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# **The Counsel at Arraignment Obligations in the *Hurrell-Harring v. The State of New York* Settlement**

## **2018 Update**

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October 30, 2018

Submitted by the New York State Office of Indigent Legal Services in accord with Section III of the *Hurrell-Harring v. The State of New York* Stipulation and Order of Settlement

## INTRODUCTION

The New York State Office of Indigent Legal Services (ILS) submits this report to update its 2015 *Final Plan to Implement the Counsel at Arraignment Obligations in Hurrell-Harring v. New York State Settlement* (2015 Counsel at Arraignment Plan). This report follows up on our two prior updates to the Settlement’s counsel at arraignment obligations: the November 2016 report entitled *Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State of New York Settlement: 2016 Update* (2016 Update report); and the October 2017 report entitled *Implementing the Hurrell-Harring Settlement: 2017 Update* (2017 Update report). In this report, we focus on the five *Hurrell-Harring* counties’ ongoing progress in ensuring that counsel is present at all arraignments.

As set forth in the 2016 Update report, with one limited exception, the five *Hurrell-Harring* counties met the Settlement deadline of November 2016 for implementing the arraignment programs needed to ensure full arraignment coverage. The one exception involved Suffolk County’s East End weekend arraignment program, which had been implemented in the larger East End justice courts by the November 2016 deadline, but had not been expanded to include the smaller justice courts. As detailed below, as of January 1, 2018, Suffolk County has achieved this Settlement objective, and now there is counsel at weekend arraignments in all East End justice courts.

Since the counties now have programs in place for full arraignment coverage, the goal of this report is to provide an update on how well these programs are working. To do so, we use:

1. the *qualitative* information we have obtained through our court observations and our regular discussions with the *Hurrell-Harring* providers; and
2. the *quantitative* information (data) that providers have sent us over the past year regarding the number of arraignments covered and the number of “missed arraignments” – i.e., arraignments at which a defendant was not represented by counsel.

In conjunction with the *Hurrell-Harring* Counties, over the past year we have been assessing this combination of qualitative and quantitative information to identify any existing problems in their arraignment programs and to develop strategies to address these problems. The problems we identified and the steps the Counties are taking to address them are fully discussed below.

Regarding data, it is important to highlight the steps the *Hurrell-Harring* providers have taken to implement protocols for collecting, maintaining, and reporting counsel at arraignment data. As of January 2018, all the providers except for Suffolk County Legal Aid had protocols in place for doing so. The Suffolk County Legal Aid Society lagged a few months behind because they needed the necessary support staff to fully implement their data collection protocols. By March 1, 2018, the Suffolk County Legal Aid Society had hired the support staff needed for full arraignment data collection and reporting.

Implementation of these data collection and reporting protocols is worth highlighting because, prior to the Settlement, the *Hurrell-Harring* Counties (like most counties across New York) had very little data on arraignment practices in their Counties. Implementing data collection and

reporting protocols is no small feat. It requires attorney time to collect the relevant information, enough staff to enter it into and extract it from case management and data collection systems, and significant changes to those systems to allow for the maintenance and extraction of this data. The fact that we now can obtain full counsel at arraignment data from all the *Hurrell-Harring* counties is in itself a significant Settlement success.

Another Settlement success is the creation and implementation of Centralized Arraignment Programs. In our 2015 Counsel at Arraignment Plan, we noted that there are advantages to centralizing arraignments but statutory barriers to doing so. We recommended changes to the law to allow for centralizing arraignments to facilitate having defense counsel at arraignment. As discussed in the next section, this has happened and three *Hurrell-Harring* counties now have Centralized Arraignment Programs.

### **CENTRALIZED ARRAIGNMENT PROGRAM OVERVIEW**

One significant innovation over the last year was the establishment of Centralized Arraignment Programs in Washington, Onondaga and Ontario counties. The Centralized Arraignment Programs were established pursuant to Judiciary Law § 212(1)(w)<sup>1</sup> and are now an important part of these three counties' programs to provide defense counsel at custodial arraignments. Custodial arraignments occur when defendants are taken into custody by the arresting officer and remain in custody until arraignment. Custodial arraignments can be held at any time of day or night and on any day of the week. Defendants not detained at arrest are issued appearance tickets to be arraigned at a regularly scheduled court session at some future date.

The 2010 decision in *Hurrell-Harring v. The State of New York*<sup>2</sup> elevated the requirement that defendants be represented at arraignment. In *Hurrell-Harring*, the Court of Appeals held that arraignment is a critical stage at which a defendant is constitutionally entitled to assigned counsel. Not long after this decision, ILS made limited funding available to counties via our competitive Counsel at First Appearance grant and non-competitive grant funding to create arraignment programs and bolster existing ones. Twenty-five counties, including four *Hurrell-Harring* counties, took advantage of this competitive funding. And of course, a key component of the *Hurrell-Harring* Settlement is the requirement that counties implement programs to ensure that all defendants eligible for assigned counsel be represented by defense counsel at arraignment.

As counties sought to create programs to provide counsel at arraignment, the problem of providing counsel at off-hour custodial arraignments became more acute. Several counties, including all five *Hurrell-Harring* counties, had to create some form of on-call programs to provide defense counsel at these arraignments. These on-call programs generally used a rotation of attorneys to cover custodial arraignments conducted outside regular court sessions, and often required attorneys to be on call not only during business hours, but also overnight and on weekends and holidays. These programs proved to be disruptive to attorneys' work days and personal lives, and often the burden of handling a caseload plus participating in on-call

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<sup>1</sup> See Chapter 492 of the Laws of 2016

<sup>2</sup> 15 N.Y.3d 8, 20 (2010)

arraignment rotations had negative effects on staff morale. For public defense leaders, administration of the on-call programs was often time consuming and taxing.

This course of events, and the burden of on-call programs for representation at off-hour custodial arraignments, served as an impetus for the June 2016 passage of Judiciary Law § 212(1)(w).

Prior to the enactment of Judiciary Law § 212(1)(w), and as detailed in the ILS 2015 Counsel at Arraignment Plan, there was no statutory authority for a county to implement a Centralized Arraignment Program. By giving New York’s Chief Judge authority to adopt county-specific Centralized Arraignment Programs that have been developed by the judiciary and key stakeholders in the county, Judiciary Law § 212(1)(w) effectively broadens the arraignment jurisdiction of local judges (city, town and village judges) and permits them to conduct arraignments from anywhere in the county in special centralized arraignment parts.

While Centralized Arraignment Programs are intended to “facilitate the availability of public defenders or assigned counsel for defendants in need of legal representation” at arraignment,<sup>3</sup> these programs also have the collateral benefit of minimizing the burdens of off hour custodial arraignments on judges, law enforcement, and prosecutors.

In the next section of this report, we discuss the *Hurrell-Harring* counties’ arraignment programs, including the Centralized Arraignment Programs for Onondaga, Ontario, and Washington counties.

## THE ARRAIGNMENT PROGRAMS IN THE HURRELL-HARRING COUNTIES

### ONONDAGA COUNTY



The Onondaga County Bar Association’s Assigned Counsel Program (ACP) is responsible for operating the programs needed in Onondaga County to ensure the presence of counsel at all arraignments. Up until late December 2017, the ACP operated the following four programs to provide defense counsel at arraignments:

1. the Syracuse City Court arraignment program;
2. the Syracuse Traffic Court arraignment program;

<sup>3</sup> Judiciary Law § 212(1)(w).

