

Evaluating the Effectiveness of Caseload Standards in the *Hurrell-Harring* Settlement Counties 2021 Update

Submitted pursuant to Section IV(E) of the *Hurrell-Harring v. State of New York* Settlement

October 30, 2021



**Indigent
Legal Services**

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Introduction

Last year, pursuant to § IV(E) of the *Hurrell-Harring v. The State of New York* settlement, we submitted a report that for the first time evaluated the effectiveness of the 2016 ILS criminal caseload standards on enhancing attorney representation in the five *Hurrell-Harring* settlement counties.¹ The report’s evaluation coincided with two significant and impactful events: the implementation of New York’s 2019 criminal justice reforms and the Covid-19 global pandemic. Still, through a series of surveys and updated data analysis, we reviewed the systemic changes resulting from caseload standards implementation and whether these changes enhanced the quality of attorney representation in Onondaga, Ontario, Schuyler, Suffolk, and Washington counties (five counties or settlement counties). We looked at this information in historical context, examining information on attorney practice prior to settlement implementation as compared to the data and information on practice and resources post-caseload standards compliance. We concluded, while “premature to fully assess the effectiveness of the current caseload standards [,] . . . the caseload standards are having a positive effect on the quality of representation.”²

Last year’s report focused primarily on pre-Covid-19 structures and practice. In doing so, we demonstrated that, though there is still progress to be made, the foundational building blocks for quality representation were present in the five counties. Overall, we saw evidence of better client communication; increased access to investigators, interpreters, social workers, and mitigation specialists; increased supervision and support; and more training opportunities to ensure attorneys have the experience and knowledge necessary for client representation.

Despite this progress, the impact of Covid-19 and the criminal justice reforms on the *Hurrell-Harring* public defense providers and their attorneys cannot be overstated. March 2020’s disaster emergency declaration due to Covid-19 under Executive Order 202 and subsequent related orders³ meant that for long periods during the last eighteen months, many court operations were suspended, in-person proceedings were infrequent, grand jury proceedings, hearings, and trials were suspended or delayed and cases were adjourned multiple times. As waves of the Covid-19 virus peaked and receded, and with the increase in vaccine availability, counties and courts cautiously resumed some proceedings; grand juries were convened, trials slowly began to occur, and backlogged cases were calendared. Simultaneously, new arrests continued, and in March 2021, defense providers began to see an uptick in the number of new criminal case assignments.⁴

¹ Section IV(E) of the settlement (as amended pursuant to the 5th amendment) dictates, “ILS shall review the appropriateness of any such standards in light of any change in relevant circumstances in each of the Five Counties. Immediately following any such review, ILS shall recommend to the Executive whether and to what extent the established caseload/workload standards should be amended on the basis of changed circumstances.”

² NYS Office of Indigent Legal Services. *Evaluating the Effectiveness of Caseload Standards in the Hurrell-Harring Settlement Counties*, 4 (2020), available on request.

³ See NYS Governor Executive Orders 202 *et. seq.*; and E.O.s 202.14, 202.38, 202.48, E.O. 202.67 (extending tolling of some criminal procedural deadlines); see also NYS Office of Court Administration Administrative Order 68/20 (March 16, 2020) (postponing non-essential court matters indefinitely) and A.O. 78/20 (March 22, 2020) (stating “effective immediately and until further order, no papers shall be accepted for filing by a county clerk or a court in any matter of a type not included on the list of essential matters.”).

⁴ See *Hurrell-Harring Institutional Defenders: Six Month Caseload Analysis and Comparison* (September 2021), available upon request.

In June 2021, then-Governor Cuomo issued Executive Order 210 rescinding Executive Orders 202-202.11 and effectively returning courts to “normal” operations.⁵

During the same period, New York’s legislative reforms to bail and criminal discovery laws took effect. Beginning in January 2020, the new Article 245 of the Criminal Procedure Law (CPL) requires prosecutors to automatically disclose evidence earlier in a case and within specific timeframes.⁶ The new laws specify twenty-one types of evidence that must be disclosed, some of which were not previously required under the old discovery laws,⁷ and requires prosecutors to disclose discovery to the defense prior to any plea. For individuals charged with a felony who indicate they would like to testify in the grand jury proceedings, the law requires the prosecution to turn over any alleged statements made by them to law enforcement at least 48 hours prior to the person’s scheduled grand jury testimony. While defense motions to obtain discovery materials are no longer required, the new laws create different and more substantial avenues for potential litigation. Additionally, CPL 245.10(2) imposes a new reciprocal discovery obligation on the defense within 30 days of receiving the prosecutor’s certificate of compliance.

For decades, defense counsel in New York operated with limited information, often receiving pertinent case evidence and information on the eve of trial. Clients frequently accepted pleas with little to no information about the evidence against them. Now, defenders are receiving more information earlier in cases which enables them to begin earlier investigations and case work, help clients make more informed decisions, and be better advocates. However, with these extensive changes, defenders spend significant time reviewing materials that previously were not disclosed and coordinating how this information is logged and organized.

We briefly touched upon both issues in last year’s report, acknowledging that it would be premature to assess the “appropriateness” of the ILS caseload standards under these circumstances.⁸ This year, given the fluctuating nature of the pandemic and its effect on the criminal court system, we again decline to make a recommendation as to “whether and to what extent the established caseload... standards should be amended.”⁹ However, we recognize that change affecting public defense practice is inevitable – whether it be an overhaul of discovery laws, a global pandemic, or simply introduction of new technology or forensic techniques that require practice change. Accordingly, in this report, we examine whether the fundamental

⁵ NYS Executive Order 210 (June 24, 2021), available at: https://www.governor.ny.gov/sites/default/files/2021-06/EO_210.pdf.

⁶ When initially enacted in 2019, the timeline was no later than 15 days after arraignment with the possibility of an additional 30 days without the need for a motion if the materials are voluminous, including body camera or other video footage, or not in the prosecution’s possession after good faith efforts to obtain them. However, subsequent amendments in April 2020 (L. 2020/ch. 56, effective May 3, 2020), expanded the timeframe: now, if the person is in custody, materials must be turned over within 20 days of arraignment; if the person is charged with a criminal offense but is not in custody, materials must be turned over within 35 days of arraignment; if the person is charged with a non-criminal offense (Vehicle and Traffic Law traffic infraction, “petty offense” under local municipal laws, and other non-criminal offenses), materials must be turned over within 15 days of arraignment. The automatic additional 30 days upon prosecutor request remains and the prosecutor can request additional time beyond that via motion. CPL 245.10.

⁷ See CPL § 245.20(1)(a)-(u).

⁸ Settlement, section IV(E).

⁹ Settlement §IV(E)

structures implemented to meet caseload standards and provide caseload relief supported *Hurrell-Harring* public defense attorneys during this unprecedented time.

To get a clear picture, we went to the source – attorneys on the frontline providing public criminal representation. In April 2021, we developed a survey soliciting information about their experiences during the peak of the Covid-19 shutdowns and received responses from 181 attorneys across the five counties.¹⁰ Additionally, we conducted a series of video interviews and focus groups of attorneys in the five counties seeking information on their programs, practice, and the impact of discovery reforms and Covid-19. In total, we conducted 18 sessions with 37 attorneys between May and August 2021.

This report includes information learned from the Covid-19 survey and attorney focus groups and interviews. It also includes information gained from conversations with chief defenders and other stakeholders. We incorporated much of this information into the first section which highlights program updates and challenges faced by the *Hurrell-Harring* defense providers in the last year. In sections II and III, we detail aggregate survey and interview/focus group findings on the impact of both Covid-19 and the criminal justice reforms on attorney practice in the five counties. Finally, in section IV, in the context of what we learned, we discuss the ongoing and, in some cases, exacerbated challenges faced by providers of mandated representation in the five counties.

Through this information gathering, we learned that because of the critical infusion of state funding under the settlement and the existence of appropriate infrastructures and resources, attorneys practicing in the five counties could rely on strong leadership and resources to assist them in meeting the challenges they faced in 2020. However, we also learned that these unprecedented challenges have significantly impacted practice and programs in 2021 and the pressures on the court system and public defenders are likely to endure for years to come. Additionally, as we detail in section IV, there are external circumstances that threaten the long-term stability of the progress made under the settlement if action is not taken.

I. *Hurrell-Harring* Provider Highlights

Since last October’s report, the *Hurrell-Harring* (HH) defenders continue to respond to the ever-changing criminal legal system landscape. Through the end of 2020 and in the early months of 2021, Covid-19’s impact meant few to no hearings or trials and continued adjournments of many cases. Ultimately, this resulted in fewer cases being resolved than normal in a typical annual cycle. However, arrests continued, and as courts resumed proceedings in the spring of 2021, providers began to see increases in the number of new case assignments. Thus, it has been incumbent on the HH defenders to ensure attorneys are available to provide representation on new cases while maintaining quality work on their pending cases. Program leaders were also confronted with additional administrative tasks as they raced to keep up with the near daily changes and communicate with their attorneys and staff while at the same time ensuring all staff had the necessary resources and supports to continue providing quality representation regardless

¹⁰ Of the 181 responses received, we analyzed 167 relevant and complete surveys.

of their physical location. In some counties, HH chiefs also face serious attrition issues.¹¹ Together with the many adjustments to defender practice required by the criminal justice reforms, the HH defenders have experienced significant pressure in the last year.

Still, despite these challenges, it was clear from ongoing conversations with the HH leaders, the Covid-19 survey, and the focus groups and interviews, that the strong foundations built because of settlement implementation and, importantly, the strong leadership and dedication at each program, enabled the HH providers to confront these challenges and, in many cases, make continued progress in enhancing the quality of representation. In this section we highlight some of the work done in each HH county over the last year.

Onondaga County

Onondaga County Bar Association Assigned Counsel

As we highlighted in last year's report, the Onondaga County Bar Association Assigned Counsel Program (ACP) has experienced significant transformation since settlement implementation began. Even in the recent unstable environment, the ACP continues to support panel attorneys, encourage the use of non-attorney professionals, and innovate new ways to improve the program.

Despite the inability to host in-person meetings, the ACP diligently communicates with panel attorneys and works to foster a culture of collaboration. Nearly every week, the ACP has continued to rely on their newsletter, the "ACP Defender," to keep panel attorneys up to date on up-coming trainings, new case law, and other matters that affect defenders' practice. Even during the pandemic, the newsletter has served as a tool to invigorate the panel as it frequently includes panel attorney case victories – whether it be a granted motion, trial acquittal, favorable plea, or a successful appeal. The newsletter also promotes the value of working with non-attorney professionals by describing successful results attorneys have achieved working with mitigation specialists and investigators. For example, the newsletter recently highlighted the following hearing or trial wins:

- an attorney and investigator worked as a team to prevail on a suppression hearing, resulting in suppression of evidence and the client's statement;
- two attorneys worked as a team to successfully challenge the legality of a car search, resulting in suppression of the of the seized weapon;
- two attorneys worked as a team to obtain a "not guilty" verdict after a felony assault jury trial where their client's testimony revealed the justification for the altercation;

¹¹ Much has been written recently about the pandemic's impact on labor and public defense providers are not exempted from what the media has dubbed "the great resignation." See, e.g., Hsu, Andrea, As the Pandemic Recedes More Workers are saying "I Quit," NPR, June 24, 2021 <https://www.npr.org/2021/06/24/1007914455/as-the-pandemic-recedes-millions-of-workers-are-saying-i-quit> ; Watson, Nancy, "The Great Resignation" and Its Impact on the Legal Industry, Reuters, September 10, 2021, <https://www.reuters.com/legal/legalindustry/great-resignation-its-impact-legal-industry-2021-09-10/>. As we discuss in section IV below, attorney retention during this time has been particularly problematic for assigned counsel programs due to increased pressures and inadequate statutory hourly compensation rates.

- a team of two panel attorneys and an investigator received a “not guilty” verdict on a misdemeanor assault case where the investigator testified to facts regarding the scene;
- an acquittal in a jury trial where the client was charged with misdemeanor criminal obstruction of breathing.

It is clear that attorneys are taking advantage of these resources and opportunities for collaboration. From January 1, 2020 to June 21, 2021 (18 months) the ACP reported that attorneys submitted 480 requests for investigator services; 45 requests for interpreter services; 144 cases in which social work services were used; and 204 requests for expert services. Additionally, during this period, 52 attorneys utilized their in-house mitigation services, and an additional 50 attorneys utilized the Center for Community Alternatives for mitigation. Attorneys also referred 152 clients to Legal Services of Central New York for reentry assistance.

In July, the ACP hosted a well-attended virtual panel meeting, where the ACP further publicized these positive case outcomes with an online “Winner’s Circle” compilation of all the achievements highlighted in the newsletters.

At the same meeting, Quality Enhancement Director Laura Fiorenza showcased the ACP’s work over the past year to enhance the ACP website’s attorney portal. The portal now provides panel attorneys with quick access to a multitude of resources. Among the new additions is a motion bank which the ACP created by collecting quality motions from respected attorneys across New York State. Attorneys can also access non-attorney professional services information, such as expert services and mitigation services, as well as links to CLE information, mentors, the ACP handbook, the ACP listserv archive, and past issues of ACP Defender. The ACP staff contact information and roles are also listed so attorneys know where to turn with questions. At the meeting, attorneys were receptive and excited to have easy access to so much useful information. The ACP anticipates continuing to build the resources available, with a focus on forensics, as described below.

In early 2020, right before the onset of the Covid-19 emergency, the ACP hired Todd Smith as their Forensic Resource Coordinator. He was previously an attorney on the panel and attended the National Forensic College, an advanced, week-long forensic science CLE designed for experienced trial and post-conviction defense litigators. Mr. Smith is now the ACP’s in-house consultant regarding DNA, latent fingerprints and other pattern evidence, psychology, pharmacology and toxicology, forensic pathology, chemical testing, DWI Standardized Field Sobriety Testing, DWI Drug Recognition Expertise, and DWI Chemical and Blood testing. He has worked to develop relationships with nationally recognized experts in several of these areas. This year, Mr. Smith created an in-depth ACP forensic website, the first of its kind in the state, which can be accessed via the attorney portal. Mr. Smith has urged attorneys to reach out to him with any forensics issues and is committed to continuing to update the forensics website.

During the interviews, the attorneys praised the ACP for the availability of resources. As one attorney said, the ACP administration has “gone from antagonist to a helpful resource.” Another attorney reported:

Previous administrations of the ACP saw themselves as the gatekeeper for the county treasury – they questioned the amounts and why you would need an expert at all. Overall, it was more difficult for attorneys to get expert services. But since ILS has been providing funding, it's a world of difference. Now, attorneys can get everything we need without question, which goes hand in hand with the ACP standards. Now, the administration *expects* us to use these experts on many, if not most of cases.

Several attorneys commented on how much the second chair program has helped their practice. One attorney noted that they “currently have second chairs on nine pending cases, and just closed two that had them. I ask for second chairs routinely because I enjoy the collaboration . . . it lightens the load and the stress level.” Another attorney stated:

We are required to have second chairs in homicide cases and required to have investigators on violent felonies. The second chair thing is great. I have three chairs approved and maybe a fourth if I need it on one upcoming murder case, just due to the volume of discovery (11 terabytes, 55 hours of video). If I need an experienced second chair, I get them. Under the old system, second chairs had to do it for free, just for the experience in order to move up the panel. You would have to put your practice aside to second chair a trial – and practically, you weren't able to participate in the investigation or preparation of the case, it was too time consuming. You would just sit at the trial and the primary attorney would hand you a folder. Now, it's very different.

The success of the second chair program is evident. Between January 1, 2020 and June 30, 2021, the ACP had 185 second chair requests and/or assignments.

The ACP also plays an active leadership role in New York's mandated defense community. ILS hosts quarterly Assigned Counsel Program Summits, where ACP leaders from across the state meet to brainstorm various issues. Executive Director Kathleen Dougherty presented at two summits: once on how to structure and develop the use of non-attorney and expert services and another time on the uses and benefits of data collection for program management. For each presentation, Ms. Dougherty worked with her team to develop helpful PowerPoint presentations that other counties requested after the summit. When Ms. Dougherty is not a presenter, she is an active participant in the summits, offering guidance based on the ACP's experience implementing the settlement. Ms. Dougherty and her team also make time to support other ACP leaders. In the past year, the ACP leadership has conferenced with multiple chief defenders who call asking for guidance and their opinions on various matters.

