

CHAPTER FOUR

RESEARCH GOALS AND METHOD

I. INTRODUCTION

When we began our empirical research in September of 1984, our purpose was to examine how the 18-B Panel of private attorneys had grown from a small, residual defense entity to a major provider of indigent defense services. We sought empirical data that would enable us to: (1) describe the structure of the 18-B Panel and nature of Panel practice; (2) compare the quality of representation provided by the Panel with that of the Legal Aid Society; (3) gauge the proportionate share of indigent defendants represented by each entity; (4) explain the movement of cases between the two entities; and (5) assess the two entities' comparative case costs.

We obtained the cooperation of the presiding justice and the 18-B Panel administrator of the First Department (New York and Bronx counties). They provided us with the Panel records for the period from 1973 to 1984 and allowed us to conduct an in-court observation study in New York County (Manhattan).⁶⁸² We chose New York County for our observation study for two reasons. First, the institutional defense system of New York City originated in New York County.⁶⁸³ Second, New York County has the greatest concentration of attorneys and the largest and most diversified caseload in New York City.⁶⁸⁴

Ultimately, however, we modified some of our objectives because we could not obtain records and aggregate statistics on staffing and lawyering activities, and on attorney caseloads from the Legal Aid Society⁶⁸⁵ and because the size of our research staff was limited.

We anticipated that this would limit our ability to compare the quality of

682. With regard to the Second Department (Kings, Queens, and Richmond counties), we obtained the Annual Reports (UCS-195) filed by the Panel Administrator with the Office of Court Administration ("OCA"), *see infra* note 740, and the Administrator's referral worksheet for the 1984 OCA report. We did not obtain other records and aggregate statistics from the Second Department or extend the in-court observation study beyond New York County.

683. *See* H. TWEED, LEGAL AID SOCIETY NEW YORK CITY 1876-1951 at 26-27 (1954) *supra* text accompanying note 226. In fact, institutional defense did not extend beyond New York County until 1949. H. TWEED, *supra*, at 87; *see supra* note 291.

684. The arrest cases filed in New York County Criminal Court for 1984 constituted 69.8 percent ($n=109,986$) of all First Department arrest cases ($n=157,590$) while the arrest cases filed in Bronx County were 30.2 percent of the First Department total ($n=47,604$). Criminal Court of the City of New York, Caseload Activity Report — Arrest Cases (1984) [hereinafter 1984 Caseload Activity Report — Arrest Cases]. The number of filed indictments in New York Supreme Court ($n=10,389$) accounted for 67.5 percent of all First Department indictments ($n=15,403$). Office of Court Administration of the State of New York Supreme Court, Caseload Activity Reports (1984) [hereinafter 1984 Supreme Court Caseload Activity Reports].

685. *See infra* pp. 701-04.

representation provided by the Legal Aid Society with that provided by 18-B Panel attorneys. Without the staffing and caseload data, we were unable to systematically assess Society staff attorneys' individual caseloads or to quantitatively analyze the particular lawyering tasks they performed.

This lack of data did not ultimately limit our ability to analyze the proportionate share of representation provided by the Legal Aid Society and by the 18-B Panel and to compare the case costs of both defense entities. The administrative judge of New York County allowed us to examine court records that documented the arraignment caseloads of Society attorneys.⁶⁸⁶ By comparing these data with the caseload records maintained by the Panel administrator, and with our own court observations, we explained how indigent cases were distributed between the two entities. In addition, we obtained the Society's internal monthly activity reports from confidential sources. These documents enabled us to analyze the Society's citywide assignments and dispositions and to compute the number of Criminal Court cases and citywide trials⁶⁸⁷ completed by the Society, the proportionate share of indigent defendants represented⁶⁸⁸ and the average cost per case of Society representation.⁶⁸⁹

II.

RESEARCH GOALS

Our historical research revealed that the Legal Aid Society pioneered a non-adversarial, low-cost method of indigent representation.⁶⁹⁰ Since 1966 the City of New York has funded the Legal Aid Society, including staff salaries, through an annual contract.⁶⁹¹ The Society has a central management structure and a pool of staff support.⁶⁹² The 18-B Panel, on the other hand, operates pursuant to the *1966 Bar Association Plan*.⁶⁹³ The City has compensated Panel attorneys on a per case basis at hourly rates fixed by statute.⁶⁹⁴ The Panel has no central management, and Panel attorneys receive no basic

686. See *infra* TABLE 8-4, at 806; TABLE 8-5, at 807; TABLE 8-6, at 808; TABLE 8-7, at 812; app. 3, at 938.

687. See *infra* note 986, TABLE B; TABLE 9-6, at 833; TABLE 9-7, at 833; TABLE 11-8, at 872.

688. See *infra* TABLE 7-4, at 788.

689. See *infra* TABLE 11-8, at 872.

690. See *supra* pp. 617-23.

691. Agreement Between the City of New York and the Legal Aid Society (Aug. 6, 1966), reprinted *infra* app. 2(c), at 932 [hereinafter 1966 Agreement]. See Exec. Order No. 178, City of New York, Office of the Mayor (Nov. 27, 1965), reprinted *infra* app. 2(a), at 922. See also *supra* pp. 646-48.

692. See *supra* text accompanying note 389; *infra* note 875, TABLE.

693. Plan of the Association of the Bar of the City of New York, Bronx County Bar Association, Brooklyn Bar Association, New York County Lawyer's 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), at 923 [hereinafter 1966 Bar Association Plan].

694. N.Y. COUNTY LAW § 722(b) (McKinney 1972). See also *supra* notes 358-61 and accompanying text.

support services.⁶⁹⁵ Beyond these general observations, there was limited information on the type of attorneys and the quality of representation systematically provided by both defense entities.⁶⁹⁶

In order to see whether the two entities' different funding and organization influence the type of attorneys they attracted, the quality of their representation, and share of the indigent defendant population they each represented, we sought to compare the following:

- 1) characteristics of Panel attorneys such as work affiliation, age, sex, race, prior experience, education and income patterns, with the comparable characteristics of the Legal Aid Society's attorneys;
- 2) the quality of criminal defense tasks performed by both defense entities, including the ability of each entity to provide continuous representation from arraignment until final disposition;
- 3) the workloads of the Panel and the Society, including the per-attorney caseloads and proportion of cases each entity handled in Supreme Court and Criminal Court;
- 4) how cases are allocated between the two defense entities; and
- 5) case costs.

