there are fewer cases and a few more lawyers show up but it's the worst job. It's depressing and you find you can't talk to individuals. It's simply a holding operation. Catching is the worst: You're talking to the judge, the court officer, the DA and you haven't any time for the defendants. You find yourself getting snappy. It's the worst assignment, absolutely the worst."

Statement of Legal Aid Society Staff Attorney "D": "[With my case-load] it's tough making the appearance, but you have to if you can. The catcher is not representation."

We observed that some judges expected the catcher to be willing to engage in substantive lawyering tasks which could effect the outcome of a case, including counselling defendants to plead guilty despite the established problem of "stage representation."[1129] Other judges were satisfied when a catcher

1129. Despite the Society's abandonment of stage representation in 1974, *see* 1975 Report on the Legal Aid Society and the 18-B Panels, *supra* note 1126; *see also supra* note 562 and

provided them with the reason for the designated attorney's absence, sketchy information on the progress of the case, and a suggested adjourned date when the designated attorney could appear. In two types of circumstances, however, judges repudiated the catcher and substituted or assigned an 18-B Panel attorney for the Legal Aid Society's designated staff attorney:

a. When certain designated attorneys *routinely* failed to appear, calendar judges expected the catcher to undertake substantive lawyering tasks. If the catcher was unwilling, or had no information from the designated attorney and could not inform the court of a case's progress, judges substituted 18-B Panel attorneys.

b. When catchers failed to volunteer for new assignments, judges appointed 18-B Panel attorneys.

A. The Legal Aid Society Was Relieved and the 18-B Panel Was Appointed[1130]

The following capsule summaries illustrate the types of situations in which an 18-B Panel attorney was substituted for the Legal Aid Society designated staff attorney:

1. The defendant was indicted and charged with criminal possession of a weapon. The Legal Aid Society was assigned at Criminal Court arraignment. The defendant absconded, and a bench warrant was issued. When the defendant was involuntarily returned, the catcher informed the judge that the designated attorney was "on sabbatical" and asked to be relieved, whereupon

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accompanying text, the continued operation of the catcher system, in which Society attorneys unfamiliar with either the defendants or the case facts undertake substantive lawyering, effectively destroyed vertical continuity. *See* U.S. *ex rel.* Thomas v. Zelker, 332 F. Supp. 595 (S.D.N.Y. 1971) (defendants under the Society's earlier system of horizontal (stage) representation were passed from one attorney to another, none of whom had any familiarity with the defendant or the previous case history; as a result, defendants were relegated to isolation for months at a time, despite the pretext of "representation"). For descriptions of stage representation in other jurisdictions, *see generally* Gilboy & Schmidt, *Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants*, 70 J. CRIM. L. & CRIMINOLOGY 1 (1979); Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473 (1982); Sudnow, *Normal Crime: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBLEMS 255, 264-65 (1965); Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523 (1970).

1130. Two additional cases falling within the sample illustrate other circumstances in which the Legal Aid Society was relieved as a result of the catcher's actions and an 18-B Panel attorney substituted: *a.* Defendants A and B were indicted for the criminal sale of a controlled substance to an undercover agent. At arraignment an 18-B Panel attorney was assigned to defend A and the Legal Aid Society was assigned B. Both defendants absconded and bench warrants were issued. Upon B's apprehension, the Society was relieved and the Panel substituted despite the presence of the Society's catcher. (Case S-56) *b.* The defendants was indicted and charged with a robbery. When the defendant first appeared in Supreme Court, the Legal Aid Society's catcher stood beside the defendant, who entered a not-guilty plea. Subsequently, upon the catcher's request, the Society was relieved and an 18-B Panel attorney substituted. The reason given by the catcher was that the defendant did not want the Legal Aid Society. (Case S-72).

the 18-B Panel was assigned for all purposes.[1131]

2. Defendants A and B were indicted and charged with robbery. At arraignment in Criminal Court, the 18-B Panel was assigned to A, the Legal Aid Society to B. The Society's designated attorney failed to appear in both Criminal and Supreme Court. When the case was called in Supreme Court, the calendar judge asked if anyone represented defendant B. Although the catcher was present, she did not respond. The judge appointed the Panel in place of the Society.[1132]