As discussed further in section IV of this report, the ACP has faced considerable challenges maintaining panel attorneys at the current statutory payment rates. ACP leadership has had to work around the clock to ensure they have enough attorneys to assign to new cases while meeting all other necessary representation needs. This has not been easy and thankfully, due to the settlement, they have dedicated leadership and infrastructure to try to meet these challenges. As the pandemic's long-term effects on caseloads, the courts, and attorney practice generally are

still unknown, the ACP will continue to confront these challenges unless they are able to recruit and retain qualified attorneys.

Hiscock Legal Aid Society

Hiscock Legal Aid Society (HLAS) continues to support collaboration among attorneys and non-attorney professionals. Although a majority of the office is still telecommuting, attorneys are able to contact and connect with their colleagues via Microsoft Teams. The office holds a general meeting every Friday for attorneys to get together and brainstorm. The attorneys we interviewed appreciated being able to use the Teams chat function or do a quick video call. One spoke highly of their supervisor, relaying that the supervisor “was fantastic” and “always available.” Another attorney explained that the legal assistant is a huge help because the attorney can “send unformatted [motions and documents] to the legal assistant, who would then send everything out.” This attorney also expressed the HLAS IT department set up their remote work equipment quickly and was always available if there were any issues.

As we highlighted in last year's report, HLAS's social worker assists parole revocation clients with potential alternatives to incarceration solutions and is a great resource to the attorneys. A parole attorney we interviewed told us that they frequently rely on the social worker to prepare reports to provide to the parole revocation specialist (PRS). This attorney called it “politely annoying the prosecutor with good news” and tries to prepare these reports “two months before the hearing” so that the PRS can “see the client’s name multiple times, with positive information, [and] humanize[]” the client. The attorney reported that the judge they typically practice in front of is very receptive to mitigation materials.

Both the appellate and parole attorneys continue to collaborate with trial attorneys from the Onondaga Bar Association Assigned Counsel Program and/or private attorneys who might also be representing the client, or previously represented the client. For example, a parole attorney explained that, if their client has a new pending criminal trial level case, they will work closely with the attorney on that pending case to ensure that the clients get a favorable global disposition. In the context of appeals, the appellate attorneys will reach out to the attorney who originally represented the client to obtain their case file and generally talk about the case.

Like many organizations recently, HLAS has experienced staffing turnover in the last eighteen months. Though they have ultimately been able to fill vacant positions in both the appeals and parole programs, recruitment and retention has proven challenging in recent years. This is in part due to lower-than-average attorney salaries because of a lack of comparable funding for their Family Court practice. HLAS is currently strategizing ways to manage this issue however, as we discuss further in section IV of this report, until there is parity in funding for mandated parental legal defense representation, they will continue to face this challenge.

Ontario County

Ontario Public Defender's Office

The dedication of the Ontario Public Defender's Office (PD Office or Ontario PD) staff and robust leadership by Chief Defender Leanne Lapp have resulted in an office that operates as a team, providing hands-on, quality representation despite the ever-changing circumstances of this past year. When the office was forced to move to remote work, they quickly created a group text message which the attorneys used to communicate with each other on a regular basis. Attorneys reported that even when the office was fully remote, Ms. Lapp and other supervisors were easily accessible by phone or Microsoft Teams. Attorneys were able to continue the collaboration that is critical to quality representation; the office held virtual case conferences where attorneys brainstormed cases and offered feedback and suggestions. This collaboration continued even with the return to in-person office work and court proceedings.

The attorneys also rely on non-attorney professionals for support. Attorneys regularly conference with investigators, discussing discovery, defenses, and potential witnesses to interview. The attorneys we interviewed reported that they appreciate this additional perspective. One attorney noted that their investigator even identified a potential jurisdictional issue in a case. The investigators are available for last minute requests and talk with witnesses before and after a case, getting the witnesses thoughts and "outside input" that attorneys may not normally get. The Ontario PD Office reports that in just six months - from January 1, 2021 to June 30, 2021 - investigators were assigned 438 investigative tasks in 227 cases.

This team approach is also highlighted by the office's use of social workers and mitigation specialists. For instance, the PD Office retained an expert in a Domestic Violence Survivors Justice Act (DVSJA) case, who wrote an extensive mitigation report detailing the client's history of domestic violence and trauma. After conversations with that expert, who noted that many of the people involved in the client's case were not trauma-informed, Ms. Lapp was inspired to create a new internal, specialized unit to focus on female clients who have experienced trauma. The unit, which includes an attorney, investigator, and social worker, works to ensure that clients with a history of trauma have access to necessary supportive services and case advocacy. This group meets as a team to ensure that no matter how the legal case proceeds, the client will benefit from this holistic representation and resulting treatment referrals.

Last year, we noted the critical role that Justine Higley, a social worker with whom the office contracts, has played during the pandemic. During our interviews this year, multiple attorneys praised Ms. Higley's work, calling her an "invaluable resource" to the office and indicating that Ms. Higley goes above and beyond to help clients, including talking with clients who are in crisis, especially when many clients were overwhelmed during the Covid-19 pandemic. One attorney recalled that "there was one client in particular who definitely might not have survived Covid if [they] were not able to connect with Justine, who made herself available to that client for several months." From January 1, 2020 until June 30, 2021 (18 months), attorneys utilized a social worker for 267 clients.

As the Chief Public Defender, Ms. Lapp zealously advocates for both her staff and the clients and is a strong leader in the Ontario criminal justice community. During the focus group, one attorney recounted an incident where a judge ordered her to remove her mask in a small jury room and became upset when she refused. Ms. Lapp took this complaint seriously and supported the attorney in navigating the situation. Ms. Lapp also advocated on behalf of treatment court clients. When the local treatment court adopted a policy preventing participants from completing the program because of a Covid-related discontinuation of drug testing, Ms. Lapp pushed back. Noting that the drug test discontinuation was not their fault, she argued that participants should not be required to participate in the program longer than necessary simply because they could not be regularly drug-tested. Her advocacy was effective, and the court changed the policy thereby allowing people to successfully complete and “graduate” from the program.

Ontario County Conflict Defender’s Office

The Ontario Conflict Defender’s Office (CD Office or Ontario CD) has continued to provide quality representation over the past year. In response to discovery reform, the Ontario CD developed an efficient way to manage and store the new discovery. Once the office receives a link to the discovery from the prosecutor, an administrative assistant downloads and stores the files in the office’s electronic content management system, enabling the CD attorneys to access and review files at any time. Attorneys reported that while the District Attorney was initially resistant to turning over the newly required discovery, the CD Office demanded accountability and they are now regularly receiving the discovery to which they are legally entitled.

Conflict Defender Carrie Bleakley encourages attorneys to engage in holistic representation. One attorney recounted how during the pandemic they became even more focused on the non-legal issues that clients were facing. They made the time to talk with each client about what resources might help and said they often text clients to give them updates about available clinics and resources, such as food banks, food stamps, and mental health counseling. The Ontario PD Office also encouraged the CD Office to refer clients to their social worker (in cases where no conflict exists), to provide services such as connecting to substance abuse treatment or securing food or public benefits. One attorney said that “made a tremendous difference” for several clients.

Ms. Bleakley’s previously reported focus on increasing the use of non-attorney professional services appears to be well received even during the pandemic. From January 1, 2020 – June 30, 2021 (18 months), the CD Office reported that attorneys submitted 87 requests for investigator services; 7 requests for interpreter services; 13 requests for expert services; and 6 requests for sentencing advocacy/social worker services.

As noted below, Ms. Bleakley’s leadership helped steer the CD Office through the chaotic changes in 2020 and 2021. One attorney noted that Ms. Bleakley is a “wonderful boss, knowledgeable and helpful” and that there is good office camaraderie.

Ontario County Assigned Counsel Program

In Ontario County, public defense clients are fortunate that, in addition to the strong CD and PD Offices, Ms. Bleakley runs a well-organized and well-resourced Assigned Counsel Program (ACP), and panel attorneys utilize these resources regularly. For instance, during the interviews, the panel attorneys spoke highly of the ACP mentor, Robert Zimmerman, noting that he is “very giving with his time and will always respond [to questions] within a couple of hours.” Mr. Zimmerman also helps the panel attorneys stay on top of new appeals decisions by circulating case law updates. One attorney we interviewed was second chairing a murder trial with Mr. Zimmerman, who has decades of criminal defense experience. The attorney described it as a “great experience.” Between January 1, 2020 until June 30, 2021 (18 months), the program reports that 12 panel attorneys relied on Mr. Zimmerman as a resource.¹²

Panel attorneys also recognize the benefit of retaining non-attorney professionals through the ACP. As we noted in last year’s report, prior to settlement implementation, ACP attorneys had to apply to the court for non-attorney professional supports, such as an investigator. Now, panel attorneys can request such services through the ACP. During the interviews, multiple attorneys noted how easy it is to obtain these valuable services through the ACP versus applying to the court and how much they appreciate this change. Attorneys can now retain professionals who are particularly skilled in the certain type of case on which they are assigned. For example, in a drug sale case, an attorney retained a former Rochester Police Department investigator who was very familiar with this type of investigation. The attorney reported that the ability to hire this investigator resulted in a favorable outcome for the client. This attorney also recounted how the ACP helped them retain a last-minute interpreter in a fugitive of justice case. Another attorney described how investigators help review the voluminous discovery including body camera footage.

Between January 2020 until June 2021 (18 months), the ACP reports that attorneys submitted 121 requests for investigator services; 3 requests for experts; and 8 requests for social workers/sentencing advocates. As one panel attorney noted, “historically, the perception was that the [prosecutor’s] office has all the resources and the defense had nothing. The [ACP] is leveling the field.”

Underpinning this effective representation is Ms. Bleakley’s leadership in public defense and the community. Ms. Bleakley continues to participate in the Ontario County Campbell Commission which discusses local policies that impact vulnerable populations with a goal of decreasing the number of individuals incarcerated in the county. The Commission also devises solutions to these issues, for example developing an appropriate local response to the mental health crisis. Ms. Bleakley also participates in on-going discussions regarding police reform in Ontario County.

¹² Notably, it is likely this number underreports the instances in which attorneys rely on Mr. Zimmerman for support since this reflects only more formal mentor assignments that are reported. We were told that attorneys frequently consult with Mr. Zimmerman informally as well. Nonetheless, based on the information we received about the number of panel attorneys (24 according to our most recent caseload analysis) it is evident that that a significant portion of the panel works with Mr. Zimmerman.

Ms. Bleakley’s leadership skills have not gone unnoticed by the panel – every panel attorney we interviewed commended Ms. Bleakley on the effective and efficient running of the office. When asked what made Ms. Bleakley such an exemplary leader, one attorney answered, “the way she empowers you, trusts you . . . she gives you confidence to do well. Not only that, but the way she prepares you . . . she’s open to discussing anything and everything with you, and [she] will make you a better attorney.” Another attorney, who has had their vouchers payments reduced in other counties, said that they would always take a case in Ontario County because Ms. Bleakley is fair and supportive.

Ontario County has cultivated a strong defense bar, in part due to the collaboration between the two leaders, Ms. Lapp and Ms. Bleakley. Throughout settlement implementation, Ms. Bleakley and Ms. Lapp have worked together on various initiatives to ensure that all public defense clients in Ontario County receive quality defense.

Schuyler County

Schuyler County Public Defender’s Office

The Schuyler County Public Defender’s Office (PD Office) experienced many changes in the last year. In addition to Covid-19 and implementation of the criminal justice reforms, the office faced various staffing shortages. Former Chief Public Defender Wesley Roe resigned in the beginning of 2021 and in March, existing staff attorney, Valerie Gardner, was appointed to replace him. Ms. Gardner’s promotion to Chief meant the office had a vacant attorney position for several months while they identified a qualified replacement. As we discuss in section IV, ILS worked closely with Ms. Gardner to monitor the PD Office caseloads and determine office capacity given its temporarily reduced number of staff. Because Schuyler County previously established a caseload overflow plan, Ms. Gardner was able to work with the Tompkins/Schuyler Regional ACP to overflow cases periodically and reduce the burden on PD Office attorneys. In May 2021, the PD Office hired an attorney who graduated from Cornell Law School and has a Ph.D. in molecular biology to fill the vacant position. As with any new hire, it was necessary to train her and incrementally build her caseload. During that time, Ms. Gardner continued to rely on the overflow plan and other PD Office attorneys to ensure client needs were met.

Since assuming the role of Chief Public Defender, Ms. Gardner has undertaken several new initiatives. Ms. Gardner worked with the county to reconfigure their office space to enhance privacy and confidential client communication. The office also installed an assigned counsel application station with a phone and a drop box in the hallway and the waiting area has a posterboard to serve as a resource center, where pamphlets regarding services and job notices are posted.

The reconfiguration of the space also created room to accommodate the on-site presence of the PD Office’s contract investigator. Previously, PD Office attorneys communicated new assignments to their investigator via email or phone calls. Now, the investigator is on-site two times a week. This has enhanced collaboration between the attorneys and the investigator; one attorney reported that they are “happy” the investigator will be on-site because the investigator will “knock on [their] door and ask, ‘What can I do?’”

Ms. Gardner is also focused on increasing services available to clients in Schuyler County. She has worked closely with their contracted OAR (a non-profit committed to helping clients access opportunities, alternatives, and resources) client service worker, Lisa Duggan, to ensure that clients continue receiving necessary services. Ms. Duggan said she never lost contact with attorneys during Covid-related lockdowns, and she checked in daily with the PD Office about client needs. She noted that even when the courts and county resumed more normal operations, the jail was otherwise not allowing non-attorney jail visits, so Ms. Gardner advocated for access for Ms. Duggan to meet with clients at the jail. Ms. Gardner also obtained a laptop for Ms. Duggan so she can assist clients with online job applications.

Tompkins/Schuyler Regional Assigned Counsel Program

As we reported last year, Supervising Attorney Lance Salisbury worked with ILS to strategize new methods to invigorate the Regional Tompkins/Schuyler Assigned Counsel Program (Regional ACP). At the end of 2020, Mr. Salisbury and ILS created an action plan that included working on the following areas: 1) identifying and expanding available supportive resources; 2) continuing to educate panel attorneys on the available resources and how they are beneficial; 3) engaging with panel attorneys earlier in the case; and 4) improving panel communication. Mr. Salisbury engages in monthly meetings with ILS to discuss progress in these areas.

Mr. Salisbury has taken steps throughout this past year to improve these areas. He developed an in-office system to review and track cases that may need non-attorney professional services. When a case is identified for potential use of these services, Mr. Salisbury contacts the assigned attorney to further discuss the details. Mr. Salisbury is also working on expanding panel attorney access to non-attorney professionals. He is actively researching and recruiting new investigators and social workers including consulting with other chief defenders for recommendations. Mr. Salisbury keeps a list of investigators who work with the Regional ACP which is available to the attorneys. Additionally, he is working with a neighboring county to plan a training on how best to use those services.

The Regional ACP recognized that it was necessary to streamline communication with panel attorneys to ensure their important messages are received. This has been especially true during the last year and a half of continuous change. Recently, they created a panel newsletter to improve communication with attorneys. They report that the newsletter is still evolving and thus far has primarily focused on Tompkins County updates and broader legal issues and developments. Still, it is intended to serve as a resource for all panel attorneys and Mr. Salisbury and his team are continuing to improve upon it by potentially adding a Schuyler section.

The Regional ACP is also working to connect panel attorneys to more experienced attorneys. In early 2021, they assigned one second chair to a case and they currently have four mentors available to panel attorneys. The ACP encourages more attorneys to take advantage of these supports. One attorney who primarily practices in Family Court but was assigned a juvenile criminal court matter praised being able to rely on a mentor:

The intersection of family court and criminal court under [Raise the Age] is a complex junction, and the pandemic only further complicates the rules. Having [the mentor] to flush through the penal law and statutory authority saved me precious time and helped me prepare for a range of options for my client. Sex abuse cases are challenging and this was no exception. There is no substitute for experience, which is why [the mentor's] assistance was so important. . . . Notably, my client is a child of color. Having an experienced criminal court attorney who also served as an [Attorney for the Child] for over a decade was essential in watching for bias against my client. Finally, by having a mentor, I was able to represent a child in criminal court where I do not have a lot of experience. The program needs attorneys who can bridge the gap between adult court proceedings and juvenile proceedings. I am grateful to be added as one of the attorneys who can bridge that gap and gain the experience necessary to be an effective advocate-with a mentor!