695. L. Tolman, Annual Report of the Departmental Committee of the First Judicial Department, in 17th Annual Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial Year July 1, 1970 through June 30, 1971, N.Y. LEGISLATIVE DOC. NO. 90 (1972) [hereinafter 1972 L. Tolman Report]; see *supra* text accompanying notes 415, 602, 605-06. See *infra* pp. 716-19 for a description of the operation of the 18-B Panel rotational system. Because professional organizations strive to dominate the marketplace and to control or eliminate competition, see M. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); see also Abel, *The Politics of the Market for Legal Services* in P. THOMAS, *LAW IN THE BALANCE: LEGAL SERVICES IN THE EIGHTIES* (1982), no one knew how the 18-B Panel could survive and grow to the point where in 1984 it had handled over 36,000 cases, see *supra* text accompanying note 664, while the principal provider of defense services, the Legal Aid Society, had all the accoutrements of a professional organization.

696. The initial Subcommittee on Legal Representation of Indigents reported some impressions of the structure of the 18-B Panel and of the quality of its representation in 1971 and 1975. See *supra* notes 523-25, *infra* notes 814-15 and accompanying text. Neither the 1971 nor the 1975 Subcommittee report systematically analyzed the composition of the Panel, the quality of its representation, or the proportionate share of the Panel's workload. See Supreme Court of the State of New York, Appellate Division, First and Second Departments, Subcommittee on Legal Representation of Indigents, Report on the Legal Representation of the Indigent in Criminal Cases 10-12 (June 17, 1971) [hereinafter 1971 Report]; 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 3 (Circulating Draft Aug. 1975) [hereinafter 1975 Report on the Legal Aid Society and the 18-B Panels].

Although *Counsel for the Poor* attempted an "outcome" comparison between the 18-B Panel and the Legal Aid Society, the authors' data was inconclusive and their information on the composition of the Panel and on the quality of its representation was obtained through conversations and interviews rather than through empirical analysis or direct observation. See R. HERMANN, E. SINGLE, J. BOSTON, *COUNSEL FOR THE POOR* at 67-121, and appendices (1977); see also *infra* note 815 and accompanying text.

III. METHODOLOGY

We sought information necessary for our comparative analysis. First, we sought to obtain demographic information through a mail questionnaire to attorneys at the Legal Aid Society and on the 18-B Panel. Next, by examining the compensation vouchers and records of Panel attorneys and the caseload records of the Society, we planned to analyze the type of services the defense lawyers provided to their clients and the cost of these services.⁶⁹⁷ In order to measure the extent to which each entity provided continuous representation and to understand the movement of cases between the two defense entities, we planned to observe a sample of felony cases in New York County. We then intended to supplement these original data with secondary data derived from the reports filed by the Panel administrators and the Society with the Office of Court Administration ("OCA")⁶⁹⁸ and with statistical data independently compiled by OCA and the New York State Division of Criminal Justice Services.⁶⁹⁹

We anticipated that these original and secondary data would provide an ample empirical basis for our comparison of the two defense entities and would enable us to explain the apparent transformation of the 18-B Panel from a residual provider into a major provider of indigent defense representation.⁷⁰⁰

IV. REDEFINING THE GOALS AND METHOD OF THE RESEARCH

The two defense entities responded differently to our research, which led to some modifications of our initial research plan. The Appellate Division First Department (New York and Bronx Counties) allowed us to examine over a million pieces of information, which we coded and transferred to magnetic tape for computer analysis. These data enabled us to study the criminal defense tasks undertaken by 18-B Panel attorneys, their caseloads, the range of their compensation, and the length of time attorneys remained on the Panel.

The First Department 18-B Panel administrator's office agreed to help distribute the questionnaire to Panel attorneys. The Panel administrator made a number of helpful suggestions with regard to the drafting of certain questions. We sent the amended questionnaire, accompanied by a letter prepared

697. These compensation vouchers include the Case Disposition Form, In-Court Activity Form, and the Out-of-Court Activity Form. *See* app. 1(e), reprinted *infra*, at 919; *see also supra* text accompanying note 531.

698. *See infra* note 738.

699. *See* 1984 Supreme Court Caseload Activity Reports, *supra* note 684; Office of Court Administration of the State of New York, Supreme Court Criminal Term Disposition Report (1984) [hereinafter 1984 OCA Criminal Term Disposition Report]; 1984 Caseload Activity Report—Arrest Cases *supra* note 699; *see infra* p. 711.

700. *See supra* text accompanying notes 397, 662; TABLE 3-1, at 665; TABLE 3-2, at 678; TABLE 3-3, at 690.

by the Appellate Division and approved by the presiding justice of the First Department, to all members of the Panel in Manhattan and the Bronx. The presiding justice and OCA's administrative judge also approved the proposed observation sample in New York County. We represented that all statements made by the participants during the course of the study would remain anonymous.

The Legal Aid Society's management would not permit access to its management information system or to any original records. They offered to provide institutional responses⁷⁰¹ but emphasized that original records would not be provided.⁷⁰² This blanket restriction included a bar on access to the Society's aggregate and individual attorney caseload activity records.⁷⁰³

Although the Legal Aid Society's management and its union (Association of Legal Aid Attorneys) were both willing to assist in the distribution of a questionnaire, management refused to permit questions relating to caseload.⁷⁰⁴ They claimed staff attorneys could not be relied upon to provide accurate responses.⁷⁰⁵ Instead, management provided an average case count derived by dividing the total number of its pending cases by the total number of staff attorneys, without differentiating between attorneys of varying levels of seniority or certification.⁷⁰⁶

701. See Letter from Archibald R. Murray, Executive Director of the Legal Aid Society, to Chester L. Mirsky (Oct. 30, 1984) [hereinafter Oct. 1984 Murray Letter].