3. the town and village court regular session arraignment program; and
4. the town and village court on-call program for custodial arraignments that occur outside of regular court sessions. In late December 2017, implementation of a Centralized Arraignment Program replaced the on-call program for custodial town and village court arraignments.

To gauge how successful these programs are at ensuring the presence of defense counsel, the ACP has worked closely with ILS to develop data collection, maintenance, and reporting protocols for the arraignment programs. Initially, the ACP maintained data using Excel spreadsheets, but this system was cumbersome and inefficient. As noted in the 2017 Update report, in mid-2017, the ACP sought to improve its data collection protocols by enhancing its data collection forms that arraighing attorneys complete and by updating ACPEeper, its electronic case management and voucher system, to maintain and report the data collected via these forms. The process of updating the forms and training attorneys on their use was completed in late September 2017. However, because of significant deficiencies with ACPEeper,<sup>4</sup> it took longer than anticipated to fully implement the requisite upgrades, and the data collection and reporting protocols were not fully in-place until 2018. Thus, the ACP has provided ILS arraignment data for six months: January 1, 2018 through June 30, 2018. This data reveals that during this 6-month period:

- ACP attorneys represented defendants at a total of **9,218 arraignments**.
- The ACP **missed only 8 arraignments**.
- The ACP reported **56 cases in which defendants waived or refused representation** at arraignment.

It is within this context that the specific ACP arraignment programs are discussed below.

## **Onondaga County's Arraignment Programs**

### **1. Syracuse City Court arraignments**

Onondaga County began counsel at arraignment representation in Syracuse City Court (City Court) in 2001 with County funds, paying defense attorneys a per diem to represent in-custody defendants. In 2013, using ILS non-competitive grant funding, the County expanded the program to include counsel for individuals who are arraigned on appearance tickets.<sup>5</sup>

City Court arraignments are conducted seven days per week. City Court has historically relied on pre-arraignment detention, which means that people arrested in the City of Syracuse are either issued an appearance ticket for a subsequent City Court arraignment session, or taken into custody and detained at the County jail until the following morning's arraignment session. The

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<sup>4</sup> The ACP is resolving this problem by transitioning to a new data collection and voucher system developed by IntelLinx, a software management company that works primarily with bar association managed assigned counsel programs. The transition, which is complicated by the need to import the ACP's legacy data from its antiquated system to the new system, should be complete by the end of this year, with full use of IntelLinx to begin on January 1, 2019.

<sup>5</sup> The County has also funded arraignment representation for those defendants arraigned in Syracuse City Community Court, which meets only once a week.

City Court arraignment attorneys start their day at the jail to interview detained defendants prior to the arraignment session. Prior to *Hurrell-Harring* implementation, and as noted in ILS' 2016 Update report, the arraignment attorneys generally did not represent at arraignment individuals they had not interviewed at the jail.

In January 2017, when Kathy Dougherty took over leadership of the ACP, the City Court arraignment program was staffed each day with four attorneys (two for the in-custody defendants and two for the out-of-custody defendants). At that time, in compliance with the *Hurrell-Harring* Settlement, Ms. Dougherty instructed arraignment attorneys that they must represent all defendants at arraignment unless the defendant refused representation, even if the attorneys had not been able to interview the defendant at the jail prior to the arraignment session.<sup>6</sup> As previously stated, simultaneously the ACP also increased the attorneys' data collection obligations, both to comply with the Settlement and to ensure that the attorneys subsequently assigned to the case had more complete information about the case. The arraignment attorneys complied, but complained to the ACP that some arraignment sessions were very busy, making it hard for attorneys to devote the time needed at arraignment for quality representation and the collection of relevant information. In response, and after reviewing data on the average number of City Court arraignments each day, the ACP used ILS distribution funding to: add two additional attorneys to the City Court morning arraignment session on the three busiest days (Wednesdays, Thursdays, and Fridays); and increase the per diem attorneys are paid for each arraignment session from \$150 to \$200. These changes were implemented on January 1, 2018.

According to the data that the ACP sent ILS, for the first six months of 2018, the City Court arraignment program comprised 55.1% of the 9,218 arraignments covered. The missed arraignment data the ACP sent ILS indicates that the ACP's recent changes have been effective in ensuring that all defendants are represented at arraignment. During the first six months of 2018, there were only four missed arraignments in City Court, which is a dramatic reduction in the incidence of missed arraignments that ILS observed and noted in our 2016 Update report. Notably, 48 of the 56 cases in which the defendant refused or waived representation occurred in City Court, with some defendants refusing because they had retained counsel, others refusing because they wanted to represent themselves, and others simply refusing to talk to an ACP attorney.

While the incidences of missed arraignments have decreased dramatically and are now merely sporadic and incidental, there is an ongoing problem with the attorneys obtaining all the arraignment paperwork in advance of their interviews with defendants. This paperwork includes the accusatory instrument, arrest reports, and criminal history report (commonly called the "RAP sheet"). Thus, attorneys often interview defendants prior to arraignment with incomplete information. This problem, which also exists in the Centralized Arraignment Program, is discussed further below in Section B.

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<sup>6</sup> In these instances, arraignment attorneys are encouraged to ask the judge to adjourn the arraignment to later in the arraignment session so that they can interview the defendant. Some judges grant this request, while others do not.

## **2. Syracuse City Traffic Court arraignments**

Syracuse City Traffic Court is held each weekday morning, Monday through Friday. Prior to the Settlement, there was no program for ensuring that ACP attorneys are available to represent defendants arraigned in the Syracuse City Traffic Court arraignment part. The Settlement provides funding to ensure that an attorney is present at each of these sessions to represent individuals who are entitled to assigned counsel and arraigned on traffic matters. This program has been in place since July 2016. For data collection purposes, the ACP includes these arraignments in its City Court arraignment data.

There are some Traffic Court defendants who are detained prior to arraignment. For these arraignments, the Traffic Court arraignment attorney sometimes faces the same issues that the City Court arraignment attorneys confront regarding the lack of access to arraignment paperwork. Additionally, under the current system, the Traffic Court attorney does not interview detained defendants at the jail prior to arraignment, but instead relies on the City Court arraignment attorneys to do so and to then share information with the Traffic Court arraignment attorney. The Traffic Court arraignment attorneys have also complained that they do not have as much time as they would like to interview appearance ticket defendants prior to arraignment. The ACP is going to examine the average number of arraignments each day to determine if it is reasonable to staff the Traffic Court part with another attorney who would also have the responsibility of interviewing detained Traffic Court defendants at the jail prior to arraignment.

## **3. Town and village court arraignments: regular court sessions**

Until 2013, defendants in Onondaga County's town and village courts had no representation at arraignment. In 2013 the County received a competitive ILS Counsel at First Appearance grant. This grant was used by the ACP to pay the cost of attorneys to be present at the regularly scheduled court sessions of the largest town and village courts to represent defendants at arraignment. Under the 2015 *Hurrell-Harring* Counsel at Arraignment Plan, this program was expanded to include the remaining town and village courts. Initially, arraigning attorneys received different per diems depending on whether they were qualified to handle felony cases or misdemeanor cases. In April 2018, the ACP changed this so that now all attorneys receive the same per diem. In the larger courts, there are two attorneys present at arraignment sessions to handle arraignments, one who is felony-qualified and the other who is misdemeanor-qualified. In the smaller courts, there is one attorney who is felony-qualified.