As discussed above, the Regional ACP also assisted the Schuyler County Public Defender's Office by taking overflow cases and assigning them to panel attorneys. Mr. Salisbury assured Ms. Gardner that he had attorneys ready, willing, and able to help. Mr. Salisbury and Ms. Gardner worked together to ensure a smooth transition of cases as needed.

Suffolk County

Suffolk County Legal Aid Society

As we noted in last year's report, under Laurette Mulry's leadership, the Suffolk County Legal Aid Society (SCLAS) has made great strides and remarkable progress since settlement implementation began. SCLAS's holistic team approach is now entrenched, such that collaboration continued despite the sudden shift to telecommuting in spring 2020. Attorneys reported that when telecommuting began, the East End and County Court Bureaus set up a weekly meeting via Microsoft Teams or Zoom, for attorneys to meet, brainstorm, and collaborate on cases. At the time of the interviews in August 2021, these weekly meetings were still occurring.

Attorneys also continued to utilize the non-attorney professional services. Notably, from January 1, 2020 through June 30, 2021 (18 months), SCLAS reports that attorneys referred 88.41% of all new cases to supportive services, which includes social workers, paralegals, or investigators. Moreover, the program reports that this figure likely underreports the number of services actually used as it only captures if a case was referred to any of these three supportive services. It is likely that multiple supportive services were used in many of these cases.

This high referral rate reflects a true culture of collaboration at SCLAS even in a remote work setting. One attorney reported that, in a serious felony case, they have "weekly meetings with the investigator" who also visits the client in jail with the attorney. This attorney praised the Investigation Unit, saying that "it's been a godsend having investigators in the office." Another attorney reported that they "definitely feel we got a lot of good support from investigators during the pandemic."

Nearly all the attorneys interviewed also spoke highly of the office's Social Worker Bureau, offering praise such as "the social workers do a phenomenal job," "[they] have been awesome," and "they've been great during the pandemic." The social workers work as part of the team and one attorney reported texting with the social workers daily. The social workers help assess client needs, connect clients with services, transportation, housing, and provide biopsychosocial reports. One attorney stated "I feel they really go above and beyond. They care as much as we do." The social workers' investment in clients was clear from numerous stories attorneys relayed in the focus groups. One attorney recalled:

I had a client who was in an inpatient program and he was released and going into sober living but the number we received from a counselor was wrong. [The social worker] was great. She went to the sober living facility, drove there herself and got his contact info.

Another attorney reported:

I have only good things to say about the social workers. On DWI cases, social workers get evaluations all the time, get treatment for clients, they are organized, and they keep the attorney up to date on what's happening with the client. Social worker is essential when client is in crisis – [if an incarcerated client is in crisis] they do whatever they can do in a moment's notice.

Attorneys told us that even in the midst of the pandemic-related shutdowns, the social workers were always available for clients and served as a critical support.

Attorneys noted that at times, the switch to telecommuting and virtual proceedings created additional administrative work in both obtaining client files and communicating with clients and courts. This increased the amount of time they spent on cases and they expressed a desire for additional administrative support and, ideally more social workers and investigators to supplement their already robust practice. They also praised the addition of some of the newer supervisor positions such as the Trial Director and Legal Director, both of whom are funded by the settlement. One experienced attorney noted that Trial Director Melissa Kanas's new training sessions have been invaluable.

Because of the structures created under settlement implementation, SCLAS could also address the influx of new discovery by creating a Discovery Bureau. All incoming discovery is now sent to the Discovery Bureau, which formats the discovery, uploads it to SCLAS's case management system, and notifies the attorney. Attorneys indicated that the Director of the Discovery Bureau not only fielded questions about changes in the discovery law, but also served a crucial role in keeping the attorneys up to date on the Governor and Office of Court Administration orders throughout the pandemic.

Suffolk County Assigned Counsel Defender Program

The Suffolk County Assigned Counsel Defender Program ("SCACP") has continued to engage panel attorneys through a well-crafted training program, excellent mentorship, and the increased availability of resources – even as they navigated the many changes over the last year and a half.

In 2021, SCACP Administrator Dan Russo worked with the Suffolk County Bar Association and the SCACP Mentor Attorneys to develop a Criminal Law Training Curriculum. This virtual training series, which runs April through December 2021, includes sixteen different sessions. The sessions cover a wide variety of practical criminal defense topics, such as arraignments, discovery, preservation of appellate issues, identification procedures, and jury selection. The SCACP relied on *Hurrell-Harring* funding to pay for panel attorneys to attend trainings. The response from the panel has been overwhelmingly positive. On post-program surveys, the majority of participants rated the trainings as “excellent” and called the trainings “very informative.” One attorney noted on the survey “I get so much valuable information from these evidence series CLEs – priceless!” During the focus group, the attorneys reiterated how valuable this training series has been. One attorney said that the trainings on how to cross examine witnesses provided him with practical tips that helped him during a trial. Another attorney, who has been practicing for nearly 14 years, said that after one training sessions, he personally called the panelists to tell them that “it was one of the best CLEs I’ve ever seen.”

Mr. Russo also uses these training sessions to remind panel attorneys of the resources that are available through the SCACP. For instance, at the training “Cross Examination of the S.A.N.E. Nurse” Mr. Russo encouraged panel attorneys to hire their own S.A.N.E. (sexual assault nurse examiner) nurse to review the records. The SCACP also compiled a list of experts that panel attorneys have successfully used. If an attorney needs an expert, Mr. Russo will suggest an expert from this list. The attorneys feel comfortable going to the ACP to access experts; one attorney reported that “in the situation where I would have needed an expert, I would have gone to Dan and I would be supported.” Another attorney said the ability to retain an expert has been extremely helpful for clients, as certain “evaluations can cost a lot of money and the clients can’t pay.” The SCACP also has a treatment coordinator on staff. A panel attorney praised this treatment coordinator and recounted how he helped a client who was moving out of state get set up with resources in Baltimore and Washington, D.C.

The SCACP also contracts with two mentor attorneys who provide guidance to panel attorneys. Although the mentor attorneys are technically part-time, they are readily available when called by Mr. Russo or the panel attorneys. In 2020, 53 attorneys consulted with a mentor attorney; between January 1, 2021 through June 31, 2021, 43 attorneys consulted with a mentor attorney. One attorney described receiving very effective advice from one of the mentors, retired Judge Martin Efman, on navigating a difficult relationship with a client who had a serious mental illness. As a former Drug Court and Mental Health Court judge, Judge Efman has experience working with people who have behavioral health issues. In addition to providing guidance on cases pre-trial, the mentor attorneys also attend every panel attorney trial and offer feedback and advice.

The SCACP data shows that panel attorneys are taking advantage of these resources. From January 1, 2020 to June 21, 2021 (18 months) the ACP reported that attorneys submitted 172 requests for investigator services; 131 requests for interpreter services; 24 requests for sentencing/mitigation specialists; 7 requests for expert services; and 2 requests for social worker services.

These resources have resulted in positive outcomes for ACP clients. At the first Suffolk County in-person trial after pandemic-related adjournments, a panel attorney achieved a not guilty verdict on an assault case. Because of the new discovery laws, the attorney received a list of potential witnesses and enlisted the ACP investigator to interview them. From these interviews, their investigator received a significant amount of information that supported their self-defense theory. In a different case where a client was charged with sexual assault, a panel attorney secured an extremely favorable plea bargain, crediting the resources of the ACP:

From the inception of the case, prior to indictment, I had the authorized assistance of a DNA expert Dan Cheswick as well as investigator Joe Cornetta. Due to their assistance – Joe’s thorough investigation and insight (he spoke with all the witnesses, conducted follow up interviews and went over his detailed findings with me), as well as Mr. Cheswick’s forensic assistance (he deconstructed the DNA evidence and discussed its limitations in a way I could understand), we were [able] to make incredible strides to weaken what the people thought was as a solid case. As a result, the client got an amazing result... I am grateful for the case-support Dan, it makes all the difference.

Washington County

Washington Public Defender’s Office

The Washington Public Defender’s Office (PD Office) took a multi-dimensional approach to ensuring quality representation over the past year. During the height of the pandemic, the office implemented a schedule where staff would rotate between working in-office and telecommuting to safeguard employees’ health while remaining available to clients. Staff attorneys reported that supervisors were easily available via phone or email to discuss any issues. Chief Defender Michael Mercure created a document to share with PD Office attorneys to keep track of which courts were open, closed, and new executive orders. Mr. Mercure urged his attorneys to continue to communicate with clients, even while cases were adjourned. Staff attorneys described the transition to virtual appearances as overall smooth, with office staff working hard to get everyone the technology they needed.

The PD Office also set up a system to track incoming discovery and send it to attorneys in a timely manner. As soon as the prosecutor sends the link to the discovery via email, an administrative assistant downloads the discovery and saves it to an internal server which the attorneys can access remotely. Attorneys noted that because of this system, receiving discovery while telecommuting was a smooth process. Overall, the attorneys interviewed seemed pleased with the current office technology, which is a marked difference from the survey results form 2020. This suggests that the PD Office made the necessary changes over the last year to update technology.

Mr. Mercure also restructured the office staffing pattern, adding an additional criminal supervisor position (bringing the office to two criminal supervisors in addition to Mr. Mercure) which allows Mr. Mercure to devote more time to quality improvement measures. For instance, Mr. Mercure implemented a policy requiring attorneys to send the case materials received at

arraignment to an investigator to review for errors and other issues that might require investigation. This policy has led to the early identification of legal sufficiency issues and more in-depth investigations as the case develops.

Attorneys reported that the new discovery laws impacted the frequency and timing with which they use non-attorney professionals. One attorney estimated that they now use an investigator in 75% of cases and will send an investigator to interview witnesses much earlier in the case. Another attorney retained an expert to review computer records in a child pornography case pre-arraignment, something that would not have happened prior to discovery reform.

As we noted in the last year's report, the county lacks access to qualified defense-based social workers and mitigation specialists and, as a result, attorneys lack experience in the use and benefits of these services. To address this issue, the PD Office and the Washington County Assigned Counsel Program hosted a joint two-part virtual training in April and May 2021 with the Osborne Association and New York State Defenders Association on the use of social workers and mitigation specialists. The first installment included an overview of defense-based social work and the role of mitigation in cases, a discussion of ethics and mitigation, and a case example discussed in breakout rooms and then as a group. The second installment included an in-depth presentation discussing the role of a social worker on the defense team the preparation of a mitigation report.

Washington County Assigned Counsel Program

Over the past year, the increased availability and use of resources by the Washington Assigned Counsel Program (ACP) has resulted in positive case outcomes. In a felony level sexual assault case, the ACP helped a panel attorney secure a confession expert who prepared a report documenting how a purported confession was tainted by improper interrogation practices. With this report in hand, the panel attorney was able to negotiate the felony, which carried a lengthy prison sentence, down to a misdemeanor and the client was sentenced to time served.

In another sexual assault case headed to an in-person trial last spring, ACP Supervising Attorney Tom Cioffi assigned a second chair despite push back from the court about the use of second chairs in ACP cases. The ACP then helped the panel attorneys secure multiple experts, including a DNA expert, a Sexual Assault Nurse Examiner (SANE), and an expert who evaluated the complaining witness's forensic interview and identified issues. During trial preparations and throughout the trial, the ACP opened the office early and closed late so the panel attorneys would have the time and space to prepare and organize. Ultimately, the client was found not guilty of the top charge, which would have resulted in a life in prison sentence. Mr. Cioffi worked to ensure that the panel attorneys were fully compensated for their effort and dedication to the case.

In last year's report we noted that some panel attorneys surveyed in the summer of 2020 did not know that non-attorney professional services could be accessed through the ACP. During the focus group in 2021, panel attorneys agreed that they now see an increased availability through the ACP, including increased access to investigation services and second chair opportunities.

From January 2020 through June 2021 (18 months), the ACP received 34 requests for an investigator; 4 requests for expert services; and 4 requests for second chairs.

Access to these resources did not change due to the pandemic. Panel attorneys reported that the office continued to make timely case assignments and ensured that all the necessary case-related paperwork was sent to the panel attorney promptly. Attorneys did comment that the lack of in-court proceedings diminished the opportunities to collaborate and brainstorm with other attorneys, as they were not regularly seeing them in court. However, the attorneys felt supported by the ACP and that Mr. Cioffi was always available for questions and insights.

II. Impact of Covid-19

In April 2021, we distributed a survey to attorneys in the five counties asking about the impact of Covid-19 and the resulting changes to the criminal judicial system on their public defense practice. We received 181 responses and after eliminating incomplete responses and attorneys who solely practiced in Family Court, we analyzed a total of 167 survey responses. We also asked a series of questions in the interviews and focus groups conducted throughout May, June, July, and August of this year.

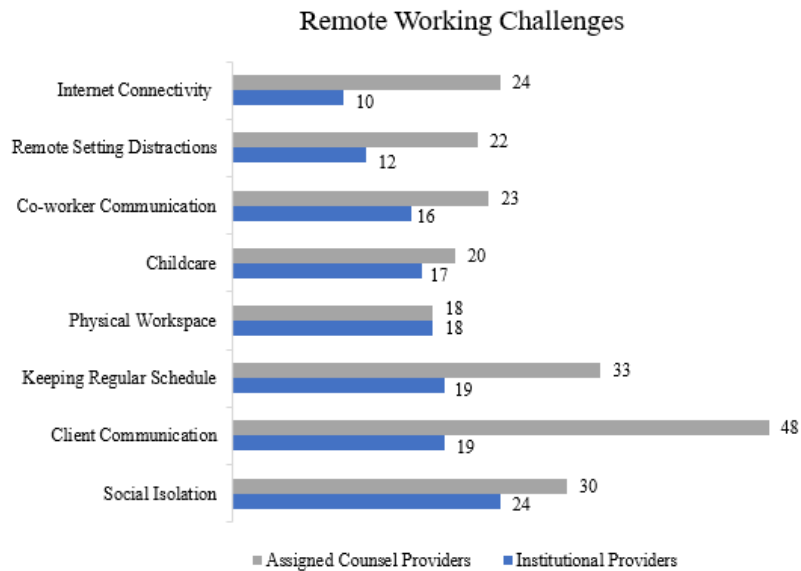
In this section we detail the findings in an aggregate format. This allows the surveyed and interviewed attorneys confidentiality, especially when the sample size in a specific county was small enough for the potential identification of a participant. A potential limitation of presenting findings in an aggregate format is that we could lose distinctions between institutional providers and assigned counsel attorneys, as well as distinctions among counties. However, in the majority of categories, we did not find that there were meaningful distinctions between providers or counties and, in most of the reported categories, attorneys perceived similar issues and provided similar responses. In the event there was a distinction between provider type, we indicated these distinctions as such.

Through the survey and subsequent interviews, we identified six key areas that arose or were affected by the Covid-19 crisis: 1) remote working challenges; 2) access to technology; 3) impact on CLE/trainings; 4) impact on client communication; 5) impact on collaboration; and 6) impact on case trajectory. We discuss these topics in detail below.

Remote Working Challenges

Telecommuting during the Covid-19 emergency posed considerable personal and professional obstacles to providing quality representation. We asked attorneys the following in the survey: “What challenges did you face or are still facing while working remotely? Please select all that apply.” The options available to attorneys are shown in the bar graph below (n = 164).¹³ There was also an opportunity for attorneys to describe any other challenges they faced while working remotely.

¹³ Note that the categories are not mutually exclusive. If an attorney did not select an option, then presumably, they did not experience the obstacle or challenge.