702. The Executive Director stated that "[t]he Society will make available to the researchers data (*not books and records*) of the Society relating to investigative and expert services, as well as staffing of the Criminal Defense Division." Letter from Archibald R. Murray, Executive Director of the Legal Aid Society, to Chester L. Mirsky (Nov. 9, 1984) [hereinafter Nov. 1984 Murray Letter] (emphasis added).

703. Harold S. Jacobson, Assistant Attorney for Planning and Management of the Legal Aid Society, Internal Memorandum at 1 (Feb. 14, 1985) [hereinafter 1985 Jacobson Memorandum].

704. Oct. 1984 Murray Letter, *supra* note 701, at 3.

705. *Id.* The Executive Director made the point this way:

Question 12 which seeks to obtain case counts is problematic because over the years we have found lawyers are not as prompt in closing completed cases as one might wish. Individual assessment of case counts without verification is not likely to be either accurate or helpful. Again, this is a question which would best be handled by the Society as an institution in some fashion and needs further discussion. *Id.*

706. See 1985 Jacobson Memorandum, and accompanying *Table: The Legal Aid Society-Criminal Defense Division-Per Attorney Caseload*, *supra* note 703 at 1. The Legal Aid Society also objected because the 18-B Panel questionnaire did not refer specifically to the number of cases presently handled by each of the respondents. At a meeting on October 5, 1984 at the City Bar Association, we informed the Society that the Panel questionnaire would be amended to include caseload questions for both Criminal Court and Supreme Court. See Letter from Chester L. Mirsky and Michael McConville to Archibald Murray, Executive Director of the Legal Aid Society (Nov. 6, 1984) [hereinafter Nov. 1984 Mirsky Letter]. Nonetheless, the Society held to its original position that the caseload question be withdrawn from the questionnaire to Society attorneys and informed us that management would respond to such questions instead. See Oct. 1984 Murray Letter, *supra* note 701, at 2. The draft questionnaire that we submitted to the Society by letter, see Letter from Chester Mirsky to Susan B. Lindenauer, Counsel to the Executive Director of The Legal Aid Society (Oct. 3, 1984) [hereinafter Oct. 1984 Mirsky Letter], is reprinted *infra*, app. 1(b), at 911.

The Legal Aid Society's management also opposed our inclusion of questions on the Society's operations and policies as part of the questionnaire.⁷⁰⁷ Questions on the Society's operations and policies would be answered through "institutional responses".⁷⁰⁸ We could not ask Society staff attorneys about the reasons given for substitution by the 18-B Panel attorneys, about the systemic problems encountered when the Society could not provide continuous (vertical) representation, or about the strengths and weaknesses of the court assignment system.⁷⁰⁹

We also sought to observe a sample of felony cases in New York County involving multiple defendants. With such a sample we could compare the representation each defense entity provided in the same case. The sample would be taken randomly from arraignments in the Criminal Court and would involve cases in which the Legal Aid Society represented one co-defendant and the 18-B Panel represented the other. We represented that this sample would be confidential, and that all statements of participants would be anonymous.⁷¹⁰

We intended that our observation sample include all Legal Aid Society staff attorneys with case-handling responsibilities and 18-B Panel attorneys who appeared in the arraignment parts over a period of at least three months. The management of the Society expressed reservations about the participation of all staff attorneys and indicated that it would like to select the attorneys we would observe before approving the study.⁷¹¹ The Society told us that it would "seek volunteers from among its staff and then make the selection from among the volunteers to assure a mix of backgrounds and experiences."⁷¹² Following a meeting, in which the President of the City Bar Association urged the Society to cooperate with the research,⁷¹³ the Society's management agreed to let us observe the Society's attorneys without restriction. The Society insisted, however, that we observe whoever had been assigned a given case regardless of her employment status; that is, we were not to differentiate be-

707. Oct. 1984 Murray Letter, *supra* note 701, at 4.

708. *Id.*

709. *Id.*

710. See Nov. 1984 Mirsky Letter, *supra* note 706, at 2.

711. Oct. 1984 Murray Letter, *supra* note 701, at 4. We wanted to include all Legal Aid Society attorneys and 18-B Panel attorneys who appeared in the arraignment parts from November 1984 to at least February 1985.

712. *Id.* The Legal Aid Society also thought we should expand our field sample outside New York County (Manhattan). The Society requested that we conduct a city wide observation sample because of the difference in quality of representation provided by 18-B Panel attorneys in each of the boroughs. The Society contended that Panel representation in New York County was better than that in other counties and that Panel attorneys should be observed in other counties in order to compare them fairly with Society attorneys. See Oct. 1984 Murray Letter, *supra* note 701, at 4.

713. Present at the meeting were the Executive Director of the Legal Aid Society, the Attorney-in-Charge of the Criminal Defense Division and Counsel to the Executive Director of the Society. At the time, the President of the City Bar Association, Robert B. McKay, was a member of the Society's Board of Directors and was a past President of the Society. See LEGAL AID SOCIETY ANNUAL REPORT (1976-77).

tween regular staff and supervising attorneys. We accepted this condition, even though it meant possibly including some supervisory staff with a limited caseload.⁷¹⁴

The Legal Aid Society's data on investigative, and support services, case costs, and attorney caseloads were contained in three paragraphs of an internal memorandum prepared by the Special Assistant Attorney for Planning and Management. That portion of the memorandum which provided data on investigative and case costs contained the following language:

Please note that our Annual Report includes data that the researcher was seeking on Investigation; we conducted 20,200 investigations of which 13,345 were initial investigations. Our current budget submission reflects a cost per case of \$170; a similar cost per case could have been obtained from our Annual Report by simple division of our expenditures by our assignments. I have provided you with our monthly tracking of average attorneys caseloads. We do not maintain data on caseload ranges. . .⁷¹⁵