These arraignments account for approximately 28% of the 2,912 arraignments ACP attorneys conducted in the first six months of 2018. Based on discussions with the ACP and ILS's court observations in 2016 and 2017, this program has run smoothly since inception, and it continues to provide defense counsel representation at justice court arraignments.

## **4. Town and village courts: off-hour custodial arraignments**

Until late December 2017, unlike City Court, Onondaga County's town and village courts did not use pre-arraignment detention for custodial arraignments. Thus, defendants arrested in the town and village courts were either issued an appearance ticket or taken into custody and brought

before a magistrate for arraignment. As a result, town and village court custodial arraignments were happening any time of the day or night, 365 days per year.

As described in ILS's 2016 Update report, the ACP implemented a program staffed by ACP attorneys to be on-call to handle these arraignments. The program divided the County into seven geographic zones, and each zone had two attorneys on-call at all times – a primary and a back-up attorney. The attorneys were paid a nominal per diem, but they were assigned to the cases at which they provided arraignment representation.

As indicated in our 2017 Update report, this program successfully ensured that all defendants were represented at arraignment. But over time, the ACP faced growing difficulty recruiting attorneys to participate in the program because of how disruptive it was to their professional and personal lives. Fortunately, as described below, on December 17, 2017, the County implemented its Centralized Arraignment Program to replace this on-call program.

### **The Centralized Arraignment Program Replaces the Town and Village Court On-call Program**

The Onondaga County Centralized Arraignment Program began on December 17, 2017. The Centralized Arraignment Program not only replaces the town and village court on-call program, but it also incorporates Syracuse City Court custodial arraignments. Thus, the program includes all custodial arraignments in Onondaga County.

#### **1. Structure of the Centralized Arraignment Program**

Onondaga County's Centralized Arraignment Program uses two arraignment sessions each day: the Syracuse City Court morning arraignment sessions; and a newly created evening Centralized Arraignment Part (CAP) session that is conducted between 6 p.m. and 10 p.m.

Both the morning City Court session and the evening CAP session operate 7 days per week, including holidays. Both sessions have jurisdiction to arraign any defendant arrested in Onondaga County and taken into custody. By having two sessions each day, the Centralized Arraignment Program ensures that defendants are not detained longer than 12 hours prior to arraignment. All defendants subject to custodial arrest are detained prior to arraignment at the County jail, unless the arrest occurs during the evening CAP session, in which case the defendant is brought directly to CAP arraignment part.<sup>7</sup>

For the newly created CAP session, law enforcement officers are encouraged to use appearance tickets whenever possible. Toward this end, the Onondaga County Centralized Arraignment Plan states as follows: "Arraignments in the Centralized Arraignment Part would only be for felonies, domestic violence charges where an order of protection needs to be issued, or other offenses requiring an immediate arraignment due to the specific nature of the offense, including arraignments on outstanding warrants, where it is anticipated that a commitment will be issued to remand the defendant to the jail. All other matters anticipate appearance tickets and release."

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<sup>7</sup> If the court of original jurisdiction is in session at the same time as the CAP and a defense attorney is present, law enforcement officers may bring the defendant to the court of original jurisdiction for arraignment.



Based on our observations of the CAP evening session, it appears that law enforcement officers are honoring this, as all the arraignments we have observed in the evening CAP session involved felony-level cases or misdemeanor cases in which an Order of Protection or driver license suspension was requested.<sup>8</sup>

Town and village court magistrates have developed a rotational schedule for presiding over the evening CAP sessions. To ensure the availability of defense counsel, the ACP has recruited a cadre of attorneys to represent defendants at the evening CAP session on a rotational basis. There are two attorneys scheduled each evening, and there are attorneys available to be called at the last minute if a third attorney is needed for an unusually busy evening arraignment session.<sup>9</sup> The attorneys are required to interview detained defendants at the jail prior to the commencement of the evening CAP session.

Defendants are told during the CAP arraignments who their assigned attorney is. To facilitate assignments, the ACP also has a pool of “clerks” who are present during the evening CAP session to assist the arraigning judge in identifying the attorneys who are available and qualified to take assignments. The ACP continuously updates this list of attorneys to ensure that the assigned attorneys have the requisite qualifications and experience for each assignment and that taking the new assignments will not result in the attorneys having too many cases. The ACP has hired a CAP Coordinator, Sovannary Sok, who coordinates the attorney and clerk schedules, maintains and updates lists of ACP attorneys for assignments, and identifies and seeks to resolve problems.

## **2. Issues from implementation of the Centralized Arraignment Program**

According to the data that the ACP sent ILS, during the first six months of 2018, there were 1451 CAP session arraignments, which is about 17% of all ACP arraignments. This is an average of 8.5 arraignments per CAP session.

To implement the CAP evening session, the New York State Office of Court Administration (OCA) supplied a computer, scanner, and the necessary software to ensure that the proceedings are recorded and the arraignment documentation is properly scanned and uploaded into the OCA system. Though magistrates were trained on how to use the software, during the first several months of the CAP session, they struggled, and there were often lengthy delays between arraignments. Several magistrates complained that there was no OCA clerk to assist them with these clerical responsibilities. It is ILS’s understanding that OCA has determined that the number of arraignments in the CAP evening session necessitates the presence of an OCA clerk, and thus, as of September 28, 2018, there is an OCA clerk present during the CAP session to assist the magistrates with clerical duties.

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<sup>8</sup> The sole exception to this was the July 31, 2018 arraignment of ten people protesting the ICE office in Syracuse, all of whom were arrested on violation-level offenses and taken into custody until the evening CAP session. All ten were released at arraignment. The ACP has told ILS that this incident was an anomaly, which is corroborated by our CAP session observations.

<sup>9</sup> For example, when the ten protestors were arrested and detained on July 31, 2018, the ACP anticipated an unusually busy CAP session and arranged for a third attorney to provide representation.

Perhaps the most persistent issue with Centralized Arraignment Program implementation, however, has been defense attorney access to the arraignment paperwork. Arraigning attorneys seldom receive all the documentation prior to their interviews with defendants at the jail; typically, they have just the arrest reports. In some instances, they also have difficulty obtaining copies of the paperwork prior to the arraignment itself, and attorneys sometimes must ask the arraigning judge – at the commencement of the arraignment – for the accusatory instrument and RAP sheet.

The ACP has determined that, for most defendants, law enforcement is providing sufficient copies of all the necessary paperwork in advance of the arraignments. But it appears that all copies of the paperwork, including the RAP sheet, are given to the District Attorney's Office instead of being made available to ACP attorneys. Apparently, it is the District Attorney Office's position that their office staff must have a chance to review the accusatory instrument prior to it being given to the defense attorney and the judge. Of course, if this is the case, there is no reason why this review cannot be done in accordance with a schedule that still allows defense counsel to obtain the accusatory instrument prior to their interview with the defendant. Moreover, there is no need for the District Attorney's Office to review the defense copy of the RAP sheet prior to it being given to the defense. Thus, at the very least, the copy of the RAP sheet should be made directly available to defense counsel, and not first to the District Attorney's Office.