According to the survey results, the top three challenges attorneys experienced were: client communication (41.5%); social isolation (33%); and keeping a regular schedule (32%). These challenges were consistent between those attorneys who worked with assigned counsel programs and those at institutional defenders. In the comment box, several other issues were expressed:

- Many attorneys indicated that not having a physical case file at home was challenging.
- Several attorneys from an institutional provider expressed that they saw an increase in their administrative duties. For example, some attorneys indicated that they were responsible for more clerical work such as routine calls that were normally done by a secretary. Another attorney reported that “[t]he administrative work seems to have increased with the remote setting. I spend large portions of the day sending email updates about my cases, filling out closing forms, and creating and sharing pictures of physical files.”
- One ACP panel attorney voiced concerns over potential delays in processing vouchers due to the courts changing their approving procedures. Though notably, we heard from many panel attorneys in the interviews that the ACPs’ ability to approve vouchers during this time enabled continued timely payments.

As discussed further below, an overwhelming majority of interviewed attorneys indicated that the biggest challenge they had with working remotely was communicating with clients or building a relationship with a client they had never met in-person. In one focus group, two attorneys commented that the social isolation of the pandemic was “really, really hard.”

Childcare

Childcare also appeared to pose an ongoing issue. Thirty-seven (37) surveyed attorneys answered that they faced this challenge while telecommuting. During the interviews, one attorney mentioned that finding childcare was a challenge, but “that wasn’t an issue the office could have done anything about.” However, the attorney also praised the provider leadership for allowing them to have a flexible schedule to accommodate childcare issues.

Virtual Court Proceedings and Remote Communication

Every attorney we surveyed and spoke with commented on virtual proceedings. Numerous attorneys described the challenges with virtual proceedings from technology glitches, to concerns about confidentiality, to having to provide video evidence remotely in hearings, to overall barriers to providing quality representation. We discuss this issue further in section IV below.

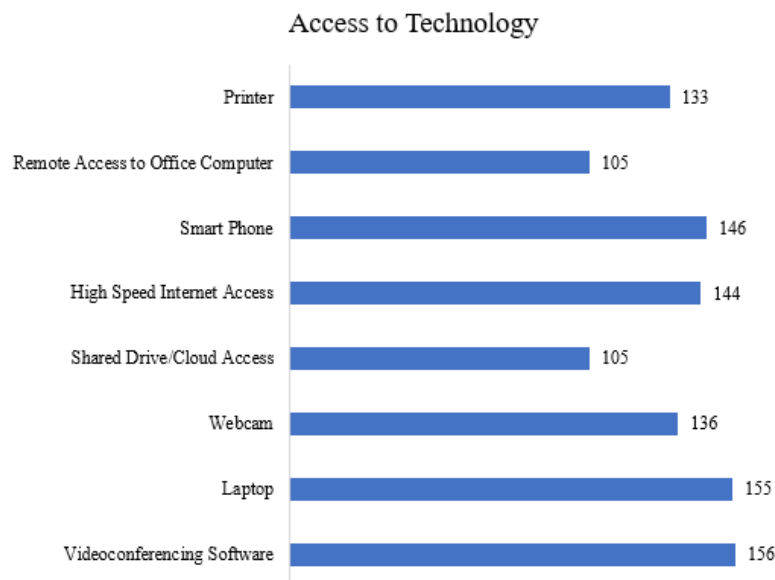
Some attorneys also saw a silver lining to the switch to remote communication within their offices noting that colleagues and supervisors were more accessible. One office quickly set up a remote communication system that allowed attorneys to frequently communicate. The chief defender noted that this was new for everyone, so they encouraged attorneys to ask questions and to help others who might need some kind of backup. An attorney from another office noted that “everybody became more accessible. Everyone was always on their email or phone. You got a response in a minute. It was crazy.”

The remote setting had wide reaching impacts on public defense representation during the pandemic. We explore the impact on technology, trainings, client communication, collaboration with colleagues, and case trajectory in the following sections.

Access to Technology

A solid infrastructure should ensure that attorneys have access to the resources they need to provide quality representation. With the abrupt shift to telecommuting, continued office functioning and client representation depended upon access to multiple forms of technology, such as laptops, videoconferencing software, and printers. Thus, we asked attorneys if they had access to the following items: videoconferencing software (e.g. WebEx, Zoom, Skype, etc.), laptop, webcam, shared drive/cloud access, high speed internet access, smart phone, remote access to office computer, and a printer.

Overall, the responses indicated that most attorneys had access to this technology.¹⁴ As the graph below shows, in all but two categories at least 80% of attorneys had access to these categories of technology.¹⁵



While all attorneys had access to most of the delineated forms of technology either initially or shortly after the shift to telecommuting, some attorneys had to purchase equipment or software themselves or use their own personal equipment. This was most apparent in ACP attorney interviews and survey responses with some attorneys stating that they purchased scanners for their remote work or updated their laptops or desktops to appear in court virtually. While many had basic technology available as part of their existing private practice, remote proceedings forced many panel attorneys to purchase new software licenses such as Microsoft Teams and Zoom or additional equipment, such as extra computers or webcams. Because of the nature of assigned counsel panel attorney practice, many panel attorneys found the need for additional technology imposed a new financial burden on their practice.

¹⁴ n = 167 attorneys which is the total of both the ACP attorneys (n = 107) and institutional provider attorneys (n = 60).

¹⁵ The two categories with less than 80% reporting access were (1) remote access to office computer; and (2) shared drive/cloud access. The data showed that those reporting less access to these two types of technology were primarily ACP attorneys. This is logical because many ACP attorneys are solo practitioners or work in small office settings and could continue to work at their offices alone (limiting their need to remote-in to an office computer) and/or did not have a need for a shared drive.

In contrast, because of the centralized nature of institutional defender systems and practice, attorneys from some institutional provider offices reported that their offices provided the necessary devices to work remotely, typically a laptop¹⁶ and videoconferencing software. Notably, unlike ACP attorneys who reported having existing equipment on which to rely, many attorneys at institutional defenders did not previously have office-issued equipment available at home. Two interviewed attorneys from one provider office noted that receiving an office laptop was “fantastic” and “very helpful.” Overall, they described the transition to remote work as “great, tech-wise.” Multiple attorneys from a large provider also credited leadership with quickly distributing laptops and working to ensure that the staff attorneys had what they needed to telecommute. Attorneys from multiple offices reported that Microsoft Teams was useful in communicating with supervisors and colleagues.

However, simply working for an institutional defender did not insulate attorneys from incurring some personal expense. One institutional provider office did not issue laptops but authorized attorneys to bring their work desktops home. This, however, posed additional challenges; if an attorney needed to go to the office to complete certain tasks, they would not have a computer at their workstation. One attorney reported that they chose to leave their desktop at the office and work from their personal computer. In doing so, they did not have access to the office’s Adobe license and ended up personally paying for a subscription.

Similarly, a number of attorneys interviewed from institutional providers indicated that some technology, such as cellphones, printers, and scanners were not provided by their offices. Many attorneys who had printers personally paid for printer supplies, such as ink and paper. Several attorneys reported in both the surveys and interviews that they did not have work cell phones to contact clients and that they had to set up Google Voice accounts to speak with their clients on their personal cell phones without giving out their personal number.¹⁷ One attorney suggested that the provider offer a stipend for phone bills because the phone “is being used 85% just for work purposes.” In one interview, an attorney detailed how they purchased a landline in order to communicate with clients and colleagues due to poor cell phone reception at their home.

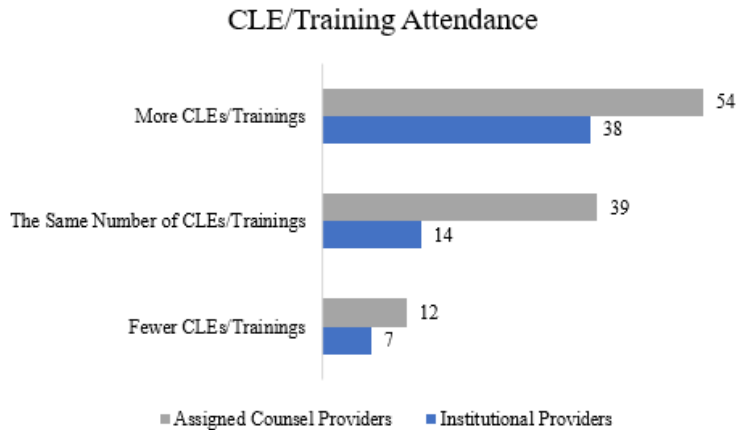
In sum, most attorneys from both assigned counsel programs and institutional defenders were able to access the necessary technology to provide their clients with quality representation. However, many had to personally pay for at least some technology.

¹⁶ There were a small number of attorneys from institutional providers who indicated in their surveys that laptops were not provided by the office. It is unclear from surveys whether this was because the attorney chose not to take an office issued laptop, if there were alternative options (such as taking home a desktop), or if the attorney chose to purchase and/or use a personal laptop because of the delay in getting an office issued laptop. At one provider, attorneys did not receive laptops until eight or nine months after the shutdowns began. These attorneys reported that they had personal laptops to use at home, however, this made “it more difficult and arduous to work remotely.” When interviewed in June 2021, the attorneys from that office reported having office issued laptops at that time.

¹⁷ Google Voice is a phone application that allows users to make and receive phone calls and text messages through the Google Voice app on their existing cell phone. Users set up and link a new phone number to ring through their existing phone. This allows attorneys to provide clients with a cell phone number that is not their private phone number. Several interviewed attorneys indicated that they used this application to communicate with clients.

Impact on CLE /Training Attendance

Adequate training is an essential component of quality defense, helping to ensure that attorneys have the skills needed be effective. Due to the Covid-related office and court closures, we hypothesized that attorneys would have more time for training, and that the virtual nature of trainings would improve access and thus attendance. Therefore, we asked attorneys if they had attended more, the same number, or fewer CLEs and trainings since onset of the pandemic, as compared to previous years. As evidenced by the bar graph below, the survey results supported our hypothesis.¹⁸



More than half (56.1%) of the attorney sample reported attending more trainings and approximately one-third more (32.3%) reported attending the same number of trainings. Only 11.6% of attorneys reported less attendance at trainings. Two reported that they attended fewer CLEs because they were “not a fan of webinars” and, as expected, there were very few in-person trainings offered. Four attorneys specifically reported that the pandemic led to more virtual CLEs and trainings, making it easier for them to sign up and attend from home.

This sentiment was echoed in the interviews; all but one attorney who discussed CLE attendance stated that they attended CLEs since the onset of Covid-19. As one attorney relayed, “while we had teleconferences, we were shut off during Covid, so I naturally went to a lot of virtual trainings and seminars.” An attorney from a large provider stated that traditionally they learned from watching other attorneys in court. When Covid-19 hit, they needed to rely on the program trainings more and they “got a lot from them.”

Multiple attorneys, from various providers, stated that their programs were offering and encouraging many training opportunities during this time. Two attorneys from one provider indicated that their agency encouraged attorneys to attend more CLEs:

¹⁸ n = 164 attorneys. Three attorneys left this question blank.

XX: We were encouraged to do a lot more virtual CLEs during the initial stages of Covid. We attended a lot. Things were moving slowly, we didn't know how it was going to go, but they knew we could do trainings, so we did that.

YY: Same here. It was pretty much agency wide. . . Courts were closed, not a lot of people were getting arrested, so we did trainings. It slowed down when things started to open up.

The providers also altered their training format to accommodate the changed circumstances, which attorneys appreciated. Several attorneys from one provider stated that the pandemic caused the administration to change their CLE structure. Rather than have a three-hour program, the administration began to offer “excellent” one credit CLEs that were only an hour. The attorneys stated that these “shorter ones pack more of a punch.” Another attorney, from a separate provider, stated that they had “done a lot more [trainings] over the last year. There were some that were at noon, which I could watch live from my desk. . . . It was nice to have one-hour sessions versus five or six hours because it is a lot less time out of the day.”

Two attorneys referenced the ability of their respective programs to compensate them for going to the trainings. One attorney stated, “if I need to go to trainings, I don't have any hesitation. I know I'm going to get compensated.”

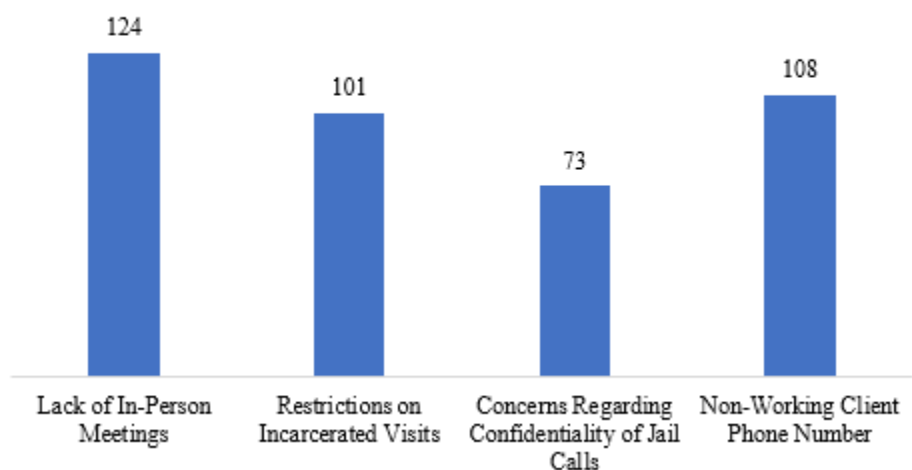
Overall, the pivot to virtual trainings did not negatively impact defenders' access or ability to attend CLEs and trainings. During this time, attorneys are generally attending the same amount, or more, with few attorneys reported attending fewer CLEs and trainings.

Impact on Client Communication

Successful caseload relief implementation allows attorneys enough time to meaningfully engage with their clients. Given the importance of client communication, we decided in the Covid-19 survey to ask attorneys if they experienced any of the following impediments when communicating with their clients: lack of in-person meetings; restrictions on incarcerated visits; concerns regarding the confidentiality of jail calls; or if clients had a non-working phone number. Attorneys were also given an optional comment box to describe other obstacles. As demonstrated in the chart below, nearly three-quarters of the responses identified the lack of in-person meetings as a challenge to client communication and approximately 65% of those responding indicated that a non-working client phone number led to communication issues.¹⁹ 60% responded that restrictions on incarcerated visits was challenging and approximately 44% cited concerns about confidentiality of jail calls.

¹⁹ n = 167.

Challenges With Client Communication



The majority of attorneys we interviewed echoed these concerns. Many felt client communication was substantially more difficult due to Covid-19. These issues were particularly acute for incarcerated clients who faced restrictions to attorney communication, and even when such communication was permitted, were often denied confidential communication thus jeopardizing attorney-client confidentiality and deterring candid conversation.

Confidentiality

Attorneys were concerned about remote confidential attorney-client communication, particularly with their incarcerated clients who they could not visit. One attorney stated that their clients call them “frequently [with] someone else on the line that they haven’t given authorization to.” Several attorneys expressed skepticism regarding the confidentiality of the jail phone line, which inhibited their ability to engage in substantive discussions with their clients. Two attorneys had the following exchange during a focus group:

XX: I made sure that if I needed private conversation with my client that it was on a line that was not recorded, I would confirm with client that he was alone in room and no one within ear shot.

YY: I would assume that everything was being listened to and tell the client that I wouldn’t have those talks over the phone. I tried to go see my clients, although that was difficult.

Inability to Meet with Clients In-person

Several appellate attorneys also expressed frustration with the NYS Department of Corrections and Community Supervision (DOCCS) policy that allows incarcerated individuals only one 30-

minute attorney call per month.²⁰ One appellate attorney noted in their survey that “the biggest impact...has been the lack of in-person meetings” because “some facilities have been strict about limiting legal phone calls to thirty minutes. This makes it tough to discuss all of the client’s concerns, answer questions, and explain the issues I’ve identified for appeal.” In a focus group, an appellate attorney noted that an in-person visit could be as long as “four to five hours,” so the thirty-minute calls are not “enough time to develop a relationship or talk about the case.” However, the attorney noted that they appreciated that that “incarcerated clients could [now] call [them] for free, which has made contact much easier.” They hoped this practice would continue after the pandemic.