This statement on attorney caseloads was supplemented by a table summarizing monthly per attorney caseloads, broken down only by county and by court.⁷¹⁶ The table provided average figures without reference to differences in the certification status of Legal Aid Society attorneys, the number of cases handled by felony certified attorneys in Supreme Court and in Criminal Court, the number of cases handled by misdemeanor certified attorneys in Criminal Court, or the ranges of cases between attorneys with different certification status.⁷¹⁷

We also could not obtain additional fiscal data that would permit a comparison of costs in the two defense entities. The Legal Aid Society explained that it does not maintain "time records" for felonies, misdemeanors, and viola-

714. See Nov. 1984 Murray Letter, *supra* note 702, at 1. The Legal Aid Society's Supervisory Staff carries a limited caseload, primarily for instructional purposes. See Legal Aid Society, Budget Submission to the City of New York for Fiscal Year 1987 at 10 (rev. Mar. 17, 1986) [hereinafter FY 1987 Legal Aid Budget]. Our observation sample, however, actually included only those staff attorneys with full case handling responsibilities. See *supra* pp. 709-10.

715. 1985 Jacobson Memorandum, *supra* note 703, at 1. As to the institutional responses regarding in-house training and continuing education, the Legal Aid Society provided generalized internal memoranda which it had prepared for purposes unrelated to the study. Letter from Susan B. Lindenauer, Counsel to the Executive Director of the Legal Aid Society, to Michael McConville (Jan. 28, 1985) [hereinafter Jan. 1985 Lindenauer Letter].

716. See 1985 Jacobson Memorandum and accompanying Table: *The Legal Aid Society — Criminal Defense Division — Per Attorney Caseload*, *supra* note 706.

717. *Id.* The Table asserted that as of December 1984, the per-attorney average in Criminal Court citywide was 55.2 cases while the per-attorney average in Supreme Court citywide was 13.1 cases. In New York County, the Criminal Court average was 57.8 while the Supreme Court average was 12.2. These data could not be used to compare the individual caseloads of Legal Aid Society attorneys with those of 18-B Panel attorneys, because the figures do not distinguish between attorneys with different certification status (some of whom are ineligible to accept assignment in Supreme Court), and do not show the disparity in caseloads between individual attorneys,

tions and that without timekeeping the Society is unable to create "appropriate cost centers".⁷¹⁸

Without access to the Legal Aid Society's original records, we were unable to determine how often staff attorneys interviewed clients or made pre-trial motions. We could not evaluate the Society's investigative efforts because the figures it provided did not distinguish between activities such as interviewing witnesses, visiting crime scenes or serving subpoenas on the police department. We could not analyze and compare the staff attorneys' individual caseloads and had no data that allowed us to determine the number of cases in which the Society was relieved or replaced by an 18-B Panel or privately retained attorney.

Our historical research revealed that the indigent defense system is highly interactive. Within this highly interactive system, the policies and practices of the Legal Aid Society largely define the size of the 18-B Panel and the role of Panel attorneys. Thus, we decided that it was fundamental to the whole research enterprise to attempt to overcome the obstacles interposed by the Society.⁷¹⁹ We overcame some of the obstacles created by the Society's informational restrictions by acquiring the Society's Monthly Caseload Activity Reports for 1983-1984 from confidential sources. The monthly reports broke down the Society's total workload by county in both Supreme Court and Criminal Court. They contained a detailed analysis of assignments and dispositions, and distinguished between cases according to method of disposition. The reports also contained the total number of cases in both Supreme Court and Criminal Court from which the Society had been relieved by Panel and privately retained lawyers. In addition, the administrative judge of the Criminal Court in New York County provided us with daily arraignment

718. The Executive Director stated that a more detailed analysis of case costs was unavailable: "We furnished the researcher with the type of data that we furnished to our funding sources and this is the best we can do at this point." Letter from Archibald R. Murray, Executive Director of the Legal Aid Society, to Robert B. McKay, President of the Association of the Bar of the City of New York at 3 (Mar. 14, 1985) [hereinafter Mar. 1985 Murray Letter].

719. Once the goals of empirical research are settled, the data sources relied on optimally should give greatest opportunity to achieve those goals subject to privacy considerations and to other legal and ethical constraints. In practice, empirical research is subject to the power of individuals or groups to refuse to cooperate or even to mislead. The manner in which researchers should respond to these circumstances has been widely debated in academic circles. See G. SJOBERG, *ETHICS POLITICS AND SOCIAL RESEARCH* (1967); Littrell, *Vagueness, Social Structure, and Social Research in Law*, 21 *SOCIAL PROBLEMS* 38-52 (1973); C. BELL & H. NEWBY, *DOING SOCIOLOGICAL RESEARCH* (1977); J.A. BARNES, *WHO SHOULD KNOW WHAT? SOCIAL SCIENCE, PRIVACY AND ETHICS* (1979); C.B. KLOCKORS & F. W. O'CONNORS, *DEVIANCE AND DECENCY: THE ETHICS OF RESEARCH WITH HUMAN SUBJECTS* (1979); R. LUCKHAM, *LAW AND SOCIAL INQUIRY: CASE STUDIES OF RESEARCH* (1981). In a wide-ranging review of political controls on research, Kelman concluded that it was necessary to develop "criteria and procedures" to avoid "the systematic violation of the rights of subjects without legitimating the imposition of political controls on research." In effect, our amended research design sought to accomplish this. See H.C. Kelman, *The Rights of the Subject in Social Research: An Analysis in Terms of Relative Power and Legitimacy*, 27 *AM. PSYCHOLOGIST* 989, 1013 (1972).

records of Society staff attorneys which enabled us to compare and analyze the arraignment caseload of staff attorneys at 134 arraignment sessions during 1984-1985.

Following the filing of our Draft Report in June, 1985,⁷²⁰ the Legal Aid Society provided additional information to the Committee on Criminal Advocacy.⁷²¹ This information enabled us to understand the Society's method of counting assignments and dispositions⁷²² and allowed us to assess the case costs of the Society's Criminal Defense Division.

V.