The problem is exacerbated by confusion among Assistant District Attorneys (ADAs) as to whether a copy of the RAP sheet can be given to defense counsel at all, even at arraignment. Some ADAs insist they cannot give a copy of the RAP sheet to defense counsel. Some arraigning magistrates agree with this position, despite statutory authority stating that RAP sheets must be made available to the defense at arraignment.<sup>10</sup> Thus, there are times that arraigning defense attorneys are forced to start the CAP session without copies of accusatory instruments for the defendants they are representing and without RAP sheets. There are also times when they receive no copy of the RAP sheet (though the judge allows them to review it during the arraignment).

The ACP is trying to determine how to resolve this issue and has met with the District Attorney's Office about the problem. These meetings, however, have not produced a resolution. In the meantime, the ACP is urging defense attorneys to make a record during each arraignment of the paperwork they were not provided, and to request sufficient time to review the paperwork prior to arraignment and, if need be, to interview the defendant.

ILS suggests that the Onondaga County Centralized Arraignment Plan be amended to include a protocol regarding defense interviews of defendants prior to arraignment and receipt of the arraigning paperwork in advance of arraignment. The written protocol should apply to City Court and CAP session arraignments and should, at the very least, include these components:

- Jail staff will seek to ensure that defense counsel have an opportunity to interview detained defendants at the jail prior to arraignment. If for some reason, such an interview is not possible, judges shall honor defense counsel's request for an interview, even if it means holding the arraignment later in the arraignment session. Steps shall be taken to

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<sup>10</sup> See e.g., Criminal Procedure Law § 160.40(2); § 530.20(2)(b)(ii).

ensure that the confidential attorney interview rooms adjacent to the arraignment parts in the Criminal Court Building and Public Safety Building can be used for such interviews.

- Law enforcement will provide three copies of the RAP sheet for every defendant taken into custody for arraignment. One copy will be provided directly to the defense, one to the District Attorney's Office, and one to the arraigning judge. If for some reasons, a RAP sheet is not provided by law enforcement prior to arraignment, and the District Attorney's Office or Court must produce a RAP sheet, a copy of this shall be provided to defense counsel at arraignment in accordance with New York law. Judges shall ensure that defense counsel has a meaningful opportunity to review it prior to the commencement of the arraignment.
- Defense counsel shall be provided copies of the arrest report, charging instruments, and necessary supporting documents accompanying the arrest reports prior to their interviews with defendants at the jail. If this cannot be done for any reason, the arraigning judge shall ensure that defense counsel has a meaningful opportunity to review this documentation and, if need be, to re-interview the defendant prior to the commencement of the arraignment.

As set forth in the 2010 decision, *Hurrell-Harring v. The State of New York*,<sup>11</sup> all defendants have the right to be represented by defense counsel at arraignment. This right cannot be effectuated if defense counsel lacks the basic information needed to advocate for the defendant. The foregoing protocols are necessary to meaningfully effectuate the right to counsel and to ensure that counsel at arraignment is not merely an attorney standing next to the defendant ill-prepared to effectively advocate for her client.

### **3. County specific benefits of the Centralized Arraignment Program**

Despite these foregoing problems, there have been significant benefits to implementation of the Centralized Arraignment Program in Onondaga County.

Perhaps the most significant benefit is that fewer defendants are being detained. Data from the County jail and from Onondaga's Pretrial Release Program suggests that implementation of the Centralized Arraignment Program may be promoting less reliance on both custodial arraignments and on pretrial detention. Data from the jail shows the number of people being held prior to arraignment and prior to trial has decreased since 2017. In the first five months of 2017 (January 1, 2017 through May 31, 2017), the daily average number of unsentenced detainees (i.e., those detained pretrial) was 568.42; during the same period in 2018, this daily average was down to 531.54. During the first five months of 2017, the daily average of un-arraigned detainees was 12.09; during the same period in 2018, this daily average was down to 8.60. This last figure is remarkable, given that in 2017, only people arrested in the City of Syracuse could be detained pre-arraignment, while in 2018 this potential pool of pre-arraignment detainees was expanded to include people arrested anywhere in the County. The fact that the number of pre-arraignment detainees decreased when it logically should have increased is a strong indication that law

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<sup>11</sup> 15 N.Y.3d 8 (2010).

enforcement is issuing appearance tickets more often rather than detaining people for arraignment.

Relatedly, Nick Bavaria of Cayuga Counseling, who runs the county's Pretrial Release Program, reports an increase in the number of people released to his program in the first 7 months of 2018 (1290) compared to the first seven months of 2017 (1220). This data suggests that arraigining judges are releasing defendants more often prior to trial.

Finally, implementation of the Centralized Arraignment Program has resulted in a net decrease in pre-arraignment detention time. Though the program utilizes pre-arraignment detention for custodial arraignments, because there are two arraignment sessions per day, defendants are not detained prior to arraignment for more than 12 hours. For a significant majority of defendants in Onondaga County – i.e., those arrested in Syracuse – this is a decrease in the pre-arraignment detention time they previously faced, when they could have been held for as long as 24 hours prior to their arraignment. This benefit was illustrated with the July 31, 2018 arrest of the 10 individuals protesting the ICE office in Syracuse. These arrests occurred in the early afternoon, and all 10 individuals were taken into custody and detained pre-arraignment. If the arrest had occurred a year before – prior to implementation of the CAP evening session - these defendants would have been jailed overnight and arraigned the following day. Instead, because of the new CAP session, they were arraigned that evening and released.

#### **4. Efforts to improve arraignment protocols and practices**

The ACP has sought to use implementation of the Centralized Arraignment Program to improve arraignment practices and protocols. For example, in the evening CAP session, the ACP has piloted the use of iPads to collect information electronically. All arraignment-related forms are stored on iPads in PDF-fillable format, and attorneys use these forms to record arraignment-related and assigned counsel eligibility-related information and then email them to the ACP. The ACP then immediately emails these documents to the assigned attorney and enters the data into ACPeep and simultaneously uploads the forms to ACPeep.

Once IntelLinx, the ACP's new case management and electronic voucher system is implemented, these forms will be uploaded automatically. Thus far, the arraigining attorneys have reported positive experiences using the iPads. The assigned attorneys are particularly pleased with this new process, as it means that they obtain documentation related to the arraignment much faster and in electronic format.

The ACP also included in its "Nuts-and-Bolts" training program for attorneys new to the ACP an intensive training component on arraignment practice. Most of the attorneys who completed the program now staff the City Court arraignment session, the CAP arraignment session, or both. Additionally, the ACP has made several arraignment-related Continuing Legal Education (CLE) programs available to all arraignment attorneys. These programs have included, for example, the "Fighting for Fair Bail" Program conducted in Ithaca, New York in June 2018, and more recently, on September 21, 2018, a CLE in Syracuse on arraignment practice. The ACP also uses its weekly *ACPeep Defender* newsletter to urge attorneys to engage in better arraignment practice and to highlight attorneys who successfully fight for the pre-trial release of their clients.