Regardless of incarceration status, many attorneys noted that meeting with clients in-person would greatly improve their representation and the client relationship. Several attorneys we interviewed remarked that they represented numerous clients and never even saw their faces. This made it “difficult to foster a relationship with the client because it’s on the phone.” An appellate attorney also voiced this concern:

I’m just a voice on the other end of the line. So far, all the clients have been satisfied with the brief I’ve drafted but I think it’s really hard on both parties. Mostly on the client, they never meet or see me. They don’t have an opportunity to figure out who is the guy who hold their fate in his fingertips.

Finally, one attorney stated they did not like virtual court because it did not give them another chance to meet with their client in person:

Lots of things can happen in a short space of time. Court appearances are efficient, and lots can get resolved. I just feel like when you try to talk to someone about their case, it is kind of complicated. You need to be face-to-face. Talking on the phone makes it more difficult to explain all these moving parts. Some of these things are complicated. It requires face-to-face communication.

Notably, while using technology as a replacement for in-person contact proved crucial during the public health crisis, issues with technology further intensified these challenges. In the surveys, some attorneys highlighted technological issues that posed challenges to communication such as: “dropped phone calls due to bad cellular service;” “lack of [client] technology;” and “both SKYPE and TEAMS crashing, glitching and freezing and causing complications with attorney equipment and crashing computers.” We discuss issues with virtual court more in section IV.

Out-of-Custody Communication Barriers

As we reported last year, the 2020 attorney surveys indicated that the top two barriers to client communication were “client does not have a working phone” and “client changes phone number

²⁰ See DOCCS Directive # 4423, Inmate Telephone Calls, January 15, 2014, § IX Attorney Legal Calls (indicating that “attorneys are expected to communicate with their inmate clients through privileged correspondence... or during legal visits” but in the event of a call, the attorney must justify the need in a written request which must precede any request by phone call to the facility. Calls cannot exceed 30 minutes or occur more frequently than every 30 days.).

or address without providing updated information.” Public defense clients often struggle to maintain access to working phones, especially when relying on public assistance for this service. This year’s survey and interviews indicated that this issue rendered communication with out-of-custody clients even harder during the pandemic-related shutdowns. In the Covid-19 survey, one attorney commented that clients “tend to change addresses/phone numbers frequently,” which made it difficult to maintain communication with their clients in a remote setting. In the interviews and focus groups, attorneys repeated this sentiment noting that the emergency simply made this pre-existing issue worse. One attorney commented, “[y]ou always have issues with clients changing phone numbers but that’s going to continue with Covid or non-Covid.”

Attorneys also said the inability to consistently communicate with clients combined with the lengthy (and at times seemingly indefinite) court adjournments, caused clients to disengage from their cases. One attorney detailed her experience:

Some clients became difficult to stay in touch with over time. Their phone numbers would change, or their criminal cases would become less of a priority in their lives due to other challenges. [I] believe this was a bit more common during Covid because of how long the cases would drag out. For example, cases that might have lasted for one-month pre-Covid, actually stretched into multiple months during the pandemic primarily because the courts could not hear them.

This attorney said they spent a good amount of time chasing clients, and often without much success.

Evolution of Attorney-Client Relationship

Interestingly, a common thread in attorney responses was that the nature and content of communication changed during the pandemic and this increased the time they spent communicating with clients. Some attorneys who were able to connect with clients indicated that they became an additional source of client support during a period imbued with anxiety. These attorneys told us that because the case’s court progress was stalled, they needed to communicate with their clients more about issues that were not necessarily directly related to their criminal case. As one attorney put it, “you had to communicate a lot about nothing.” An appellate attorney explained:

Clients need more handholding and communication due to Covid. The vast majority of my criminal clients are in DOCCS facilities so with the outbreak of Covid, some have gotten Covid. I have had to spend a lot more time speaking to clients, showing empathy. I’m not complaining but it takes additional time. Judges don’t understand but clients absolutely deserve it. But it adds to hours on the voucher. You get to [the statutory payment cap of] \$4400 pretty quickly when you are responsible to your client. They’re worried they’re going to get Covid. They need some connection. Some reassurance. And they’re not getting it. Especially at the beginning when there were no visits and they weren’t able to communicate with family members. I don’t think the judges and court staff really

understand. They see our clients as numbers and not human beings. But for us they are absolutely human beings and we see the other side of them.

Another attorney observed that the long delay in case processing allowed more time to address clients' basic non-legal needs by updating clients on food banks, mental health counseling and treatment resources, and SNAP benefits resources. This attorney noted that, before the pandemic, they were "not as focused on these social issues" and that "once [they] could connect with [their] clients, [their] one-on-one communications with them was nice because there were fewer case assignments and [they] could focus on [their] cases and achieve greater outcomes." This attorney also began using Google Voice to call and text-message their clients, which "the majority of clients seemed to appreciate the flexibility to choose the communication mode that works best for them."

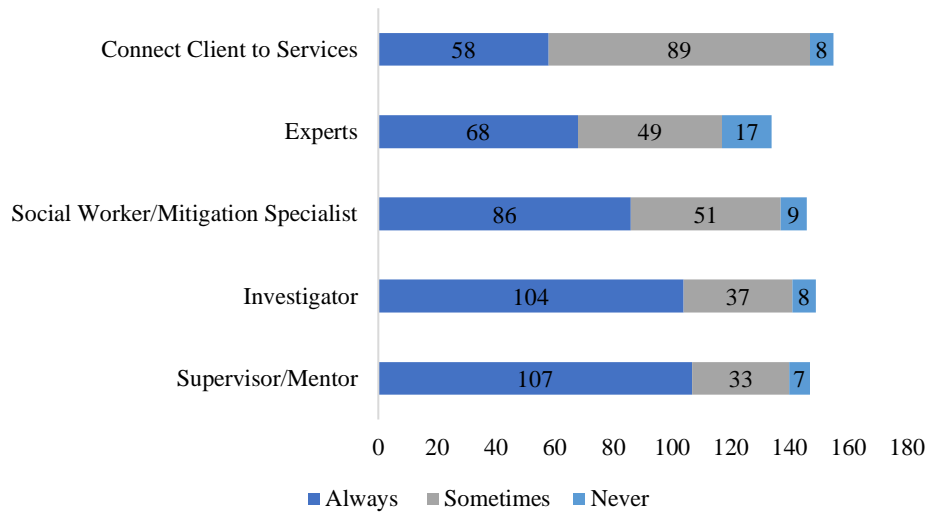
In sum, the Covid-19 emergency significantly impacted attorneys' ability to effectively communicate with their clients. The systemic barriers to client communication that existed prior to the pandemic and highlighted in last year's report were exacerbated by the pandemic-related court closures, the necessary limits to in-person meetings with incarcerated clients, and the need to socially distance, which posed barriers to any type of in-person client meeting. Additionally, the switch to virtual court proceedings added new concerns about the confidentiality of any attorney-client discussions before and during video court appearances (which were hosted by the court), as well as concerns about client access to the technology needed for video communication. However, as evidenced by the follow up information gathered in the interviews, attorneys took steps to protect client confidentiality and continue to communicate with their clients, despite these challenges. Given that effective client communication is a core quality component of the settlement, it is especially encouraging to see nearly all the attorneys were concerned about maintaining meaningful communication.

Impact on Collaboration

Successful caseload relief implementation should result in attorneys having the time needed for collaboration and consultation with other attorneys, non-attorney professionals, supervisors, mentors, and resource attorneys. Thus, in the survey we explored whether the infrastructure for collaboration and consultation created under the *Hurrell-Harring* settlement endured during the pandemic. We asked attorneys if, from the onset of the pandemic until they completed the survey, they were "always," "sometimes," or "never" able to collaborate with the following groups: supervisors or mentors; investigators; social workers or mitigation specialists; experts; and client service programs. The bar graph below shows the distribution of responses.²¹ Notably, the responses indicate that most attorneys were "always" or "sometimes" able to continue working with experts, social workers, investigators, and supervisors/mentors.

²¹ The sample size for responses varies based on category: Supervisor (n = 147), Investigator (n = 149), Social Worker (n = 146), Experts (n = 134), and Client Services (n = 155).

Collaboration



Attorneys also had the option to include comments about their answers. The majority of comments reflected the difficulty of connecting clients to various services. According to these comments, the process of connecting clients to services “took longer,” “was slower,” and drug treatment specifically “definitely was not easy to work with.” This may have been due to the programs “reduced availability and in-person access.” One attorney highlighted their experience:

The issue with services is that they are not as easily accessible as they used to be. Some clients don’t have access to the internet and cannot do a Zoom meeting with a treatment service or cannot afford to miss work given the limited availability of these services. Housing has been a major challenge especially at the height of the pandemic. Even now it is still challenging to find a client a place to stay long-term in certain situations.

Another attorney echoed a similar sentiment during an interview:

During Covid, the XX Center dropped the ball bad – clients were compliant and doing the screening and XX would lose the file and then say that the client was not responsive. To get an evaluation, you need to go to three appointments and if you don’t follow through with all three, they have you start over. They were all working from home, so no clients were getting treatment... They were terrible at communicating with clients. Some clients live in motels and move weekly, clients use [cheaper pre-paid] phones, and they can’t receive calls. Because the outpatient programs weren’t taking any calls from clients, it was impossible to communicate. Clients were getting lost in the process... The problem with outpatient programs is that they are overworked, they are over assigned and dealing with people who have addiction problems, eventually you will drop the ball under those circumstances.

Strikingly, all interviewed attorneys stated that they were able to collaborate with their supervisor and/or mentor throughout the Covid-19 emergency.²² Many reported that their supervisors or mentors were “approachable and accessible” and that they didn’t feel like they were “inconveniencing anyone” when asking for questions or backup.

While, as we noted above, some attorneys felt that supervisors and colleagues were more accessible, this collaboration presented its own challenge – namely that collaboration and supervision was not as spontaneous as it was prior to the pandemic. As one attorney pointed out, “there are so many little things you can learn being in an office. Everything now requires the intentionality of drafting an email. It’s a lot of extra supervision that’s required.” Attorneys felt that it was harder to establish rapport, “harder to brainstorm about cases,” missed being able to “bounce things off people in court,” and having regular contact with other attorneys. An attorney who serves as a mentor to less experienced attorneys noted that it was tough to mentor over Zoom, explaining that virtual mentoring “creates barriers . . . because you have to set up the meeting and you often don’t have paperwork to look at.”

In both the interviews and surveys, attorneys also agreed that they were able to collaborate with non-attorney professional supports throughout the Covid-19 emergency, and many attorneys specifically highlighted social workers.²³ Attorneys in one county were able to make a tremendous difference for several of their clients because of their collaboration with social workers. These social workers were able “to provide brief services such as connecting to substance abuse treatment or securing food or public benefits.” A parole attorney also highlighted the social worker on staff. They indicated that their social worker “was really talented.” This sentiment was also seen in a large provider in which all attorneys agreed that “the social workers have been great.”

In another county, ACP attorneys raved about a “treatment coordinator” whose services were available and was “eager to help”:

He is above and beyond. If you have any client where any form of traditional or non-traditional counseling is warranted, you give them his contact, and he will email you. He keeps him in the loop about if client shows up or does not. He will also do intake himself. Depending on where they live and level of intervention, he will refer someone to who accepts their insurance and who is closest to where they live. All levels of success are up to the client, but he opens all the doors.

A handful of attorneys indicated they used non-attorney professional services less frequently throughout the Covid-19 emergency due to the pause on many cases. One attorney noted that they were able to access the services if needed, but that they “ha[ve] a limited need for doing so.” As we discuss further in section IV, the pause created a situation where this type of work was delayed, but not forgotten. As one attorney noted, the use of non-attorney professionals during Covid “decreased because cases were on hold, but it didn’t decrease throughout the entire case

²² Attorneys from one provider indicated that while they could consult with their supervisor, they often did not. This appeared to be due to personality differences with a new supervisor.

²³ Attorneys did note that they appreciated the services of the investigators, but social work usage typically dominated the conversations about non-attorney professional services usage during the Covid-19 emergency.

because once things opened up again, I did get an investigator.” A focus group exchange between two attorneys further explains:

XX: I guess since things were closed, there was no use in having experts, but I don’t think [the pandemic] affected it honestly. Investigator had more time to work on cases.

YY: We weren’t actively doing cases, so less need to actively use investigator.

Finally, some attorneys pointed out that, despite the challenges of Covid, systemic changes to their programs ensured that they now have better access to non-attorney professional supports overall. Multiple ACP attorneys said that it is now easier to get an investigator on the case. An ACP attorney explained their ACP a list of investigators they frequently use. They just need to “give them a call and there’s no issues whatsoever.” An attorney from the same program furthered this by saying their use of non-attorney professional supports had not been impacted by the Covid-19 emergency “because [they] have better access to them in general.” Another ACP attorney from a large panel heralded the administration’s non-attorney professional support offerings, stating the administrator “has synergized the panels.” At an institutional provider, two attorneys who had been with the provider for ten years said:

XX: One of the most significant changes is the amount of services; more investigators, social workers, access to paralegals, and of course, decreased caseloads as well.

YY: I echo that sentiment exactly. With the more resources we have, our job has been a lot easier. There’s been a shift in the focus on the clients’ lives, to address things while criminal cases are going on.

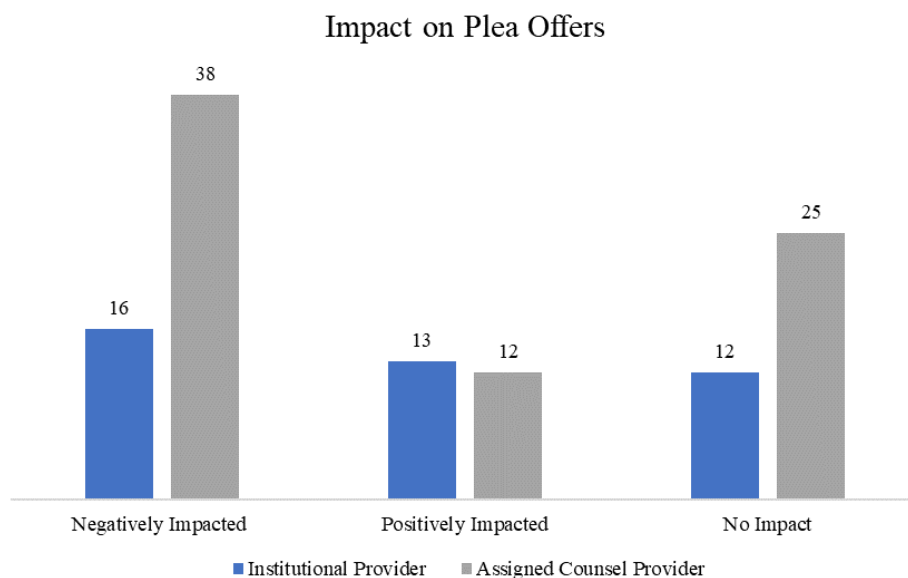
In short, throughout the Covid-19 emergency, attorneys were generally able to communicate and collaborate with investigators, social workers, experts, mentors, and supervisors. While connecting clients to services was a challenge, attorneys consistently praised the services of defense based social workers or their equivalent counterparts. Moreover, all attorneys reported that they had better access to any of the services they needed. This is no small feat and is a true testament to the work of the leaders of the provider offices.

Impact on Case Trajectory

Discussions with attorneys and chief defenders about the pandemic-related court closures, suspensions of grand juries, hearings, and trials, and tolling of certain provisions of the Criminal Procedure Law revealed that Covid-19 also considerably disrupted anticipated plea negotiations and case trajectories. However, we also learned that the way in which these changes impacted their cases was highly dependent on local jurisdictional practices. For example, an attorney in a small county with a lower criminal case volume told us that, in their experience, prosecutors were typically not making good case offers while hearings and trials were suspended. The attorney speculated that this was because they knew the defense could not opt for an immediate trial. In contrast, in a county with high criminal case volume, we heard that, at least initially, prosecutors were making significantly better offers to dispose of cases and avoid a huge backlog

when normal court proceedings resumed. Thus, in our survey, we asked attorneys if they experienced a positive impact, a negative impact, or no impact on the plea offers they received. Though we discussed some of these issues in the interviews and focus groups, more information on this topic was detailed in the survey so we primarily focus on those findings here.