THE ORIGINAL AND SECONDARY DATA RELIED UPON IN THE RESEARCH

Because of the problems we encountered in obtaining time records and caseload data for Legal Aid Society attorneys, we could neither directly compare the individual caseloads of the Society attorneys with the those of 18-B Panel attorneys nor quantitatively compare the criminal defense tasks undertaken by each entity. We were able to describe and analyze data related to the following issues:

- (1) the demographic characteristics of the attorneys of both defense entities;
- (2) the criminal defense tasks systematically undertaken by Panel attorneys;
- (3) the ability of each defense entity to provide continuous representation from arraignment until final disposition;

720. See McConville & Mirsky, Committee on Criminal Advocacy of the Ass'n of the Bar of the City of New York, *Defense of the Poor in New York City: An Evaluation* (1985) [hereinafter 1985 McConville & Mirsky Draft Report].

721. Between September 1985 and January 1986, we met twice with a subcommittee of the Committee on Criminal Advocacy and the management of the Legal Aid Society. The statements made at these meetings and the documents and data submitted represent the additional information provided by the Society. The first document submitted by the Society was a reply memorandum to the McConville and Mirsky Draft Report. See Legal Aid Society, Reply Memorandum to McConville and Mirsky Draft Report (Oct. 1, 1985) [hereinafter 1985 Reply Memorandum]. We followed the submission of that reply with a memorandum dated October 16, 1985, in which we directed a series of written questions on behalf of the Committee on Criminal Advocacy to the Society's management. The Society responded to this memorandum by letter dated October 22, 1985 and appeared at a meeting of the Association of the Bar of the City of New York on that date. See Letter from Archibald R. Murray, Executive Director of the Legal Aid Society, to the Committee on Criminal Advocacy of the Association of the Bar of the City of New York (Oct. 22, 1985) [hereinafter Oct. 1985 Murray letter]. Another meeting was held at New York University School of Law on November 4, 1985. On November 7, 1985, we presented a 93 page response. See M. McConville & C. 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 Society later submitted an additional reply memorandum. See Legal Aid Society, Additional Reply Memorandum to McConville and Mirsky Draft Report (Jan. 3, 1986) [hereinafter 1986 Additional Reply Memorandum].

722. We found, for example, that the Legal Aid Society counted as assignments and dispositions those cases in which it was relieved or replaced by 18-B Panel attorneys or by privately retained counsel, and double-counted felony assignments. See *infra* pp. 777-80.

- (4) the total comparative caseloads and proportionate share of arrest cases and filed indictments for each defense entity;
- (5) the mechanisms by which cases are allocated between the two defense entities at arraignment in Criminal Court;
- (6) the means by which cases are transferred from the Society to 18-B Panel attorneys after arraignment;
- (7) the comparative case costs of the two defense entities.

The balance of this chapter is devoted to a discussion of the sources of data.

A. Original Data

1. Attorney Questionnaires

Questionnaires seeking demographic data were sent to 862 attorneys certified for 18-B Panel service in the First Department. These questionnaires also sought information on work experience, on current caseloads, on reasons for accepting assignments, on the need for support services, and on the administration and reform of the 18-B Panel system; they were sent to 862 attorneys certified for Panel service in the First Department.⁷²³ The Panel administrator's records revealed that 45.2 percent (n=390) of the Panel members regularly took cases and that 30.2 percent (n=260) infrequently took cases, while 22.3 percent (n=192) were inactive and 2.3 percent (n=20) could not be classified.⁷²⁴ Table 4-1 sets out the response rate of attorneys within each category of our questionnaire:

TABLE 4-1: *18-B Panel Attorneys' Questionnaire Response Rates, According to Degree of Attorney Activity*

<u>Degree of Activity</u>	<u>Mailing</u>	<u>Response</u>	<u>Rate</u>
Regularly take cases	390	279	71.5
Infrequently take cases	260	67	25.8
Inactive/not classifiable	<u>212</u>	<u>26</u>	<u>12.3</u>
Total	862	372	43.2%

Although the overall response rate could have been higher, we received an excellent response from attorneys who regularly took cases (71.5 percent). The questionnaire data thus provided an excellent opportunity to describe in

723. Our questionnaire to 18-B Panel attorneys is reprinted *infra*, app. 1(a), at 903. Although the administrator's report to OCA listed 955 active attorneys, *see* Report UCS-195 (1985) (18-B 1st Dep't), some attorneys were certified to serve on more than one 18-B Panel. The administrator's office in the First Department prepared an explanatory letter at no cost to the research; this letter accompanied each of the questionnaires submitted to the Panel attorneys. Upon return of the questionnaires, the responses were coded, keypunched, and transferred to magnetic tape. Thereafter, specific instructions were devised for computer analysis.

724. This breakdown was obtained from the records of the assignment clerk of the First Department after a review of the rotational listing of 18-B Panel attorneys and an analysis of the frequency with which they accepted assignments.

detail the backgrounds and work characteristics of active 18-B Panel attorneys.

We sent a separate, restricted questionnaire to 480 attorneys in the Legal Aid Society's Criminal Defense Division during February and March 1985.⁷²⁵ This group included 409 case-handling staff attorneys and 71 supervisors. Some 60.2 percent (n=246) of the staff attorneys and 52.1 percent (n=37) of the supervisors completed the questionnaire, yielding an overall response rate of 59 percent. The restricted questionnaire provided data on the educational background, work experience, age, race, and sex of the attorneys in the Criminal Defense Division of the Society.⁷²⁶

2. 18-B Panel Attorney Control Cards

The 18-B Panel administrator's office for the First Department holds a set of control cards for each Panel attorney.⁷²⁷ These cards, approximately 10,000 in total, contain a record of the activities of every attorney who has accepted an assignment since 1974.⁷²⁸

725. The Legal Aid Society management produced the list of 480 attorneys. The questionnaire distributed to Society attorneys was restricted in scope, to conform to the Society's objections. See *supra* text accompanying notes 705-09. The final, restricted questionnaire is reprinted *infra*, app. 1(b), at 911.