The ACP has also coordinated and mobilized the ACP mentors and panel attorneys to respond to systemic issues. For example, in February 2018, David Gideon, Special Counsel, 5<sup>th</sup> Judicial District Town and Village Courts, emailed all the 5<sup>th</sup> Judicial District magistrates a notice stating that while a magistrate can *sua sponte* dismiss a case because of the issue of facial insufficiency of the accusatory instrument, there is “no ability for the defendant or defense counsel to raise the same [issue] orally at the time of arraignment.” Notably, Mr. Gideon stated that this notice was necessitated by the fact that there have been “many oral motions made for insufficiency during the arraignment process of the Centralized Arraignment Part.” Ms. Fiorenza sent this memo to all the ACP Mentors and Resource Attorneys for their advice, and they uniformly responded that if a local criminal court accusatory instrument is not sufficient as prescribed by law, and if the court is satisfied that on the basis of the available facts or evidence, it would be impossible to file an accusatory instrument which is sufficient, the court must dismiss the case. Or as one mentor succinctly stated: “A jurisdictionally defective accusatory instrument deprives the court of ... well... jurisdiction.” Using this input from the mentors and the case law they sent her, Ms. Fiorenza emailed arrainging attorneys practice tips and advisories and ultimately, a memo detailing with case law support why arrainging judges should entertain motions for insufficiency at arraignment, even when made orally.

Around the same time, Ms. Fiorenza also noted the fact that at arraignments, ADAs are regularly asking the court to set cash bail in misdemeanor cases. This practice is contrary to what District Attorney William Fitzpatrick described as his office’s policy on bail, set forth in a February 1, 2018 editorial in the *Syracuse Post-Standard*. In that editorial, Mr. Fitzpatrick stated that it is his office’s policy to not request cash bail in non-violent misdemeanor cases. Ms. Fiorenza emailed this editorial to arrainging attorneys and advised them to alert the judge and arrainging ADAs of the District Attorney’s policy and ask that the ADAs be held to it. Additionally, Ms. Fiorenza reached out to arrainging attorneys and obtained information about specific cases in which the arrainging ADA had not complied with the District Attorney’s policy. Armed with this information, she requested a meeting with the leadership in the District Attorney’s Office to put them on notice that there is a gap between the practice of arrainging ADAs and the District Attorney’s policy.

ILS has observed that there has been an improvement in arraignment practice. The attorneys who completed the Nuts-and-Bolts program, as well as others, are advocating effectively for pretrial release and appropriately moving to dismiss facially insufficient accusatory instruments. Many attorneys have also appropriately pushed back against the failure to receive the appropriate paperwork prior to arraignment and not having time to talk to their clients prior to arraignment. Still, there are some defense attorneys who are not engaging in full and appropriate advocacy. The ACP’s efforts to improve arraignment practice need to continue, but it is evident they are on the right track.

## ONTARIO COUNTY



The Ontario County Public Defender Office (PD Office) is responsible for ensuring the presence of defense counsel at arraignments in Ontario County. Like other *Hurrell-Harring* counties, Ontario was representing many defendants at arraignment prior to the Settlement. Indeed, by late 2015, when ILS developed its 2015 Counsel at Arraignment Plan, Ontario County was further along than other *Hurrell-Harring* counties in ensuring the presence of counsel at arraignments. The PD Office was regularly covering Geneva and Canandaigua City court arraignments, most appearance ticket arraignments at regular court sessions in the County's seventeen town and village courts, and off-hour custodial arraignments that occurred prior to 10 p.m. on weekdays and weekends.

The 2015 Counsel at Arraignment Plan was designed to fill existing gaps in the PD Office's arraignment coverage, and as a result, now there are programs to ensure that all defendants are represented at arraignment. To gauge the success of these programs, the PD Office has worked with ILS to implement protocols to track the number of arraignments covered as well as any missed arraignments and is sending ILS arraignment data on a quarterly basis. This data reveals that, between July 1, 2017 and June 30, 2018:

- The PD Office represented defendants at a total of **2,283 arraignments**.
- The PD Office **missed only 18 arraignments**.
- The PD Office reported **10 cases in which defendants waived or refused representation at arraignment**.

Significantly for purposes of this report, the County took another important step in arraignment coverage in May 2018, when it implemented a Centralized Arraignment Program. This new program, as well as Ontario County's other arraignment programs, are discussed in more detail below.

### Ontario County's Arraignment Programs

#### 1. Arraignments in regularly scheduled court sessions

Prior to the Settlement, the Ontario PD Office attorneys were representing defendants arraigned during regular court sessions of the Geneva and Canandaigua City Courts as well as most of the

court sessions of the County's 17 justice courts. Attorneys are assigned to specific courts, and those attorneys represent the defendants who are arraigned during those court sessions. At the time the 2015 Counsel at Arraignment Plan was developed, the PD Office could cover criminal court sessions at which attorneys from the District Attorney's Office appear (euphemistically called "DA sessions"), but not non-DA sessions. Yet, occasionally, defendants would appear at these non-DA sessions to be arraigned on an appearance ticket. The 2015 Counsel at Arraignment Plan filled this gap in arraignment representation by providing funding for the PD Office to hire two additional attorneys to cover these non-DA town and village court sessions. As set forth in the 2016 Update report, the first attorney was hired by August 2016, and the PD Office began to fully staff these court sessions. The hiring of a second attorney in February 2017 bolstered the PD Office's ability to do so.

Based on the missed arraignment data provided to ILS, it appears that this program is working well as most of the 18 missed arraignments between July 1, 2017 and June 20, 2018 were custodial arraignments and not appearance ticket arraignments.

## **2. Daytime, evening, and weekend custodial off-hour arraignments**

Even before the Settlement, the PD Office had implemented an on-call program to cover custodial off-hour arraignments that occur in the daytime and evenings. In 2014, using ILS Counsel at First Appearance grant funding, the PD Office hired two attorneys to bolster its ability to cover arraignments at regular court sessions and to initiate the on-call program needed to cover custodial off-hour arraignments. To cover custodial, off-hour arraignments, the PD Office maintained an on-call program with these three components:

1. a rotation of attorneys to be on call for custodial arraignments during business hours (8:30 am to 5:00 p.m. on weekdays);
2. a rotation of attorneys to be on call for custodial evening arraignments (5 p.m. to 10 p.m. on weekdays); and
3. a rotation of attorneys to be on call for arraignments that occur on weekends and holidays, from 8:30 a.m. to 10 p.m.

As previously stated, the PD Office's missed arraignment data shows only 18 missed arraignments during the period of July 1, 2017 through June 30, 2018. Most of these were off-hour custodial arraignments, and they were from various courts with various reasons for the missed arraignments, including: "judge wouldn't wait"; "attorney ill, done by phone"; and "no call from 911 center." These missed arraignments were sporadic and episodic, and overall, the program worked well with no systemic problems. Still, as ILS has repeatedly noted in our counsel at arraignment reports, the need to be on call so often was taking a toll on the morale of PD Office staff attorneys, who found it difficult to have their work interrupted when on call during business hours, and their personal lives disrupted when on call evenings, weekends, and holidays. Indeed, as noted in our 2015 Counsel at Arraignment Plan, Public Defender Leanne Lapp questioned the long-term sustainability of the PD Office's on-call arraignment program. Her concerns about staff morale and burnout, as well as the possible departure of experienced attorneys due to the demands of the on-call program, continued to grow over the life of the on-call program, as ILS noted in both our 2016 Update and the 2017 Update reports.