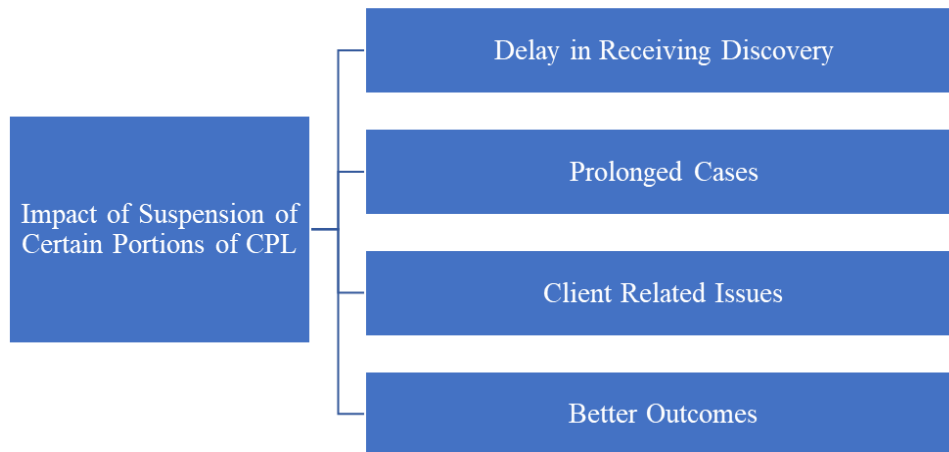
As shown in the bar graph below, approximately 68% of the attorneys representing both institutional defenders and assigned counsel programs said there was some impact on the plea offers they received during the pandemic-related changes.²⁴ Almost half of those responding (47%) said plea offers were negatively impacted and, interestingly, the majority of those responding with this option were assigned counsel program attorneys (38 of 54).



We also asked attorneys the open-ended question, “How have the Executive Orders suspending certain portions of the CPL affected the outcome of your cases?” We engaged in open-ended thematic coding,²⁵ which resulted in the following main thematic constructs:

²⁴ n = 116. We received seven responses indicating that the attorneys handle appeals cases, so they do not receive plea offers. In addition, we received two responses from attorneys who said they had experienced both a negative and a positive impact.

²⁵ Thematic coding is the process of creating and assigning codes to categorize data extracts. These codes are used to derive themes and patterns for qualitative data analysis. The overall goal of coding is to make generating themes and data analysis more manageable through labeling and grouping similar types of data together.



Because of the open-ended nature of the question, we summarize what we learned below. Notably, the quotes presented in the following analysis serve as a representation of each thematic construct and are not the only comments attorneys made.

Delay in Receiving Discovery

Several attorneys indicated in their surveys that they felt as if the prosecution had no incentive to comply with discovery requirements and were less responsive to defense attorney requests for discovery. In some cases, attorneys indicated that this resulted in needless case delays. Some examples include:

Suspending [CPL] 30.30 gave no incentive for prosecutors to comply with discovery requirements or move cases towards trial. Also, suspension of trial deprived clients of their rights to a speedy trial.

Suspension of [CPL] 30.30 has made prosecutors less responsive to requests for discovery. It has been challenging to resolve matters or seek timely information. Conversely, it has helped those rare few cases where the passage of time has given perspective (i.e., a client who was originally looking at a prison sentence was given time to show his ability to remain law abiding and received a probation sentence).

Suspension of [CPL] 30.30 has had a negative impact on my ability to obtain discovery in some of my cases. There's a case from May 2020 that I have still not received discovery on despite repeated requests and filing a 30.30 motion earlier this month.

In some cases, the People were still trying to get discovery materials to me in a timely manner. In other cases, they never certified compliance, and the EO's added an additional 6 months to the cases.

Prolonged Cases

Attorneys also indicated that the suspension of certain portions of the CPL prolonged their cases. As a result, at the time of the survey, attorneys reported that many of their cases were still pending. This standstill in case activity negatively affected their clients. Attorneys wrote about this challenge the most in their survey responses. Some examples include:

The Executive Orders suspending portions of the CPL have delayed case resolution. There are also cases that could have been dismissed on speedy trial grounds if [CPL] 30.30 had not been suspended (assuming the District Attorney's office would not have certified discovery and announced readiness sooner without the suspensions in place).

The EO suspending [CPL] 30.30 on felony complaints has resulted in my client's case being at a stand-still for months while he tries to maintain stability. If the EO were not in effect the DA's office would have almost certainly knocked the E F[elony] down to a misdemeanor and we would have handled it. As it is, he has spent months with a felony hanging over his head.

It took the case longer to be [CPL] 30.30 dead regardless of the fact that the prosecution could have continued to prepare the readiness of their case.

Many cases that would have been [CPL] 30.30 dead remained pending due to continuous suspensions of speedy trial, and inability to conduct trials caused issues as well – keeping open cases that may have been very favorably resolved.

Matters are continually adjourned even for plea matters or the dismissal of matters - defendants are in limbo for lengthy periods of time – Further, virtually impossible to get an in-person judge or jury trial.

Represented a client in a domestic violence courtroom. We continued to announce ready for [CPL] 30.30 purposes. Witness was not showing up in court and 90 days had almost elapsed when the lockdown occurred. Case lingered for another six months before dismissal

Client Related Issues

Clients were negatively affected by the increased length of their cases. In some instances, the clients could have been released earlier but were incarcerated for longer, or accepted unfavorable plea offers to be released. Fear of contracting Covid in the jails exacerbated this issue. Delays in resolving cases also meant delays in the start of probation or other alternative sentences. As discussed in previous sections, the attorneys experienced difficulties referring their clients to support services. In more serious cases, clients might have been re-arrested. Some examples of survey responses follow:

The extension of orders of protections has been one of the hardest aspects especially when local court judges do not correspond by email and refuse to do

anything if we are not in person. The DA's office was not eager to move cases along while [CPL] 30.30 was suspended, so multiple clients had anxiety about their cases and delayed resolutions, delayed starting probation, clients were left driving with hardship licenses or conditional licenses for over a year.

The suspension of statutory speedy trial provisions has been disastrous in a few cases. In particular, defendants who have addiction related issues often accumulated additional charges during a time when they could not access needed level of personal treatment and support services. Also, the mad rush to indict everything once Grand Juries were convened after long periods of essentially no case progress resulted in what I believe were leveling of more serious charges than what would have been levied under normal case progression.

Clients have been unable to get CPL 180.80, 190.80 releases from custody; cannot meet with in-custody clients confidentially. Clients are taking offers would not normally take to get out of custody.

We have had clients detained on indictments for excessive time periods.

The tolling of speedy trial has affected the outcome of some cases. I have a specific client facing a state prison sentence who has a clear speedy trial argument -- the DA exercised zero due diligence in producing him for court appearances from federal custody -- who has now waited over two years for an arraignment. Other clients, out of custody and waiting trial, have worked to move past their charges for over a year now and unfortunately may end up incarcerated for events/incidents that occurred two or maybe three years ago.

Case Outcomes

Generally, the survey results indicated that with more cases taking longer to resolve, attorneys have been faced with a considerable backlog as courts resume normal proceedings. The delays often resulted in clients accepting pleas instead of exercising their right to hearing and trial and delays in attorneys receiving discovery to properly advise their clients and prepare their cases. However, a small number of attorneys (6) noted that even with delays, they received better plea offers for their clients. They attributed this to the need for prosecutors to quickly dispose of cases, particularly as courts resumed more normal proceedings. As one attorney reported:

It more than doubled my caseload because once all pressure was removed from prosecutors to move cases, many stopped attempting to resolve cases. However, once things restarted, the laziness benefited many of my clients because then I was able to secure more favorable dispositions.

Still, it is clear that pandemic-related changes to the criminal system extensively affected public defense attorney practice and their clients.

III. Impact of Discovery Reform on Attorney Practice

Given that the 2019 criminal justice reforms completely overhauled New York’s antiquated discovery laws and reformed New York’s bail laws to prevent needless pre-trial detention, we examined how the infrastructures and resources in place due to settlement implementation withstood such significant changes. Thus, the interviews and focus groups also elicited information about the impact of the 2019 criminal justice reforms on attorney practice.²⁶

Our chief focus was the sweeping changes to discovery requirements that occurred when the legislature repealed CPL Article 240, New York’s previously restrictive discovery laws, and replaced it with CPL Article 245 which requires greater sharing of information between the prosecution and defense. With the enactment of Article 245, the defense should now receive more information from the prosecution earlier in the case, which should facilitate more informed client decisions and enable thorough case evaluation and preparation. CPL § 245.20 requires the prosecution to disclose “all items and information that relate to the subject matter of the case and are in the position, custody or control of the prosecution or persons under the prosecution’s direction or control.” The statute specifies twenty-one areas in which materials must be turned over including, for example, grand jury minutes; electronic recordings such as 911 calls and law enforcement body camera videos; any other electronically stored information related to the case; statements; witness information; scientific tests and other mental or physical examinations and all related documents; and any known information favorable to the defense (commonly called “Brady” information).²⁷

We anticipated that the overhaul of the discovery process would have a considerable impact on defense practice, potentially requiring more time for each case and increased resource needs, and we asked attorneys about these issues in our interviews and focus groups. We also discussed reforms to the bail laws and other criminal justice related laws. However, most of the conversation centered on the impact of discovery reform as it related to defender workloads, an increased need for technology, and motion practice.²⁸ Accordingly, that is the focus of this section’s analysis.

Impact on Workload

Since its implementation on January 1, 2020, defenders have consistently told us that discovery reform has changed their workloads.²⁹ During the interviews and focus groups, we learned that in most jurisdictions defenders are now receiving more discovery earlier in the case and therefore spending more time reviewing discovery materials. The new materials allow attorneys to have

²⁶ As the focus of the Covid-19 survey was on the impact of the pandemic, we primarily focus on information learned in the interviews and focus groups in this section though where relevant we reference the survey.

²⁷ See CPL § 240.20(1)(a)-(u).

²⁸ Additionally, our November update report on the implementation of counsel at arraignment in the *Hurrell-Harring* counties will further discuss bail reform and include information learned from the survey and interviews about Covid-19’s impact on arraignment practice.

²⁹ As discussed further in section IV, “workload” includes the total amount of work currently required, i.e., all pending cases and the associated tasks. This is distinct from how we define “caseload” under the ILS caseload standards which count the number of new case assignments in a year.

better informed conversations with their clients, better investigate and litigate their cases, and engage in more meaningful plea negotiations with the prosecution.

Time Spent Reviewing Discovery

The general consensus among the interviewed attorneys was that in most cases, they spend more time reviewing the discovery materials than they did prior to January 2020. Many attorneys found the volume of discovery material challenging to manage and review. One attorney commented, “When we get voluminous discovery, like 200 files with various PDFs in each file, it is hard to go through because it’s so much. But you have to go through it, so you don’t miss anything.”³⁰ Another attorney explained that when they review their timesheet “the majority of [their] time is looking at discovery. When [they are] not in court or talking to my client I am reviewing discovery all day.”

A few attorneys relayed that the increase in discovery materials is affecting their ability to keep up with their workloads. One attorney recounted:

The other night I was watching a videotape at 8pm because I had no other time to do it. We get sex [offense] cases with video. . . . Discovery is voluminous and you have to go through every single piece of paper because you never know what you’re going to find there. But it is a lot.

Some attorneys noted that that the more open nature of discovery facilitates quicker and fairer case dispositions. As one attorney noted, they spend “more time upfront but less time in the long term” because “now I know if we have a case, I know what [the prosecutor] has, I can push clear legal issues.” Another attorney explained:

It expedited the whole process, I now get the comprehensive package upfront, it’s easy to review scrolling through your computer. It’s helped move cases along because you have a much better view of the prosecutor’s case, in better place to counsel client. Prior to this, you’d have to make a formal demand, review it, you’d have to convince judge you were entitled to discovery, which in the judge’s opinion was outside the scope. Now it’s forthcoming and helps move the case along. So, in that respect it’s much quicker. Sometimes it doesn’t require motions practice because you have what you need. It serves as a good basis to negotiate with the DA’s Office.

A few attorneys pointed out that certain cases do not produce voluminous discovery and therefore there is not a large increase in the amount of time spent on the case. For example, one attorney who primarily handles domestic violence cases acknowledged that in these types of cases, often there is not much discovery beyond a witness statement and possibly a 911 call. Another attorney noted that, while they are receiving more discovery than before, cases charging Aggravated Unlicensed Operation under the Vehicle and Traffic Law still do not involve significant discovery.

³⁰ Notably, this attorney went on to say that despite the challenges associated with voluminous discovery, they “like getting discovery.”

Informed Client Communications

While the new discovery materials appear to be generally increasing attorney workloads, many attorneys appreciated that they can now have more informed discussions and overall better relationships with clients. One attorney summarized this transformation:

This has all changed the attorneys' relationship with their clients. In the past, the attorneys were stifled in their communications with the clients as they did not have all the information. Now, it is different, and they can have more informed discussions with them.

As one attorney noted, prior to discovery reform, "clients plead[ed] guilty or [went] to trial in the dark." Now, attorneys can provide clients with discovery and have meaningful conversations about the case, including plea offers, investigation, and trial strategy. Two attorneys, from different providers, said that they will not discuss a plea offer until they review the discovery with the client. Another attorney explained how the client is now more engaged with the case investigation because the "client can offer suggestions about which persons to talk to for more information, thus providing the investigator with more specific information about what and whom to pursue."

Several attorneys commented on the positive effect this has on attorney-client relationships. One attorney stated, "to be able to have all that information for a more informed client discussion helps to improve [my] relationship with the client." Another attorney noted:

It certainly feels better to be able to go to a client up front, give them copies of things which they can review, so that they can talk with their family members and make more reasoned decisions, and so have more informed discussions with [us]. [I] believe that this has enhanced clients' respect for [us].

Additionally, an attorney told us receipt of timely and comprehensive discovery materials is benefitting her Family Court practice and clients:

It's helpful for me. When [the client has] family and criminal cases. [I] can share discovery I get from the department and what [the criminal attorney] get[s] from DA at a much quicker rate. Sometimes the information is not the same. It benefits both attorneys. Sometimes CPS says there are things that exist in the criminal case that I don't get from the criminal attorney. Especially during Covid, they weren't able to use that negative information.

Transformative Effect on Case Evaluation, Litigation, and Negotiation

Attorneys also noted how transformative the new discovery requirements are in allowing them to better evaluate their cases to identify potential avenues of investigation, litigation, and/or effective plea negotiations. One attorney summarized the profound effect of this legislation:

Up until discovery reform, the DA held the PD attorneys to the letter of the [Article 240] law: they would not give the APDs anything, unless they really had to do so. They would send the defense attorneys 500 pages of Rosario material on a Friday afternoon for a Monday morning trial.³¹ [We] were forced to practice in the dark - clients [had to] plead guilty or go to trial in the dark. The fact that the PD attorneys were winning any cases under those circumstances was miraculous. However, since the discovery reforms, [we] are practicing a whole different type of law. Though [we] still have to litigate in order to receive some materials, the reforms have changed [our] practice from night to day, and the transition has been amazingly smooth.

Several attorneys indicated that they believe the reforms impacted the way they engage with non-attorney professional services. These attorneys noted that they are involving non-attorney professional services earlier, using them more often, or both. One attorney said that they initially thought that, with all the information they were receiving, they would not need any of these professional services. Instead, they find that having more information raises more questions that they need to investigate. Another attorney said they now use investigators in the majority of cases, whereas before they only used an investigator if the case was going to hearing or trial. Another attorney commented that it is helpful to have investigators review the discovery to get another perspective. One attorney explained:

Having all the discovery beforehand has definitely helped with getting an expert involved. I have client who is mentally ill, charged with rape 1 and having everything in the beginning has definitely helped me to say let me get an expert involved because they can write a report or talk to me about their thoughts. Having it early on is better off. Especially with judges, [when you ask for an expert later on in the case] they say: now you want to do this, now you want to get a forensic psychiatrist involved? So, it's helped to have it earlier.