3. Robbery defendants A, B, and C were represented at Criminal Court arraignment by the Legal Aid Society, which remained with defendant B. The 18-B Panel was assigned to A and C. The Society's designated attorney failed to appear on the second Supreme Court date. The catcher informed the court that she was unfamiliar with the facts of B's case and did not wish to participate in substantive discussions. The calendar judge impatiently told the catcher to "go away," and said in open court that it was her intention to relieve the Society and appoint the Panel for defendant B. When the catcher asked the reason for the substitution, the judge responded "because I want to."[1133]

B. The Legal Aid Society Catcher Failed to Volunteer for New Assignment and the 18-B Panel was Appointed[1134]

The following capsule summaries illustrate the types of situation in which

1131. Case S-6.

1132. Case S-63.

1133. Case S-69. Subsequent to the judge's decision to substitute the 18-B Panel for the Society's catcher, the Society's designated attorney asked the court to reconsider and indicated that her absence was explainable. Thereafter, the judge reinstated the Society after which the matter was adjourned to another date. On the subsequent date the designated attorney again failed to appear.

1134. Several additional cases falling within the sample illustrate other circumstances in which an 18-B Panel attorney was appointed despite the presence of the Legal Aid Society's catcher: *a.* Four defendants were indicted for criminal sale of a controlled substance. All defendants were initially represented in Criminal Court by private counsel. When the case was calendared in Supreme Court, private counsel asked to be relieved of all but one defendant. Despite the presence of the catcher, the remaining three defendants were referred to the 18-B Panel. (Case S-36) *b.* The defendant was indicted and charged with criminal sale of a controlled substance. She was represented by a misdemeanor-certified 18-B Panel Attorney at arraignment and during the pendency of the matter in Criminal Court. When the defendant was indicted, the calendar judge substituted by requesting the Panel administrator to assign a successor Panel attorney. The Panel administrator was notified. (Case 046) *c.* The defendant was indicted and charged with the sale of a controlled substance to an undercover agent. She was represented at arraignment by an 18-B Panel attorney and reassigned to a successor Panel attorney for all purposes. When the designated attorney failed to appear in Supreme Court, she was immediately replaced by a third Panel attorney present in the courtroom. (Case 044) *d.* The defendant was indicted and charged with two sales of a controlled substance to an undercover agent. She was represented at arraignment by an 18-B Panel regular who was replaced by the calendar judge in Supreme Court. The judge stated that the first Panel attorney was "incompetent," yet she substituted by assigning a second Panel regular in the courtroom. (Case 006) *e.* Defendants A, B, and C were indicted and charged with criminal sale of a controlled substance. All three defendants were represented at arraignment by the Legal Aid

the Legal Aid Society catcher failed to volunteer for new, non-conflict cases requiring assignment of counsel, and, instead, an 18-B Panel attorney was appointed.

1. Six narcotics defendants were initially represented by private counsel in Criminal Court. Thereafter, in Supreme Court, private counsel asked to be relieved of all but one defendant. Despite the Legal Aid Society's policy to take one co-defendant, the catcher did not volunteer and the judge assigned 18-B Panel attorneys to all five remaining co-defendants.[1135]

2. A narcotics defendant was represented at arraignment by an 18-B Panel attorney who continued with the case. When the defendant first appeared in the Supreme Court, the Panel attorney was relieved by the judge because of alleged incompetence. The catcher failed to volunteer, despite the absence of conflict. The court appointed another Panel attorney.[1136]

3. The defendant was indicted for the sale of a controlled substance. An 18-B Panel attorney on the misdemeanor Panel represented the defendant at Criminal Court arraignment and continued with the case. When the matter appeared in Supreme Court, the misdemeanor-certified attorney was relieved. The catcher failed to volunteer, despite the absence of conflict, and the calendar judge appointed a successor Panel attorney.[1137]

4. A narcotics defendant was represented at arraignment by an 18-B Panel attorney and reassigned to a successor Panel attorney for all purposes. When the successor attorney failed to appear in Supreme Court, the calendar judge relieved him. Despite the absence of conflict, the catcher failed to volunteer and the court appointed a third Panel attorney who was present in the courtroom.[1138]