726. We mailed a questionnaire to each active attorney on the list provided by the Legal Aid Society's management. See *supra* note 725. Both the Society's management and the Association of Legal Aid Attorneys (the Society's union) wrote coverletters asking staff attorneys to complete the questionnaire. We analyzed the data using the same methods as those used on the 18-B Panel questionnaire. See *supra* note 723.

727. A control card is reprinted *infra*, app. 1(d), at 918. A total of 1308 attorneys, excluding attorneys who were assigned only to appeals, are named on the control cards as having been assigned cases in New York and Bronx Counties. Each card contains 20 to 24 case assignments, and when one card under an attorney's name was filled, another was opened. A single attorney may, therefore, have a number of cards recording the chronological list of cases assigned; 20 or 30 cards for a single attorney was not uncommon.

Since the control cards were used on a daily basis by the Administrator's staff, it was impossible to extract the data during ordinary office hours. The Appellate Division, and the Presiding Justice, Francis T. Murphy, without whose cooperation this research would not have been possible, allowed us to transport the cards on weekends under secure conditions to New York University, where the analysis was undertaken.

728. The data were transferred from the control cards to coded sheets in November 1984. Among the variables collected for each 18-B Panel attorney were:

- 1) County.
- 2) Whether the Panel attorney was "active" or "inactive." We defined an attorney as inactive if she had not accepted any assignment since January 1, 1982. This rule somewhat overstates the number of "active" Panel members, because an attorney may have become inactive between January 1982 and November 1984.
- 3) The number of years the attorney had been on the Panel.
- 4) The number of control cards held for each Panel attorney.
- 5) The total income to the nearest dollar derived from Panel work since 1974.
- 6) The total Panel income for 1983. This was determined according to the year of the attorney's receipt and, therefore, sometimes related to cases assigned in earlier years because of the lag between case assignment and case disposition and the submission of a claim for reimbursement.
- 7) The number of times the Panel attorney took part in an arraignment for both 1983 and

The control cards revealed a great deal about the range of cases handled by 18-B Panel attorneys and therefore served as an invaluable resource for examining how cases are distributed to Panel attorneys. The information we collected through the cards enabled us to address the following questions: Are cases distributed evenly between attorneys regardless of their length of service on the Panel? Do some Panel attorneys accept large numbers of assignments, while others accept relatively few? Is the caseload of a Panel attorney determined by the administrator's rotation or by some other means? How much income do Panel attorneys earn from Panel practice?

3. 18-B Panel Attorney Voucher Claims

We surveyed all compensation vouchers processed in the First Department over three months in 1983, three months in 1984, and one month in 1985.⁷²⁹ The Office of Project Development originally devised these vouchers to monitor attorney performance and to assure compliance with the legal requirement that "[e]ach claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source."⁷³⁰

The vouchers were designed to provide detailed information about (i) the nature of the charge; (ii) the method of disposition; (iii) the number of hours spent on in-court activity; (iv) the number of hours spent on out-of-court activity; (v) reimbursable expenses incurred; (vi) the tasks the attorneys performed in and out of court. They also told us whether the court rejected or allowed the claim. We analyzed over 14,000 vouchers⁷³¹ of which over 13,800 specified the charge and method of disposition. The vouchers contained roughly 80 separate data items relating to in-court activity and another 20 data items describing out-of-court activity.

By reviewing these data, we gained an understanding of the lawyering

1984. The count for 1984 was not a full count because it included only those arraignments taken up to November 1984.

8) For 1983 and 1984, the number of cases in which an attorney represented the defendant at arraignment in Criminal Court and continued to represent the defendant until disposition.

9) The number of cases assigned by rotation by the Panel administrator for 1983 and for 1984. In a few instances it was apparent that a case had been directly assigned by a judge in court, but because the relevant notation was not consistently made on the control cards, such cases were treated for research purposes as having been assigned by rotation.

729. By sampling the same months over a period of several years, we hoped to reduce the likelihood that our findings would be skewed by patterns or practices of 18-B Panel attorneys in any given year. We used data from only one month in 1985 because it was the last month for which data was available at the time we were conducting our research. A copy of the compensation vouchers which show both "in-court" and "out-of-court" activities is reprinted *infra*, app. 1(e), at 919.

730. N.Y. COUNTY LAW § 722 (McKinney 1972); see *supra* note 531 and accompanying text.

731. The number of voucher claims analyzed for New York County (Manhattan) and Bronx County is detailed in the following table:

tasks regularly claimed by 18-B Panel attorneys. For example, we were able to determine the extent to which Panel attorneys claimed to have (a) interviewed clients, (b) conducted independent investigations, (c) familiarized themselves with the background and character of the accused, (d) prepared written motions, (e) engaged in oral argument, (f) conducted hearings on constitutional issues, (g) participated in trials and (h) considered sentencing options.⁷³²

4. Observation Study

To understand the overall growth of the 18-B Panel's caseload, we had to observe the method by which cases were assigned to Legal Aid Society staff attorneys in court and the specific circumstances under which Society staff attorneys declined to represent defendants or were relieved of assignments.⁷³³ The data reported in Chapter Three made clear that the continuing growth of the Panel related to events and decisions internal to the Legal Aid Society.⁷³⁴ Knowing this, we focused our observation sample on four questions:

- (i) how cases are allocated to the Society and Panel attorneys at arraignment;
- (ii) whether the Legal Aid Society has any discretion over which defendants it represents and which defendants it refers to the Panel attorneys;
- (iii) whether the same attorneys for both defense entities provide continuous representation from arraignment to disposition and whether this affects the proportionate number of cases referred to the Panel;
- (iv) to what extent and under what circumstances Society attorneys are relieved by and substituted with 18-B Panel attorneys.

TABLE: *Number of 18-B Panel Attorney Voucher Compensation Claims Analyzed for 1983-1985*

<u>County</u>	<u>Number of Vouchers</u>	<u>Percent of all Vouchers Analyzed</u>
New York	8812	62.4
Bronx	5298	37.5
Unknown	9	0.1
TOTAL	14,119	100.0

For a breakdown of the charges and the methods of disposition covered by the vouchers, see *infra* note 820, TABLES A & B.