Moreover, almost all interviewed attorneys felt that they were better prepared to negotiate with the prosecution. One attorney emphatically said, "I can't believe we were blindly taking deals without discovery before this law." Another attorney described how they are now engaging in "more productive work and quicker resolution" and has a "greater clarity if you are going to have to litigate case by motions or trial, or if it's in your client's best interest to do plea negotiations."

A number of attorneys commented on this shift of bargaining power – now that they have access to the same materials at the prosecutor, they can better identify the case's strengths and weakness. As one attorney said:

It does take more time to go through all the discovery. Often times, the DA does not look at the information they have before turning it over to the [us], but that is ok as [we] can go through it and point out issues/facts that are helpful to [our] case preparation. It is indeed more time consuming, but it is worth it in the end.

³¹ "Rosario" material is the legal requirement announced in *People v. Rosario*, 9 NY2d 286 (1961), and codified in the CPL's discovery rules, that the prosecution must disclose all relevant prior statements (written or recorded) made by a witness prior to their testimony in court.

One attorney noticed that now “the [assistant district attorneys] are less likely to bluff with them.” Another attorney stated that “the access to more information helps us to point out the weaknesses in the case. I can better determine if I have a good defense [to take the case to trial] or if my client should seriously consider a plea bargain.”

A few attorneys reported this has resulted in more favorable dispositions for their clients. One attorney commented that, since discovery reforms were enacted, there is “not as much resistance from the [prosecutors] when [they] negotiate[] . . . for a better disposition than [the prosecutor] is offering.” Interestingly, two attorneys, from two different providers, recounted how early access to discovery made a difference in cases where clients were charged with breaking and entering. After receiving and reviewing video footage and reviewing witness statements, both attorneys were able to obtain favorable dispositions for their clients.

In sum, our research found that while implementation of the discovery reforms has generally increased defense attorney workload, it has positively transformed defense practice, including case evaluation, litigation, and negotiation. Defense attorneys are now able to meaningfully evaluate their cases and help their clients to make informed decisions about the course of the case. They are better prepared to investigate and litigate cases and, when engaging in plea negotiations, attorneys are now armed with information on the strengths and weaknesses of the prosecution’s case. With this increased information, defense attorneys now have leverage for fairer pleas and more just case outcomes. Above all, public defense clients and attorneys no longer make life-altering decisions in the dark.

Impact on Technology Needs

As we noted in section II, proper infrastructure should ensure that attorneys continue have access to the resources they need to provide quality representation and should be able to adapt to changes to make that happen. Thus, during the focus groups and interviews we solicited information about how discovery reform impacted defenders’ technological needs.

Method of Receiving and Storing Discovery

The interviewed attorneys indicated that generally, the discovery material is provided electronically. This is typically done via email link from the prosecution, which expires after thirty days. Once the prosecutor sends the link, the defense attorney, or someone who works with the defense attorney, downloads the discovery material.

There are different ways of storing this electronic information. Some download the discovery and save it to their computers for printing if necessary, while others rely on administrative staff to download and save it in an office file. Attorneys from different provider offices offered the following information about electronic storage:

I download it into my computer because those logins are time sensitive, I’ll print it out every now and then especially if my client wants to review it.

Now, the email notification is not only sent to the attorney, but also to a separate “discovery email inbox,” which is regularly checked by the secretary [who] downloads and stores the materials immediately. Sometimes, when there is a new document added to the discovery materials, the link is sent out again, but it remains unclear which document is the new one (it’s just a long list with all discovery, and you can only identify the new document by comparing the current and prior list). This is a bit of an issue. When this happens, usually the secretary downloads all materials again, and it is up to [me](or any other attorney) to identify the new document(s).

It goes to the secretary who then puts it in a digital folder (folders are ordered alphabetically by client name). I make a hard copy of it. The digital client folders including all discovery materials are stored on the office’s computer system.

It takes more time. I try to download everything. Then I print it right away, so I don’t have to worry about having it. I don’t like it but it’s the best way to get it done.

Some offices rely on a cloud server or case management system to store discovery.

Upon receiving the link, XX, one of the two administrative assistants in the office, downloads and stores the files onto [the electronic content management system], enabling the attorneys to access and review the files at any time.

It’s now connected, and you can get it through case management. It’s more convenient. I guess. It wasn’t terribly inconvenient before but it’s more convenient.

We have it on a server. We can only access the server while on county property (maybe remotely), but if we move to Cloud, it would be easier to access in court.

We keep them on the server. If I go to trial or a hearing, I print them out, but otherwise not. So generally, I just access the materials on the server without printing them.

While the method for receiving discovery changed, most attorneys we spoke with felt comfortable with the digital process. Only two attorneys expressed difficulty with obtaining the discovery material; one felt that the platform the county used was not user-friendly and the second indicated they were not comfortable with technology. Attorneys also expressed that they are typically able to obtain new links from the prosecutor for the discovery material after the thirty-day window if necessary.

Increased Time to Organize Discovery Materials

Several attorneys also highlighted the increased time it now takes to download and organize the discovery material:

The prosecutors had an order to doing it. Now it's all over the place. I'm getting communication with lab reports... You now have to put it in a particular order. It's much quicker than it was, but you have to do more work and spend more time with it organizing it.

Between getting the email and link and clicking each file, it takes 45 minutes to 1.5 hours to download, print, organize and make a file.

Increased Need for Technological Resources

We have heard from public defense provider offices across the state that they needed to purchase new software, cloud storage, and hardware to accommodate the new discovery processes. As indicated by the above responses, the attorneys we spoke to during the interviews and focus groups echoed these needs.

After reviewing the Covid-19 surveys where many assigned counsel attorneys indicated that they incurred personal cost to increase their remote technological capacity, we asked the assigned counsel program attorneys specifically if they personally had to purchase new hardware or storage for the additional discovery. Apart from one self-described “tech nerd,” many ACP attorneys said they needed to purchase additional items to keep up with the new procedures.³²

One ACP attorney said that they needed to “buy additional hardware to store and review all [discovery].” Another ACP attorney stated that the discovery reforms “have increased my expenses on ink. It used to be that you got a big pack. Now you have to print the page. It gets expensive!” Attorneys from one large ACP thought it would be a good idea for the assigned counsel program to provide resources to print out their discovery but recognized that doing so would be complex and lead to more issues given the size of their panel. An attorney from the same panel explained they purchased an iPad to link to their office computer to review discovery material on demand.

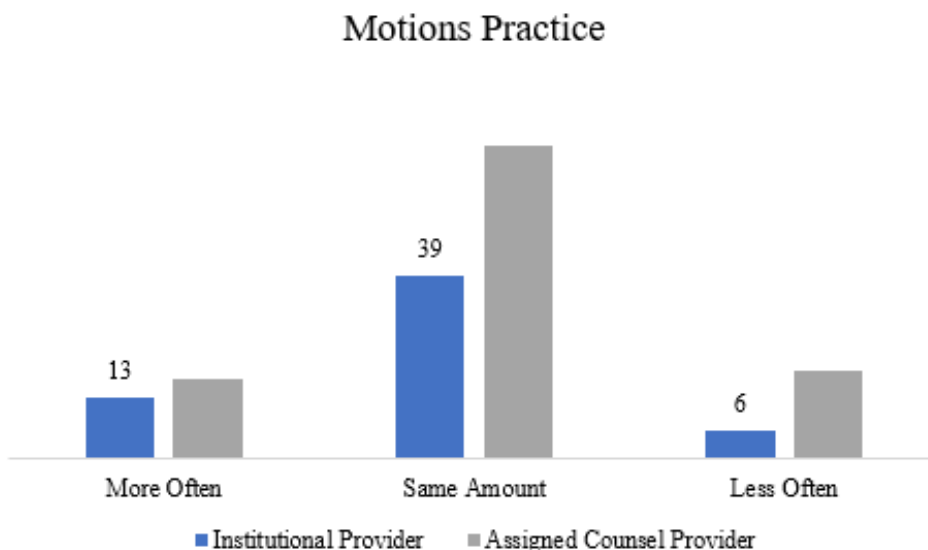
In sum, discovery reform implementation increased technological needs and, at least initially, defense attorneys and staff sought solutions for downloading and saving discovery materials. For many assigned counsel program attorneys, this came at personal expense as they had to purchase equipment to effectively view their discovery material. However, it is likely that once programs and attorneys have the resources they need and adjust their procedures, these challenges will diminish to some extent. A more enduring issue that may require further exploration was identified by attorneys when they indicated that they now need additional time needed to download files and organize them into a readable fashion.

³² The one attorney said they “didn’t have to upgrade anything” and stated “my laptop has a huge amount of storage. I’ve downloaded everything to here. I don’t have any space problems.”

Impact on Motion Practice

Article 245’s automatic discovery requirement should obviate the need for at least some procedural motion practice that was previously required under its predecessor, Article 240. Still, with more information available to the defense, earlier in the case, including access to grand jury transcripts, defense attorneys may have more reason to file substantive motions during a case. Further, the discovery timelines and requirements for the prosecution’s readiness for trial articulated in Article 245 could lead to different avenues of litigation and speedy trial issues under CPL § 30.30. Thus, we explored whether attorney motion practice has changed in light of the criminal justice reforms and the Covid-19 pandemic.

In the Covid-19 survey, we asked attorneys if, on average, they were filing motions more often, about the same, or less often than prior to the onset of the pandemic. Several interviewed attorneys expressed that they had more time to work on and file motions during the Covid-19 emergency due to the decrease in newly assigned cases. However, as shown in the bar graph below, the majority of attorneys indicated they are filing the same number of motions when compared to the period before the Covid-19 emergency (65.8%).³³ Only 18.6% of attorneys filed motions more often, while the remaining 15.5% filed motions less often.



This trend was also evident in the interviews. Attorneys were asked about their motion practice in relation to both the criminal justice reforms and during the pandemic. Two attorneys from one county confirmed they are filing more motions since the discovery reforms were implemented (“more motions practice in general”). The remaining attorneys we spoke with indicated they are either filing approximately the same number of motions or fewer motions, though their reasons for varied.

In one focus group exchange, an attorney said they filed fewer motions because doing so potentially impacts the ability to dismiss a case under CPL § 30.30 as motions made by defense

³³ n = 161.

stop the “30.30 clock,” i.e., the time is excluded from calculations for statutory “speedy trial” dismissals.³⁴ Another attorney in the group said they did not need to file as many motions because they received better offers early in the case from the prosecution:

Motions slowed down and we were getting way better deals initially. There are motions being filed, but they were more for cases that were going to be tried...there weren't that many. [They are] now building up the trial track cases [and filing] motions on those. But, early on the “victimless” cases...were getting resolved. [I] haven't really seen an uptick in motions.

Some attorneys said while the number of motions they file has not changed, the nature of their motion practice has. For example, they now file motions earlier, file more strategic and targeted motions, and/or are better prepared to begin case negotiations with the prosecution (“evaluate the case quicker”). Below are several examples from attorneys at various provider offices:

The only difference is you're writing a motion earlier because you have everything. Otherwise, everything is the same. Prior to the new discovery, I wrote a lot of motions for DWIs; we were getting voluntary disclosure so not much has changed for me.

I would say the same amount of motions but they are more specified motions. I used to file omnibus motions on everything. Now I know in some cases I'm better off pleading because I saw the discovery. I do more specific motions, more facial sufficiency motions. It's at least the same amount of motions but more specific attacks, I like that a lot better, they are very specific.

It expedited the whole process, I now get the comprehensive package upfront, it's easy to review scrolling through your computer. It's helped move cases along because you have a much better view of the prosecutor's case, in better place to counsel client. Prior to this, you'd have to make a formal demand, review it, you'd have to convince judge you were entitled to discovery, which in the judge's opinion was outside the scope. Now its forthcoming and helps move the case along. So, in that respect it's much quicker. Sometimes it doesn't require motions practice because you have what you need. It serves as a good basis to negotiate with the DA's office.

In sum, our initial research indicates that while the number of motions filed may not have increased, the nature of attorney motion practice has changed as compared to practice prior to the Covid-19 emergency and discovery reform, and motion practice appears to be more strategic and better targeted. ILS looks forward to exploring this issue further as court functions approach pre-pandemic levels.

³⁴ CPL § 30.30 requires the prosecution to be “ready for trial” within prescribed time periods (depending on the level of offense) or else the case must be dismissed. However, under CPL § 30.30(4)(a), “[i]n computing the time within which the people must be ready for trial... the following periods must be excluded. . . a reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to...pre-trial motions.”

IV. What We Learned

Sections I through III above demonstrate that despite the extraordinary challenges faced recently by the *Hurrell-Harring* defenders, settlement implementation provided the foundation needed to continue the delivery of quality representation in criminal cases. This is due in large part to the infrastructure and resources implemented as part of the settlement's caseload relief initiatives. Our research revealed that entering this chaotic period with reduced caseloads, increased resources, and strong leadership put the *Hurrell-Harring* defenders in a good position to support attorneys in providing quality representation and meeting client needs. Even so, during the focus groups and interviews, several common narratives arose concerning external pressures which impact *Hurrell-Harring* defenders' practice. In this section, we discuss these pressures.

Covid-19 Related Challenges

We learned of two Covid-related pressures that challenged defender practice this year. First, although remote court proceedings appear to alleviate some systemic scheduling pressures, they diminish the quality of representation. Second, despite being in compliance with caseload standards, many defenders have felt overburdened by the significant increase in case activity in new and old cases when courts reopened. While we are working closely with providers to monitor workloads and we anticipate that reliance on virtual court will diminish as the pandemic wanes, it is important to be aware of both issues as they will likely affect public defense practice for the foreseeable future.

Remote Court Proceedings

The switch to nearly universal virtual court proceedings in the early stages of the Covid-19 pandemic was necessary to ensure continued functioning of essential court matters while keeping people safe. However, nearly every attorney we spoke with made clear that while theoretically convenient, remote proceedings are not conducive to quality representation. One attorney noted, “[v]irtual [court] undermined my ability to develop an attorney client relationship. . . . I hope they don’t rewrite history to make it seem like virtual court is good. I think it’s not good, especially with custody clients.” Another expressed concern that attorneys were prioritizing the ease of remote proceedings over being able to effectively represent their clients calling it “disconcerting.” While they recognized that “virtual has been convenient and helpful during Covid to prevent people from getting lost in the system, judges and ADAs need to see their clients in person, to see whose lives they are affecting.”

Another attorney summed it up as follows:

The challenge of having virtual preliminary hearings, no one understanding what was going on, and the administrative adjournments of court proceedings, together created a lot of fear and anxiety for the clients which attorneys had to try to alleviate while advocating for their clients. This was particularly challenging for defense attorneys.

While many we spoke with and surveyed indicated that remote court proceedings pose significant challenges to both client communication and overall quality representation, a few attorneys noted the efficiencies of remote proceedings. For instance, in one focus group, an attorney noted, “before Covid I was running into problems of being in two places at the same time. I have to allocate more hours on criminal cases because I have to drive all around.” The same attorney concluded that with the switch to remote proceedings, “during Covid, I could appear at all of them, it was simpler.” Another panel attorney echoed that sentiment, “I don’t have to juggle the commute time, court’s schedule, length of the appearance, they are much quicker.” That attorney specifically highlighted that the pressures of Family Court practice in making this comment.

In our 2017 interviews and again in this year’s surveys, focus groups, and interviews, we learned that it is also common for public defense attorneys to experience long wait times in courtrooms before their cases are heard. Indeed, we heard that private attorney cases and other cases are often prioritized over public defense attorneys, causing attorneys to spend unnecessary hours in the courtroom and prevent public defense attorneys from using those hours effectively for other case work. Because of these entrenched practices, some attorneys noted a benefit to remote proceedings – less waiting. One attorney commented in their survey that “not sitting in court, getting there at 9:30 but not being called until 4 PM” meant that they “could now write a motion while waiting for case to be called in virtual court.” This makes them “feel better about [their] work product.” This also led to less waiting and less frequent appearances for clients: “Clients didn’t have to show up. They only had to show up if there was a disposition. And if the judge saw the client waiting in the virtual lobby, they would call the case and not make our clients wait until all the other cases were called.”