### **3. Overnight off-hour custodial arraignments**

Fortunately, the PD Office's on-call program for custodial arraignments did not need to include a component for overnight custodial arraignments. This is because, in 2011, at the urging of the Ontario County Sheriff whose deputies were finding it difficult to reach the justices needed to preside over overnight custodial arraignments, Ontario County received the statutory authorization needed to detain defendants in its jail pre-arraignment.<sup>12</sup> The Canandaigua City Court judge was designated as an Acting County Court judge, and as such could preside over the arraignment of any defendant arrested and charged in Ontario County. These two events allowed for the creation of a centralized system for overnight custodial arraignments in which a person arrested anywhere in the County after 10 p.m. would be detained at the jail and arraigned the following morning. Defendants arrested in the Town or City of Geneva were arraigned in Geneva City Court morning sessions; all other defendants were arraigned in Canandaigua City Court morning session by the Acting County Court Judge.

Because the Geneva and Canandaigua City Courts did not have regular court sessions on weekends, the Administrative Judge for the Seventh Judicial District authorized the arraignments of defendants arrested and detained overnight on weekends to be conducted at the Ontario County Jail on weekend mornings. As highlighted earlier this year by William Beck, a former PD Office staff attorney, this arraignment procedure was far from ideal not only because the jail is not a public setting and because these arraignments were not recorded, but also because the arraignments occurred at individual jail cells through the cell bars. Even before Mr. Beck began talking about this problem publicly, Ontario County officials and judges had been meeting to implement a Centralized Arraignment Program which, as discussed below, ends the practice of unrecorded jail cell arraignments.<sup>13</sup>

#### **Ontario County Implements a Centralized Arraignment Program for Custodial Arraignments**

Discussed below is the Ontario County Centralized Arraignment Program, which was implemented on May 1, 2018 and replaces the PD Office's on-call arraignment programs. It is expected that this program will diminish or eliminate the incidence of missed custodial arraignments.

##### **1. Structure of Ontario County's Centralized Arraignment Program**

Because Ontario County has had authorization since 2011 for pre-arraignment detention, the Centralized Arraignment Program utilizes pre-arraignment detention for custodial arraignments. Thus, all defendants arrested in the County and taken into custody are transported to the County

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<sup>12</sup> See Correction Law 500-a(2k).

<sup>13</sup> As also reported by Mr. Beck, there was another problem with off-hour custodial arraignments specific to Geneva City Court. Specifically, one of the Geneva City Court judges would regularly conduct off-hour custodial arraignments in the interview room of the courthouse's holding area rather than the court itself. This interview room has a glass partition, and the defendant sits on one side while the interviewer sits on the other. During arraignments, the defendant stood on one side of a glass partition and the judge and defense counsel stood on the other side. These arraignments were not recorded and not accessible to the public. The County's Centralized Arraignment Program also ends this improper practice.



jail. The Centralized Arraignment Part (CAP) is located at the jail to conduct custodial arraignments. If the CAP is in session when the defendant is transported to the jail, the defendant is immediately arraigned. If the CAP is not in session, the defendant is detained until the next CAP session.

The CAP courtroom is located in the lobby of the jail. The courtroom space is in a roomy alcove to one side of the lobby area. There is an L-shaped desk created by construction of two half walls, one of which is the judge's bench; the other is perpendicular to the bench with a swinging door. The front of the bench extends beyond the half wall to create space for attorneys to use for their files and notes. The judge sits behind the bench; the defendant, defense counsel, and the Assistant District Attorney stand in front of the bench. The judge's bench area has a computer, scanner, copier, microphone and a digital recorder to ensure that the proceedings are recorded. The courtroom area includes chairs for observers from the public.

Attorney interview rooms are off the courtroom space and reached through a door at the far end of the alcove. Defendants are brought down to the interview rooms before arraignment so PD Office staff can meet with them.

There are two CAP sessions each day, every day of the year. The morning session runs from 7:00 a.m. to 9:30 a.m., and an evening session runs from 5:30 p.m. to 8:00 p.m. If there is no defendant in custody to be arraigned at the time the CAP session is to begin, the session will not commence. However, the CAP judge and designated attorneys from the PD Office and District Attorney's Office are available by phone to immediately go to the CAP for an arraignment if any defendant is arrested and transported to the jail during the 2 ½ hour CAP session. Because there is a morning and an evening session, no defendant is detained prior to arraignment for more than 12 hours.

The town and village magistrates and the Geneva and Canandaigua City Court judges preside over the CAP session on a rotating basis. Similarly, PD Office attorneys staff the CAP session on a rotating basis. PD Office staff contact the jail in advance of the CAP session to determine if there are any defendants in custody waiting to be arraigned; if so, PD Office staff obtain the arraignment paperwork and interview these defendants prior to the arraignment. Ms. Lapp has told ILS that the number of arraignments per session have varied from zero to nine, though there are seldom more than three or four.

ILS staff observed the Ontario County CAP session on May 2, June 20, and June 21, 2018 (two evening sessions and one morning session). Our observations confirm that the CAP is conducted in a professional and respectful manner. Defense attorneys are provided the arraignment paperwork in advance of the arraignment, and, in fact, Ms. Lapp told us that her attorneys are getting more complete paperwork than before CAP implementation. Defense attorneys have the time to make comprehensive arguments about bail and release on behalf of their clients and the time needed to speak with their clients in a confidential setting before and after the arraignment.

## 2. County specific benefits of the Centralized Arraignment Program

From our discussions with Ms. Lapp, it appears that the Ontario County's Centralized Arraignment Program has significantly reduced the burdens the prior on-call programs placed on PD Office staff. The Centralized Arraignment Program has also created a single location for all town and village court custodial arraignments and most of the Canandaigua and Geneva City Court custodial arraignments,<sup>14</sup> thereby eliminating the travel that was previously necessary to represent defendants at town and village court off-hour custodial arraignments. Most importantly, the program has also eliminated the disruption to PD Office attorneys' work days and personal lives as well as the burn-out that accompanies this disruption.

It is also a benefit that PD Office attorneys are typically notified of CAP session arraignments well in advance, and thus can meet privately with the client without time restraints. In one case, for example, a defendant was brought to the CAP session on a warrant for failure to appear at a court date. During her pre-arraignment interview, the defendant told Ms. Lapp that she was not informed of the court appearance, and that she even had an email from her assigned counsel panel attorney stating that the next court date had not yet been scheduled. Ms. Lapp called the attorney, and she confirmed that this was true and that, in fact, the attorney had not been notified of the missed court appearance for which the defendant was arrested. Ms. Lapp shared this information with the CAP judge, who released the defendant.