732. The vouchers may not accurately describe work actually undertaken or time expended by 18-B Panel attorneys. It seems reasonable to assume that, at worst, the claims submitted overstate the activities that Panel attorneys undertook and inflate the time actually spent on these activities. See *infra* text accompanying notes 822-23.

733. For a discussion of these practices and their effect on the 18-B Panel's proportionate share of the indigent defense caseload, see *infra* chs. 8-10.

734. See *supra* TABLE 3-1, at 665; TABLE 3-2, at 678; TABLE 3-3, at 690; *supra* pp. 664-69, 677-78, 688.

Over the six month period running from the fall of 1984 through the spring of 1985, we observed 230 defendants in New York County (Manhattan) in approximately 150 felony cases involving over 650 required appearance dates. Approximately two-thirds (68 percent) of the appearance dates involved multiple-defendant cases in which the Legal Aid Society represented one co-defendant and a member of the 18-B Panel represented the other(s).

The sample of cases initially observed was comprised almost exclusively of co-defendants charged with felonies. These cases were tracked from arraignment in Criminal Court to the calendar part in Supreme Court for at least three dates after indictment.⁷³⁵ The number of multiple-defendant cases proved fewer than expected. Moreover, a substantial number of the felony cases observed were resolved in Criminal Court.⁷³⁶ We therefore took a second sample, which was based on randomly selected single- and multiple-defendant cases represented by both defense entities in Supreme Court. This provided us with additional opportunities to observe the distribution of single- and multiple-defendant cases undertaken by attorneys from the respective defense entities and to determine to what extent the interaction of the attorneys affected the growth in referrals to the 18-B Panel attorneys.⁷³⁷

B. Secondary Data

While our empirical study drew primarily from the original data described above, several sources of secondary data proved vital to an understanding of the ongoing vitality of the 18-B Panel.

735. Observations were made at arraignment in Criminal Court, at the "all-purpose parts" in Criminal Court, and at the "calendar parts" in Supreme Court. See FIGURE 1, *supra* at 588 and accompanying text at 586-87. At Criminal Court arraignment, once the bail determination is made, the court is required to assign counsel to all indigent defendants. See N.Y. CRIM. PROC. LAW § 170.10(3) (McKinney 1972). Attorneys from both the Legal Aid Society and the 18-B Panel appear at the arraignment part to interview defendants and to accept court assignments.

We recorded the presence of attorneys at each required appearance and the statements made at bench conferences and in open court. We also documented the progress of each case by reviewing the court records and questioning the attorneys.

736. The disposition of felony cases as misdemeanors in Criminal Court has been documented by other researchers. See VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS (1977).

737. Cases followed in Supreme Court only, were selected at random from the calendar parts when they first appeared on the calendar. We began these observations immediately after a felony case had been transferred from Criminal Court to Supreme Court. In some instances, a case appeared on the initial Supreme Court calendar while at the complaint stage, awaiting a formal indictment.

At the conclusion of the research, the Legal Aid Society complained about the presence of single defendants represented by 18-B Panel attorneys in our observation study. The Society contended that such cases distorted the rate of appearance in court in favor of 18-B Panel attorneys, see *infra* note 1124. Because our sample also included single-defendant cases represented by the Society, we have analyzed the entire sample in terms of both single- and multiple-defendant cases for each defense entity. See *infra* TABLE 10-2, at 843; TABLE 10-3, at 844; see *infra* p. 838.

1. *Annual Reports ("UCS-195")*

Both defense entities are required to file a year-end report with the New York State Unified Court System, Office of Court Administration ("OCA").⁷³⁸ These reports contain a summary of each entity's annual workload and expenditures. They provided a basis for calculating the proportionate share of indigent cases undertaken by the Legal Aid Society and by the 18-B Panel attorneys. The total expenditure figures in these documents supplied a starting point for our fiscal analysis through which we sought to compare the cost of representation provided by each defense entity on a per-case basis.

2. *Office of Court Administration Reports*

The OCA Caseload Activity Reports contain the total number of New York City arrest cases and filed indictments, broken down by county. The Criminal Term Disposition Reports contain the net dispositions handled by 18-B Panel attorneys in the First Department and the proportionate share of net dispositions handled citywide by the Legal Aid Society, the Panel attorneys, and private counsel. The Disposition Reports were prepared from daily entries recorded by court clerks upon receiving an attorney's notice of appearance. We used these OCA reports to establish the total workload in Criminal Court and Supreme Court for 1984; the number of arrest cases and filed indictments; the pending inventory in Supreme Court; total final dispositions (completed cases) in the Supreme Court during a three year period; and each entities proportionate share of these final dispositions and the pending inventory.

3. *Institutional Records*

Each of the two defense entities report information differently. In order to compare the defenders' workloads and case costs, we had to create a standard information base. A review of each entity's internal records was essential to this task. Through an analysis of the Legal Aid Society's Monthly Caseload Activity Reports, the internal worksheets prepared by the 18-B Panel adminis-

738. These annual reports, which each defense entity files with OCA, will be cited throughout as follows: Report UCS-195 [or OCA-95] (year) (name of reporting entity, i.e. Legal Aid Society, 18-B 1st Dep't, or 18-B 2d Dep't). It should be noted, however, that the form has had three different names. From 1965 through 1973, it was titled "Report to the Judicial Conference for the Judicial Year July 1, 19— to June 30, 19—: Representation of Indigent Defendants" and was designated Form JC-195. From 1974 through 1982, it was called "Report to the Office of Court Administration, initially for the Judicial Year July 1, 19— to June 30, 19—, and later for the Year January 19— to December 19—: Representation of Indigent Defendants" and designated Form OCA-195. Finally, in 1983 its name again changed to "Report to the New York Unified Court System for the Year January 19— to December 19—; Representation of Indigent Defendants" and designated form UCS-195. The Office of Court Administration supervises over all criminal courts of the state (superior courts and local criminal courts). See N.Y. JUD. LAW §§ 211-21 (McKinney 1972). The Chief Administrator, on behalf of the Chief Judge, operates all trial courts and directs the administrative office.

trator for the Second Department, and the certified audit published by the Society, we were able to standardize the caseload and expenditures for each defense entity.⁷³⁹

VI.