IV.
THE LEGAL AID SOCIETY'S EXPLANATION FOR THE SUBSTITUTION OF ITS STAFF ATTORNEYS BY 18-B PANEL ATTORNEYS

The Legal Aid Society has maintained that its reliance on the catcher system in New York County was occasioned by a "case-tracking" system over

Society. Thereafter, defendant A retained private counsel, while B and C were appointed 18-B Panel attorneys. When the Panel attorney for defendant B failed to appear in Supreme Court, the calendar judge substituted by calling upon a Panel regular present in the courtroom. (Case S-79) *f.* The defendant was indicted for arson. The Legal Aid Society was assigned at Criminal Court arraignment. In Supreme Court, the Society's designated attorney was replaced with private counsel. Subsequently, the defendant's funds were exhausted and the court relieved private counsel. Despite the presence of the catcher and the Society's previous involvement in the case, the judge appointed an 18-B Panel attorney for all purposes. (Case S-52).

1135. Case S-58.

1136. Case 006.

1137. Case O-46A.

1138. Case O-44.

which it had no control.[1139] By "case-tracking" the Society meant a predictable movement of cases from initial arraignment to linked parts (two courts in Criminal Court and two courts in Supreme Court). If cases moved in this predictable way, the Society could assign attorneys to a set of linked parts ("a complex").[1140] Those attorneys' cases would have only been heard in those linked parts.

The Legal Aid Society contended that this ideal case-tracking system had been replaced by a prosecution-oriented system which operated for the convenience of the district attorney's office.[1141] Under this system, the Society

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1139. The Legal Aid Society has argued that New York County is unique in both its case processing methods and in the numbers of cases it processes annually:

> The [draft] report fails to consider or even to mention this fundamental distinction unique to New York County and thus makes no reference to its impact. The choice of New York County as the site of the study without taking account of this major structural distinction and its consequent effect on what is the keystone of providing effective defense services — continuity of representation — undercuts the validity of many of the conclusions reached by the researchers. Moreover, the problems occasioned by the system used to track cases in New York County are exponentially increased by the high volume of cases filed in New York County. The result is painfully apparent in the all-purpose parts.

1985 Reply Memorandum, *supra* note 1114, at 27-28.

The Legal Aid Society's contentions notwithstanding, in its 1986 Budget Submission, the Society itself admitted that the lack of case-tracking was prevalent in other counties, describing it as a citywide occurrence "that detracts from staff attorney productivity." 1986 Legal Aid Budget, *supra* note 1116, at 8. Moreover, brief site visits by our researchers to other counties in the fall of 1985 revealed adaptive mechanisms similar to New York County's "catcher." In Queens County, for example, the Society employed an "anchor" in Criminal Court, to fill the same role as the New York County catcher. In Queens County Supreme Court a "rotating anchor" was assigned to several court parts to cover for unavailable Society attorneys. In King's County, a catcher was assigned to each part in Criminal Court and to the arraignment parts in Supreme Court. Thereafter, in the calendar parts of the Supreme Court a "miscellaneous person" was available to substitute for designated attorneys. Finally, subsequent to the filing of our Draft Report, the Society formally abandoned the catcher system in New York County Supreme Court. This change in policy occurred despite the continued absence of reliable case-tracking and despite the establishment of an individual assignment system, *see supra* note 31, requiring the presence of the Society's attorneys in many more courts than was the case under the "complex" system. *See* Letter from Maurice N. Nessen, President of the Legal Aid Society, to members of the Association of the Bar of the City of New York at 3 (Jan. 22, 1986) [hereinafter Jan. 1986 Nessen Letter].

1140. 1985 Reply Memorandum, *supra* note 1114, at 354; *see also supra* text accompanying notes 36-37.