Another added benefit stems from the fact that the CAP session arraignments occur at the County jail, which is located on the same campus as the County Probation Department. According to Ms. Lapp, this proximity has facilitated the immediate release of defendants who are released either to Probation's Pretrial Release Program or its Electronic Home Confinement Program (EHC) at arraignment. Because the Probation Department is so close, defendants released to Pretrial Release or EHC can go home almost immediately after arraignment. Ms. Lapp recounted one example of a defendant who was arraigned during a CAP session held on a Friday evening, and the judge released him to EHC. Ms. Lapp called Probation from the arraignment, and an officer immediately came to the jail to set up the EHC so that the defendant could go home instead of spending the weekend in jail. Ms. Lapp also notes that Probation's EHC program, which was only recently implemented, is being utilized more frequently since implementation of the Centralized Arraignment Program.<sup>15</sup>

Finally, implementation of the Centralized Arraignment Program also means the discontinuation of the problematic arraignment practices described above. Thus, weekend arraignments are now conducted in a courtroom space at the jail instead of at jail cells, they are open to the public, and are fully recorded. Similarly, custodial Geneva arraignments are no longer being conducted, unrecorded, in the Geneva Court holding area.

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<sup>14</sup> Canandaigua City Court and Geneva City Court continue to have court sessions on weekday mornings. If a defendant is arrested in Canandaigua or Geneva early in the morning, instead of being brought to the CAP session for arraignment, the defendant will be brought to either the Canandaigua City Court session (if arrested in Canandaigua) or the Geneva City Court session (if arrested in Geneva) for arraignment.

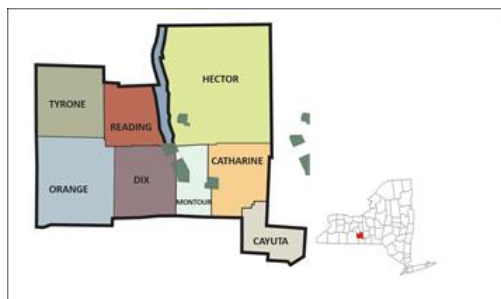
<sup>15</sup> The County did not authorize creation of a Probation -supervised EHC program until mid-2017. The program was authorized to reduce the number of defendants detained prior to trial. See [http://www.fltimes.com/news/supervisors-seek-to-reduce-ontario-county-jail-population/article\\_ff1d5a58-059c-11e7-8f2f-b3e2e928c380.html](http://www.fltimes.com/news/supervisors-seek-to-reduce-ontario-county-jail-population/article_ff1d5a58-059c-11e7-8f2f-b3e2e928c380.html).

## The Ontario PD Office's Arraignment Practice

Since ILS' last update, the PD Office continues to take steps to improve their arraignment representation.

In September 2017, the PD Office initiated a coordinated effort to make oral motions at arraignment for dismissal of the case. The basis for such motions varies; it may be a claim that the accusatory instrument provides inadequate notice of date, time or place, or it may be that the allegations in the accusatory instrument are conclusory or are insufficient to make out every element of the crime charged. Prior to implementation of the Centralized Arraignment Program, judges were reluctant to entertain these motions during arraignments at which the attorneys from the District Attorney's Office were not present. Since implementation of the Centralized Arraignment Program, District Attorney Office attorneys are now present at arraignments, and thus, judges are increasingly willing to entertain such motions. Ms. Lapp tells us that only a few of these motions have been granted; she believes this is because the judges are reluctant to dismiss criminal cases at such an early stage. However, she thinks there is still a benefit to making these motions because doing so alerts the judge to the weaknesses in the prosecution's case. This bolsters the argument that the defendant should be released pending trial.

### SCHUYLER COUNTY



The Schuyler County Public Defender Office (PD Office) is responsible for ensuring the presence of counsel at all arraignments, which it does by staffing regular court sessions and maintaining on-call programs for custodial arraignments. The PD Office initiated its programs to provide arraignment coverage in 2013, when the County received an ILS Counsel at First Appearance competitive grant. This grant was used to transition a part-time staff attorney to full-time to allow the PD Office to cover custodial off-hour arraignments that occur during business hours. In late 2014, the PD Office took advantage of ILS' Upstate Caseload Relief and Quality Improvement grant to hire a part-time attorney to cover custodial off-hour arraignments that occur in the evening (i.e., 5:00 p.m. to 11:30 p.m.). The staff made available from these two grants also ensures that the PD Office can provide arraignment representation during regular criminal court DA sessions.

As discussed below, the 2015 *Hurrell-Harring* Counsel at Arraignment Plan was designed to fill the remaining gaps in arraignment coverage.

To gauge the effectiveness of its arraignment programs, the PD Office has worked with ILS to develop protocols for tracking the number of arraignments at which defense counsel is present and missed arraignments, and has effectively implemented these protocols sending ILS this data each quarter. This data reveals that between July 1, 2017 and June 30, 2018:

- The PD Office represented defendants at a total of **365 arraignments**.
- The PD Office **missed 22 arraignments**.<sup>16</sup>

It is within this context that the Schuyler PD Office's specific arraignment programs are discussed further below.

## **Schuyler County's Arraignment Programs**

### **1. Regularly scheduled court sessions**

As stated above, the PD Office had been covering regularly scheduled court sessions prior to 2015. However, the PD Office only covered DA court sessions. Yet occasionally, defendants were appearing for arraignment on an appearance ticket at one of the non-DA court sessions. The PD Office did not have the staff needed to cover these non-DA court sessions, and estimated that doing so would require an additional full-time and a part-time staff attorney.

As part of the 2015 Counsel at Arraignment Plan, it was agreed that instead of hiring more attorneys for the PD Office, it would be more efficient to cover these arraignments by obtaining agreement from law enforcement to issue appearance tickets for DA court sessions only. As detailed in ILS' 2016 Update report, this was done by late 2015.

A review of the PD Office's missed arraignment data reveals that this strategy is working well, as there have been no missed appearance ticket arraignments.

### **2. Off-hour custodial arraignments during the weekdays**

These arraignments occur when a person is arrested and instead of being issued an appearance ticket, is taken into custody and brought before a magistrate for arraignment. As set forth above, the PD Office used ILS funding to initiate coverage of these arraignments in 2013, and then expanded its capacity to do so in 2015. Full-time PD Office staff attorneys cover the custodial arraignments that occur during regular business hours, and a part-time PD Office staff attorney works evenings to cover the custodial arraignments that occur between 5:00 p.m. and 11:30 p.m. on weekdays.

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<sup>16</sup> The data ILS received from the Schuyler PD Office also shows 33 instances in which defendants refused to be represented by PD Office staff at arraignment. However, we have learned that this data is inaccurate because one attorney was indicating that defendants refused representation when they accepted PD Office representation for the arraignment, but afterward stated they did not want continued PD Office representation, often because they planned to retain counsel. This attorney has been instructed on how to correctly note a "refused representation" in the future.

This coverage appears to be working well. The PD Office's missed arraignment data for July 1, 2017 through June 30, 2018 does not include any missed custodial arraignments during business hours, and only two during the evening hours.<sup>17</sup>

### **3. Weekend and holiday daytime arraignments**

Prior to the Settlement, the PD Office did not have any programs to provide counsel at the arraignments of defendants arrested and taken into custody for arraignment during daytime hours on weekends and holidays. The 2015 Counsel at Arraignment Plan provided for the creation of an on-call program, staffed by PD Office attorneys, for these arraignments. As set forth in the 2016 Update report, the PD Office initiated this on-call program in early March 2016. Using a rotational schedule, PD Office attorneys are on-call duty from 9 a.m. to 9 p.m. each weekend and holiday.