LOCATION OF RESEARCH DATA IN THE ARTICLE

The data described in this chapter form the basis for the discussion and conclusions in the ensuing chapters. In Chapter Five we used the information collected through the attorney questionnaires and control cards to describe the workload, organization, and income patterns of 18-B Panel attorneys. The questionnaires provided basic demographic data on Panel attorneys and permitted a comparison with the Legal Aid Society staff attorneys.⁷⁴⁰

In Chapter Six, the voucher and observation sample enabled us to describe the services that 18-B Panel attorneys provide to their clients. Our data demonstrated the frequency of interviewing and counseling; the time allotted to investigation, pretrial motions, and trial preparation; and the degree to which Panel attorneys provided continuous representation.⁷⁴¹

In Chapter Seven, we used the Monthly Caseload Activity Reports of the Legal Aid Society, the records of the Office of Court Administration, and the responses made by the Society to the Committee on Criminal Advocacy to compute final dispositions (completed cases) for both entities. We also determined the citywide share of arrest cases and filed indictments undertaken by the two defense entities and the difference between their expected and actual workloads.⁷⁴²

In Chapter Eight, the observation sample and the caseload data maintained by the administrative judge of New York County allowed us to describe arraignment "shedding," the method by which 18-B Panel attorneys were substituted for Legal Aid Society staff attorneys at the initial court appearance in Criminal Court.⁷⁴³ The observation sample also provided the basis for a description, set out in Chapter Nine, of the Legal Aid Society's staff attorney selection practices in multiple-defendant cases;⁷⁴⁴ and in Chapter Ten, we employed the data collected through the observation sample to describe post-arraignment "shedding," the process by which the Society passed cases to

739. For discussion of the process by which we standardized caseload data, see *infra* pp. 858-89; see also *infra* notes 985-86. See also TABLE 11-8, at 872; TABLE 11-9, at 873.

740. See, e.g., *infra* TABLE 5-1, at 721; TABLE 5-2, at 722; TABLE 5-3, at 723; TABLE 5-4, at 723; TABLE 5-5, at 726; TABLE 5-7, at 728; TABLE 5-8, at 729; TABLE 5-9, at 732; TABLE 5-10, at 733; TABLE 5-11, at 733; TABLE 5-12, at 734; TABLE 5-14, at 735; TABLE 5-15, at 736; TABLE 5-16, at 737; TABLE 5-17, at 739; TABLE 5-18, at 740.

741. See, e.g., *infra* TABLE 6-1, at 752; TABLE 6-2, at 759; TABLE 6-3, at 763; TABLE 6-6, at 767; TABLE 6-7, at 769; TABLE 6-8, at 769; TABLE 6-9, at 773.

742. See, e.g., *infra* TABLE 7-2, at 782; TABLE 7-3, at 787; TABLE 7-4, at 788.

743. See, e.g., *infra* TABLE 8-1, at 795; TABLE 8-2, at 798; TABLE 8-3, at 800; TABLE 8-4, at 806; TABLE 8-5, at 807; TABLE 8-6, at 808; app.3.

744. See, e.g., *infra* TABLE 9-1, at 821; TABLE 9-2, at 826; TABLE 9-3, at 827; TABLE 9-4, at 828; TABLE 9-5, at 829.

Panel attorneys in Criminal Court and Supreme Court.⁷⁴⁵

Last, in Chapter Eleven, we used the compensation voucher sample to establish an actual cost per case for 18-B Panel attorneys. We then used the Legal Aid Society's certified audit, the Society's response to the Committee on Criminal Advocacy, and the expenditures reported by the Panel administrators to compare the two entities' respective cost per final disposition.⁷⁴⁶

VII.

CHAPTER SUMMARY

The response that each entity made to our empirical research reflected their basic structural differences. The Legal Aid Society has a managerial staff which seeks to legitimate the organization and protect it from critical scrutiny. Management precluded access to original books and records because this would have permitted us to systematically assess Society staff attorneys' individual caseloads and to quantitatively analyze the particular lawyering tasks performed. An analysis of these data could have cast light on the extent to which the Society complies with national standards for providing defense services and whether its staff attorneys regularly engage in adversarial advocacy. The 18-B Panel, on the other hand, lacks a managerial structure. The Panel depends on judges, administrators, and court clerks to operate the rotational assignment system. They view their function as case expeditors, not as persons allied with Panel attorneys or concerned with the quality of the Panel representation. It is not surprising, therefore, that the administrators provided complete access to Panel records, enabling us to study the caseloads and lawyering practices of Panel attorneys.

In the end, we were able to provide a detailed picture of the structure and composition of both defense entities, the quality of indigent representation, the reasons for the 18-B Panel's dramatic growth, and the comparative costs of both methods of representation. This was possible, in part, because of the mediating role played by the City Bar Association, with which the Legal Aid Society is closely allied. It also occurred because of independent access to OCA data and to the Society's internal monthly reports. Although our systematic analysis of the quality of indigent representation did not extend beyond the Panel, our court observations enabled us to measure the degree to which Society attorneys provided continuous representation in New York County. Our observations also enabled us to see whether Society attorneys engaged in facilitative, non-adversarial advocacy, in compliance with the Society's original structural goals. To this extent, we were able to compare the Legal Aid Society's representation with that provided by the 18-B Panel.

745. See, e.g., *infra* TABLE 10-1, at 838; TABLE 10-2, at 843; TABLE 10-3, at 844; TABLE 10-4, at 852; TABLE 10-5, at 852.

746. See, e.g., *infra* TABLE 11-1, at 860; TABLE 11-4, at 867; TABLE 11-5, at 867; TABLE 11-6, at 868; TABLE 11-7, at 869; TABLE 11-9, at 872.