The comments praising virtual appearances shed light on a broader issue: existing inefficiencies in the court’s scheduling process has led to devaluing of public defenders’ and their clients’ time. Pre-pandemic, this was intensified by high court case volume – often because of the sheer number of lower-level charges such as those under the Vehicle and Traffic Law and low-level misdemeanors – which could also lead to unnecessary court appearances. With the return to in-person proceedings and scheduling of previously adjourned cases, attorneys will once again experience the demands of inefficient court scheduling. As we detail below, in some instances, this pressure is exacerbated by the hybrid scheduling some courts have adopted. Although virtual court appearances offer a superficial level of convenience, because of the diminished quality of representation, they are not a viable solution to the larger systemic issues. Instead, courts should focus on creating more efficient and fairer in-person scheduling systems and reducing case volume and unnecessary appearances when possible.

Additionally, the problem of assigned counsel attorneys appearing in multiple counties at once speaks to issues with assigned counsel recruitment and low statutory pay rates which we address below.

Workload Crunch

During the interviews and focus groups, we also learned that as courts resumed more normal operations, many attorneys felt overwhelmed by their workloads. At the outset, it is important to

note the distinction between caseloads and workloads. Under ILS standards, caseloads are measured by the number of new case assignments in a year. Workloads, on the other hand, refer to the current number of pending cases, or total number of cases on which an attorney is providing representation at a given time. This distinction is critical as the caseload standards operate on the assumption that the typical cycle of cases opened and closed will generally balance out. Under normal circumstances, measuring new case assignments each year is a good indication of workloads as it can be assumed that cases resolve at a relatively consistent pace.

However, the past 18 months have not been normal, and the pandemic-related court-closures and delays have completely disrupted the pace at which cases are being resolved. The shutdowns created a backlog of cases the court system is still working to resolve. Cases from 2020 and early 2021 that were stalled because of the pandemic-related court closures remain open as the number of new case assignments continue to grow. As a result, workloads are growing even though caseloads appear to be down. While many providers appear to be far under the caseload standards in 2021, this is deceiving because the caseload is not accurately capturing the workloads. One attorney succinctly summarized this problem: “it wasn't work eliminated . . . It was work displaced.”

Courts are now scheduling older cases for hearings and trials while attorneys work to keep up with the new case assignments. We heard from one attorney that “a lot of serious felonies that were pending in 2020 are still pending now . . . We are seeing a lot more [sexual assault] indictments right now. They are piling on and piling on and [it is] getting a little more difficult.” An attorney from a different provider echoed this sentiment, stating that “we don't have a wave yet, but you feel it coming. It's starting to pile on and pile on.”

Several attorneys also expressed concerns about the number of cases they have that are pending trial. One attorney was “worried about what life is going to look like once jury trials resume in local courts.” Another attorney recalled how their “colleagues who have cases waiting to go to trial are feeling the heat because each of those cases may require hundreds of hours of work time, which, in the end, will not be reflect[ed in] the number of cases they have overall.”³⁵

ILS is committed to working closely with the defenders to ensure that their overall workload does not impede their ability to provide quality representation. ILS consistently monitors caseload data and discusses attorney workloads with the chiefs. For example, the Schuyler County Public Defender's Office faced this workload issue when Mr. Roe resigned, and Ms. Gardner was appointed Chief Defender. The office had a vacant position for several months which was not filled until May 2021. During this time, from January 2021 through June 2021, the Schuyler PD Office opened on average 40 cases per month. Compared to the same time frame in 2019, this is more than their pre-Covid average when the PD Office opened on average

³⁵ While we do not diminish the experiences of attorneys practicing on the frontlines during Covid-19, it is important to acknowledge that some of the fatigue described could be related to stress of the on-going pandemic. Much as has been written about “pandemic fatigue.” See, e.g., “We Have All Hit a Wall,” New York times, April 3, 2021, <https://www.nytimes.com/2021/04/03/business/pandemic-burnout-productivity.html> ; “Does the Pandemic Have Your Brain In a Fog? Doctors Say You're Not Alone,” NPR, April 17, 2021, <https://www.npr.org/2021/04/17/988331473/does-the-pandemic-have-your-brain-in-a-fog-doctors-say-youre-not-alone> .

38 cases a month.³⁶ Alone this data point is not highly unusual and would typically be flagged for continued monitoring. However, in this case, the PD Office's backlog of cases intensified the issue. As grand juries resumed in late 2020 and early 2021, the PD Office saw an increase in indictments that were delayed due to the pandemic. Simultaneously other cases that had been administratively adjourned were now calendared. Coupled with the staffing shortage, this workload left the PD Office attorneys stretched thin.

While ILS worked closely to monitor the PD Office's 2021 caseload, we recognized that under these circumstances monitoring only new 2021 assignments did not capture the breadth of the PD Office workload. In other words, even though the PD Office was on track for caseload standards compliance for 2021, this number was not representative of their overwhelming workload. Thanks to settlement implementation, Schuyler County has a caseload overflow plan in place, and with the county's support, the PD Office was able to transfer cases to the ACP to alleviate some of these pressures.

Still, this issue is not unique to Schuyler County. Chief defenders and attorneys at nearly every HH provider reported that they were facing similar workload issues. While the circumstances of the last year may ultimately prove to be a unique consequence of the pandemic, it may take some time to restore the balance. Additionally, the events that transpired in Schuyler County highlights the importance of a vibrant ACP. But, as we detail in the next section, the durability of the ACPs is in jeopardy unless hourly rates are raised.

Ongoing External Pressures

We also learned of two ongoing external pressures that, if not addressed, could adversely impact settlement goals. First, the current statutory hourly rates for assigned private counsel have created barriers to recruiting and retaining attorneys to accept these cases; and second, the lack of funding parity for Family Court is straining providers and jeopardizing attorneys' ability to provide quality mandated representation in both family and criminal cases. While both issues existed prior to the pandemic, the events of the last year and half have elevated these concerns to a critical point.

Need for Increased ACP Rates

As the above Schuyler County example shows, assigned counsel programs play a critical role in ensuring manageable caseloads and quality representation. To fulfill this role, ACPs must be well-resourced and have enough qualified panel attorneys participating in the program. However, without an increase in ACP hourly rates, ACPs are at risk of not being able to provide such representation and this risk threatens the entire mandated defense community.

ACP's struggle to retain and recruit competent, qualified attorneys. As we highlighted in last year's report, ACPs in the five counties could face shortages in the number of available panel attorneys to accept new assignments unless the ACP hourly rates, which are set by statute via County Law § 722-b, are increased. The challenges of the Covid-19 pandemic have only exacerbated this issue – ACPs are now on the verge of, if not already in, crisis. Qualified,

³⁶ See Hurrell-Harring *Institutional Defenders: Six Month Caseload Analysis and Comparison* at 8.

experienced attorneys are retiring or otherwise leaving the panels and new lawyers, many of whom are burdened by student loan debt,³⁷ are unable to make a living in taking assigned cases at the current, inadequate statutory rates.

Panel attorneys have not received an increase in compensation in seventeen years when, in 2004, rates were increased to \$60 per hour for misdemeanors and \$75 an hour for all other types of mandated cases (i.e., felonies and Family Court matters). As a comparison, since 2004, the federal Criminal Justice Act (CJA) panel rates have increased from \$90 to \$155 per hour for all federal work. Indeed, one panel attorney told us that it is common for their ACP to lose attorneys to the federal CJA panel since the rates are double.

Nearly every ACP panel attorney we interviewed expressed dismay at the “woefully inadequate” rates. It is important to note that the hourly rates are not only for attorney time, but also for the overhead and infrastructure essential to legal practice. Panel attorneys are independent contractors and are therefore responsible for paying for health insurance, malpractice insurance, and the myriad of other overhead costs associated with running a law practice. Many assigned counsel attorneys, particularly those with a solo practice, expressed how overwhelming the influx of discovery has been, as the current rates are not enough for them to hire staff to help maintain and organize the discovery. If they need certain software to attend virtual court, or open discovery, they must pay out of pocket. One appellate attorney informed us that they had to purchase a \$3,000 printer/copy machine and pay \$450 for Adobe software to properly e-file appeals. Another attorney recounted:

I had to go get a new computer to run Microsoft Teams. [I] had to go out and spend money I don't have and that is going to take me all year to pay for. For Teams, they expect us to have a second computer in my office for clients who don't have their own. . . There seems to be this idea that we have unlimited funds to keep up with the technological needs for virtual courts.

During the focus groups and interviews, we heard stories of experienced attorneys leaving the panel because “it’s just not worth it.” One dedicated defender expressed that “sometimes I go through periods where I think this is just not worth it. What keeps me in the game is the client who is genuinely appreciative.” Another attorney, who exclusively takes ACP cases and told us “I do this work because I care about the clients,” described how the low rates impact many aspects of their life: they can continue to do this work only because their partner has health care benefits; their oldest child will graduate from college before they are done paying off their own student loans; they cannot take time off if their child is sick; and have no paid vacation times. As another attorney put it:

³⁷ Currently, ACP attorneys do not qualify for Public Service Student Loan Forgiveness (PSLF). PSLF is a loan forgiveness program run by the federal government, in which certain federal loans can be forgiven after 10 years of qualifying public interest work. Since ACP attorneys are considered independent contractors, they are not eligible for this program, unlike their institutional defender counterparts.

You cannot sustain a practice at \$75 per hour. . . You cannot pay your mortgage and the equivalent of a second mortgage on your [student] loans at \$75 per hour. I think that's why younger people are not coming in. . . Quite frankly, you have to have a high caseload to make enough to sustain a practice.

As that attorney pointed out, the inadequate ACP rates are negatively effecting caseloads in two ways: 1) the low rates encourage panel attorneys to accept more cases than they should; and 2) the low rates are causing experienced attorney to leave the panel and deterring new lawyers from joining the panel. The Onondaga ACP, which is now a well-run and reputable program, is a prime example how this dynamic is playing out in a large program. The ACP experienced the workload crunch described in the above section, with many attorneys continuing to carry open cases from 2020. Additionally, so far in 2021, Onondaga County has seen a spike in homicide cases. Between attorneys leaving the panel and the pending cases from 2020 still open, the ACP is struggling to find enough attorneys to accept new case assignments. As of September 2021, about two-thirds of panel were “yellow-lined” – meaning that they are not accepting new cases. An Onondaga ACP attorney told us, “it’s a problem finding people for homicides and violent felonies because experienced attorneys are mostly self yellow-lined.” These struggles are directly related to the low hourly rates.

These challenges are not temporary; ACP rates were an issue prior to the pandemic and discovery reform and the additional issues brought on by these changes will have long lasting effects. Since the rates are set by statute via County Law § 722-b, the ACPs have no recourse to address this issue. While institutional providers can offer retention stipends, or annual salary increases, ACPs cannot on their own accord increase attorney rates. Without a legislative increase in rates, ACPs will continue to struggle with high caseloads and risk being unable to meet their constitutionally mandated duty to provide competent counsel in all criminal and Family Court cases.

Need for Parity in Family Court Funding

Finally, though the settlement is limited to improving the quality of mandated criminal defense, we would be remiss if we did not address the lack of parity in Family Court funding. Every provider in the five counties also provides mandated parental defense in Family Court and many of the attorneys we talked with juggle time-consuming Family Court cases with the expectations that come with significantly better resourced criminal case representation. Further, Family Court representation is not immune to the stressors we detailed above – the compounded workload with rising new cases in 2021 and low ACP rates – and has been deeply affected by the pandemic-related court disruption.

Several chief defenders told us that Family Court workloads significantly increased during the pandemic. This is creating an additional stress as the programs must continue to support now robust criminal practices while also managing an increased number of family defense matters without similar resources or adequate funding to implement caseload standards.³⁸ One chief

³⁸ ILS issued *Caseload Standards for Parents’ Attorneys in New York State Family Court Mandated Representation Cases* on June 4, 2021 which are available at:

defender expressed concern that this is creating a culture of “the haves and have nots.” Family Court attorneys see their criminal counterparts with additional support that has improved the quality of representation. This leaves them frustrated that they do not have access to the same kind of resources. For attorneys who handle both criminal matters and Family Court matters, their ability to adequately represent their criminal clients risks being hampered by their excessive parental legal representation caseloads.

Further, though most criminal court proceedings are back to in-person, we are told most Family Court appearances continue to be virtual. We heard from both attorneys and chief defenders that this is hugely problematic for attorneys who provide representation on both types of cases. As we noted above, attorneys face serious scheduling issues that make providing representation in both types of locations logistically challenging. Attorneys are often scheduled for both in-person and virtual court appearances at the same time. Because of this, attorneys must rely on court Wi-Fi, if it is available, and find a private location within the courthouse to conduct a virtual appearance. Often, this is simply not possible. Even when it is possible, this raises concerns over attorneys’ ability to focus on either court proceeding and calls into question the confidentiality of conversations with their virtual client. Though above we discussed how virtual proceedings seemed to alleviate the issue of being in two places at once, this dilemma highlights that virtual court is merely a superficial solution to this problem.

ACPs are also struggling to recruit and retain attorneys for mandated Family Court representation. This directly effects criminal caseloads since more panel attorneys are being assigned to time consuming mandated parental representation cases. Because of the low rates, few attorneys are joining Family Court panels. Family Court panel attorneys also face a unique challenge – cases often last for years. Panel attorneys are not paid for their time until the case resolves, so, as one attorney noted, “if the case goes on for five years, it is five years [un]til you get paid.” This attorney also described the incredible stress they endure:

Since August, I work from 9 am until 5-6. I’ll take a break over dinner to have dinner with family. Start back at 7-8 and work until 2-3, 5 days a week and weekends. . . We are sacrificing our families. Our health. Our sanity. And not being compensated. It’s not sustainable. . . There are days when I feel like if I stubbed my toe when I walked to the printer, that’s the thing that will put me over the edge.. . [the system] does not understand what it’s like to do all this work and still not have the money to pay for things.

Until mandated parental representation is also adequately resourced, defenders will continue to face challenges that impede their ability to adhere to the principles of the criminal caseload standards.

<https://www.ils.ny.gov/files/Caseload%20Standards%20Parents%20Attorneys%20NYS%20Family%20Court.pdf>.

However, while the state’s FY 2021-2022 budget included \$2.5million in aid to localities for mandated parental representation, this is not enough funding to implement these standards statewide and indeed allows ILS to issue only small awards to approximately 5 counties for the purposes of some caseload relief and quality improvement in child welfare matters.

Conclusion

In this report, we examined whether the fundamental structures implemented to meet caseload standards and provide caseload relief supported *Hurrell-Harring* public defense attorneys during this unprecedented time. As we saw in sections I through III, the providers in the five counties have continued supporting attorneys throughout the instability of the last year and a half. We learned how the Covid-19 crisis, coupled with implementation of the 2019 criminal justice reforms, has impacted defenders' practice. From this information, it is clear that the infusion of state funding and caseload standards implementation are continuing to have a positive effect in the settlement counties. Because the providers previously put in tremendous effort to come into compliance with caseload standards, they had the time, resources, and foundations to adapt to these challenges.

We recognized calculating caseloads based solely on new assignments may create the misimpression that provider workloads are quite light. The reality is, however, that while there may be fewer new case assignments than in pre-pandemic years, current workloads remain challenging, given the combination of unresolved cases (a situation unique to the pandemic) and new case assignments.

We also know that while the settlement-created infrastructure has so far withstood Covid-related and other external challenges, for assigned counsel programs the infrastructure is already cracking and at risk of crumbling if County Law § 722-b is not amended to increase the hourly compensation rates. The failure to fund mandated parental representation also jeopardizes the long-term stability of progress made under settlement implementation.

We acknowledge that the challenges providers faced this past year are likely going to endure, and no one knows when (or if) the system will return to pre-pandemic "normal." Because of this and because, as of the writing of this report, defenders and the whole court system continue to navigate this period of instability, we again make no recommendation to amend the caseload standards on the basis of changed circumstances at this time. Still, ILS will continue to work with the *Hurrell-Harring* providers to evaluate the impact of the settlement initiatives on the quality of representation their clients receive. As such, we will update our evaluation and recommendations and report on our findings next year, pursuant to the settlement agreement.