1141. The Legal Aid Society has described the case-tracking system presently utilized in New York County as follows:

> In New York County each assistant district attorney is assigned to a Criminal Court all-purpose part and a Supreme Court part. Cases are adjourned or tracked from the arraignment part to the all-purpose part to which the assistant district attorney who drew the complaint is assigned. Until recently there was an enormous delay between arrest and arraignment in New York County [footnote omitted]. Seventy two [sic] hours and more were not uncommon. As a result, in any eight hour arraignment session cases from several different days' arrests might be involved. Because the complaints would have been prepared by different assistant district attorneys on different shifts, the cases would be adjourned to a wide variety of court parts where those assistant district attorneys were assigned.
>
> While this system of assignment or tracking is of great convenience to the prose-

argued, cases were assigned to those court parts to which the assistant district attorney who drew the complaint was assigned, rather than to the linked court parts on arraignment intake where the Society was assigned.[1142] "Off-track" cases, according to the Society, dispersed Society attorneys to different complexes, making it impossible for them to make all of their court dates.[1143]

The Legal Aid Society's explanation is unsatisfactory for two reasons. First, if a case did not "track" the complex to which the Society's designated attorney was assigned, it was nonetheless invariably sent to another complex located nearby on the same corridor. To make both appearances, a staff attorney would merely have had to indicate to court personnel or the Society catcher that she intended to appear. When the case was called, the attorney would only have had to walk down the hall to the other complex, where court personnel ordinarily would hold the case for a reasonable period of time. Second, the overall appearance rate of 18-B Panel attorneys was better than the Society's,[1144] although cases tracked Panel attorneys even less than they did the Society.[1145]

Further, if the Legal Aid Society's contentions were accurate, its attorneys would have had a much higher appearance rate in "on-track" cases than in "off-track" cases;[1146] yet we found that the Society's appearance rate for on-track cases was only marginally higher than for off-track cases.

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cution it wreaks havoc with the scheduling of cases for others. The Society has vehemently objected to this New York County practice but has failed to persuade more than a few judges to assign cases in a more rational fashion. Furthermore, in those rare instances in which a judge sitting in Criminal Court does utilize a more even-handed basis for assigning cases to all-purpose parts, when the cases proceed to the Supreme Court they move to the part to which the assistant district attorney is assigned.

1985 Reply Memorandum, *supra* note 1114, at 26-27.

1142. *Id.*

1143. The President of the Legal Aid Society's Board of Directors emphasized that the catcher system was "required" as a result of the absence of case-tracking in New York County. Oct. 1985 Liman Letter, *supra* note 1114.

1144. *See supra* TABLE 10-2, at 843.

1145. Although 18-B Panel administrators nominally assigned Panel attorneys to a court complex similar to the Legal Aid Society attorneys, *see supra* note 1138-39, and accompanying text, our observations of the administrator's assignment practices in the First Department, *see supra* p. 718, revealed that assignments clerks asked Panel attorneys to take cases in court parts to which they were not assigned on a regular basis.

1146. In our sample, 66.5 percent of the Legal Aid Society's appearance dates were "on-track".

TABLE 10-4: *Legal Aid Society Staff Attorneys' Appearance Rates in OFF TRACK and ON TRACK Court Dates*

	Number of court dates when appearance required	Number of appearances by designated attorney	Number of occasions when designated attorney failed to appear	Appearance rate %
ON TRACK	143	75	68	52.4
OFF TRACK	72	34	38	47.2

This finding alone does not fully rebut the contention that several "off-track" cases might conjoin to disrupt an attorney's overall appearance rate; one must analyze that attorney's entire caseload. Nevertheless, case-tracking appears to be an unsatisfactory explanation for the Legal Aid Society's appearance rate. Some staff attorneys regularly made court dates, whether on-track or off. Others consistently failed to appear. We may infer that differences of attitude and motivation among attorneys, rather than a dysfunctional tracking system, provide the better explanation.

To test this inference, we examined the appearance rates of those nine Legal Aid Society staff attorneys in our sample who had five or more required court dates in one or more cases. The results are presented below:

TABLE 10-5: *Legal Aid Society Staff Attorneys' Appearance Rates During Observation Period (for Attorneys With Five or More Required Court Dates)*

	Required Appearances by Society Attorneys			
Attorney	Cases	Dates	n	%
1	4	10	0	0.0
2	3	5	1	20.0
3	2	6	0	0.0
4	4	8	1	12.5
5	4	6	0	0.0
6	2	6	5	83.0
7	1	5	5	100.0
8	2	7	7	100.0
9	3	8	7	87.5

Table 10-5 confirms our own observation that appearance rates over time were attorney dependent.[1147] The mean appearance rate of the first five attorneys was only 5.7 percent as compared with a 92.3 percent mean rate among the

1147. The following profiles correspond to the appearances of each of the staff attorneys falling within *Table 10-5* above. The profiles explain the time between each required appearance in each of the cases falling within the sample:

remaining four. All but one designated attorney was assigned to two or more cases. In each case the required appearance dates spanned a period of two or more weeks, while many appearance dates covered a period of a month to three months.

V.
CHAPTER SUMMARY

The interaction of the practices of the Legal Aid Society's designated staff

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PROFILES OF LEGAL AID SOCIETY STAFF ATTORNEYS IN 25 CASES: POST-CRIMINAL COURT ARRAIGNMENT APPEARANCES

Attorney 1

Was designated attorney in four cases in the sample period. Excluding arraignment dates, one case involved two required appearances over a period of six weeks; one required three appearances over a period of four weeks; one required three appearances over a period of five weeks; one required two appearances over a period of three weeks. The attorney was absent for all ten dates.

Attorney 2

Was designated attorney in three cases in the sample period. Excluding arraignment dates, one case involved one required appearance; one required two appearances spanning three weeks; and one required two appearances over a four week period. The attorney appeared on one of the five required dates.

Attorney 3

Was designated attorney in two cases in the sample period. Excluding arraignment dates, one case involved four required appearances spanning nine weeks; the other required two appearances over a period of four weeks. The attorney was absent for all six dates.

Attorney 4

Was designated attorney in four cases in the sample. Excluding arraignments, one case involved one required appearance; one required two appearances over two weeks; one required three appearances over five weeks; and, one required two appearances over two weeks. The attorney appeared on one of the eight required dates.

Attorney 5

Was designated attorney in four cases in the sample. Excluding arraignments, one case involved two required appearances over two weeks; one required two apppearances over five weeks; and one required two separate appearance dates. The attorney was absent for all six dates.

Attorney 6

Was designated attorney in two cases in the sample. Excluding arraignments, the first case involved four required appearances covering a period of seven weeks; the second involved two required appearances over a period of seven weeks. The attorney appeared on five of the six court dates.

Attorney 7

Was designated attorney in one double-defendant case in the sample, involving a total of five post-arraignment dates over a period of more than six weeks. The attorney attended court on all required dates.

Attorney 8

Was designated attorney on two post-arraignment cases falling within the sample. Excluding arraignment, one case involved three required court appearances spanning three weeks; the other case involved four court appearances covering three months. The attorney attended court on all seven required dates.

Attorney 9

Was designated attorney in three separate sample cases. Excluding arraignments, the first case involved three required court appearances over a period of two weeks; the second involved three required appearances over five weeks; the third involved two required appearances covering a period of five weeks. The attorney appeared on seven of the eight required dates.

attorneys, the "catchers" who act on their behalf, and regular 18-B Panel attorneys resulted in judges substituting Panel attorneys for Society attorneys in Supreme Court and the appointment of Panel attorneys to new non-conflict of interest cases. Society staff attorneys, in an effort to cope with unrestrained workloads and in response to low morale or motivation, achieved low rates of court appearance. They also showed a lack of familiarity with the defendant and a lack of preparation in individual cases. These practices encouraged judges to substitute Panel attorneys solely on the basis of the willingness of those attorneys to undertake immediate representation and thereby facilitate the processing of cases. This was the price paid in a system whose predominant concern is cost-efficiency and efficiency of disposition, rather than adversarial representation. The absence of adversarial advocacy by both defense entities engendered in efficiency-minded judges the notion that indigent defense lawyers were fungible. Substitution occurred despite the historical alliance between the Society and the courts in the efficient processing of criminal defendants, and, again, despite the Panel's lack of essential support services necessary for adequate and meaningful representation.