To date, this program appears to be working well. The PD Office's missed arraignment data for July 1, 2017 through June 30, 2018 does not reveal any missed arraignments during the daytime on weekends and holidays.

### **4. Overnight arraignments**

Prior to the Settlement, there was no program for the representation of defendants who are arrested overnight and taken into custody for arraignment. The 2015 Counsel at Arraignment Plan noted that this gap had recently been filled by the County Sheriff, who had obtained the authorization needed for an overnight holding facility so that defendants arrested after 11:30 p.m. on weekdays and 9 p.m. on weekends and holidays can be held for arraignment the following morning, when defense counsel can be present and prepared. However, this program is not without its limitations, the primary one being that this facility can hold only a limited number of defendants. This limitation is evident in the PD Office's missed arraignment data, which shows that 4 of the 22 missed arraignments between July 1, 2017 and June 30, 2018 occurred at 12:23 a.m. on October 23, 2017, when four co-defendants were arrested on gun possession charges, taken into custody, and arraigned. Indeed, 20 of the 22 missed arraignments reported between July 1, 2017 and June 30, 2018 were overnight arraignments.

The PD Office has implemented steps to mitigate the harm of these missed overnight arraignments, including ensuring that there is a court appearance the following day for defendants who are detained post-arraignment. At this court appearance, issues pertaining to release, for example, can be immediately re-visited.

Still, the PD Office has worked closely with ILS to carefully monitor missed arraignment data, and in mid-2017, noticed that over time a significant percentage of missed overnight arraignments occurred during two particular overnights: Saturday and Sunday. Around the same time, the County had agreed to use Settlement caseload relief funding for the PD Office to hire a part-time staff attorney. In December 2017, the County, in consultation with ILS, agreed to reduce the number of missed arraignments by using unspent Settlement counsel at arraignment

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<sup>17</sup> For one of these two, it appears that the defendant may not have been statutorily entitled to assigned counsel, as the top charge was for a non-criminal "log book violation."

funds to supplement the caseload relief funds so that a full-time attorney could be hired. The PD Office now has three full-time attorneys (including the Public Defender, Wes Roe), and one part-time attorney. Mr. Roe determined that this staffing pattern is sufficient for the PD Office to expand its weekend on-call program to include Saturday and Sunday overnight arraignments.

The new attorney joined the PD Office on May 7, 2018. The PD Office implemented its expanded weekend arraignment coverage on June 23, 2018. Now on weekends and holidays there are two on-call shifts, a daytime shift from 9 a.m. to 9 p.m. and an overnight shift from 9 p.m. to 9 a.m. The attorneys rotate on-call duty for these shifts. The expansion of on-call arraignment coverage means that the PD Office now provides around the clock arraignment representation from 9 a.m. Saturday until 11:30 p.m. Monday.

In addition to expanding its on-call program, the PD Office also changed the mechanism for attorney notification of custodial arraignments. Initially, attorneys used a designated cell phone to receive calls from county dispatch notifying them of arraignments. In June 2018, the PD Office switched to Google Voice, an application that allows the on-call attorneys to activate their personal cell phone number to receive the calls from dispatch. The use of Google Voice eliminates the need for attorneys to physically possess and transfer the formerly designated on-call phone.

ILS will continue to work with the PD Office to monitor missed arraignments to gauge how well this expanded on-call program is working.

### **Schuyler PD Office's Efforts to Improve Its Arraignment Practice**

The PD Office has worked to enhance its bail and release advocacy. In June 2018, Mr. Roe and a staff attorney attended a bail advocacy training sponsored by the Schuyler-Tompkins Regional Assigned Counsel Program. The training, titled "Fighting for Fair Bail," addressed statutory forms of bail not often used, such as partially and wholly unsecured bonds. The training also focused on methods of challenging unfavorable bail decisions including subsequent bail applications, bail reviews, habeas corpus actions and writs to the Appellate Division. Mr. Roe is planning to incorporate some of these strategies into the Office's bail practice. To lay the foundation for doing so, one PD Office attorney has created educational materials on bail for the Schuyler County judiciary. These materials include a "cheat sheet" that sets out basic principles of bail and reminds judges that the sole purpose of bail is to ensure defendants' return to court, and not to detain defendants just because a judge thinks they may be dangerous. The cheat sheet also sets out the statutory factors a court may consider when setting bail. The materials also include the requisite forms for partially and wholly unsecured bonds, templates of the necessary supporting documents, a court script, and a copy of the decision *Kunkeli v. Anderson*.<sup>18</sup> The PD Office attorneys will use these materials to educate the local courts, initially targeting the judges who will be most receptive to the use of non-traditional forms of bail as a means of cultivating buy-in from the judiciary as a whole.

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<sup>18</sup> 59 Misc.3d 238 (Sup. Ct. Dutchess Co., 2018)

The PD Office is already increasing its bail advocacy with some success. For example, in July 2018, a local magistrate set a bail amount much higher than the client, charged with a low-level misdemeanor, could afford. The PD Office staff attorney requested a bail review in County Court. The County Court judge reduced the bail to an amount within client's reach, and the client was released.

## SUFFOLK COUNTY



Arraignment coverage in Suffolk County is complicated both by the County's bi-furcated court system and its unusual geography. On the County's West End, a District Court in Central Islip has handled most of the West End criminal cases since 1964. In contrast, the County's East End continues to use a town and village court system, with nine courts that handle criminal cases. Moreover, because the Peconic Bay divides the East End into a North Fork and a South Fork, access to some of these courts can be challenging. Indeed, one of the nine courts, Shelter Island, is accessible only by ferry. This problem is exacerbated in the warmer months when tourists and part-time residents flock to the East End to enjoy its beautiful scenery, wineries, beaches, and historical sites, as well as its popular restaurants and shops.

Despite these barriers, the County has succeeded in implementing the programs needed to provide counsel at arraignment representation for all defendants. But doing so has required the efforts of both the County's providers of mandated representation: the Suffolk County Legal Aid Society (SCLAS) and the Suffolk County Assigned Counsel Program (ACP). The number of arraignments these two providers have covered speaks to the enormity of the task:

- During a three-month period, April 1, 2018 through June 30, 2018, the SCLAS provided representation at 3,079 arraignments, which puts them on-track to provide representation at over 12,000 arraignments over the course of a year.<sup>19</sup> In 6 cases during this period, the defendant waived or refused representation at arraignment.
- During the one year period of July 1, 2017 through June 30, 2018, the ACP provided representation at an additional 9,332 arraignments. In 21 cases during this period, the defendant waived or refused representation.

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<sup>19</sup> Because SCLAS did not have enough support staff in the early stages of Settlement implementation, it took longer for SCLAS to implement the protocols needed to fully track all arraignments. As a result of Caseload Relief implementation, SCLAS now has the data entry staff needed to track arraignments and, working closely with ILS, was able to fully implement its arraignment data collection and reporting protocols beginning the second quarter of 2018 (April 1 through June 30). Thus, for this report, we have only one quarter of complete arraignment data from SCLAS.

It is within this context that the County's arraignment programs are discussed further below.

## **Suffolk County's Arraignment Programs**

### **1. West End: District Court arraignments**

The vast majority of Suffolk County arraignments occur in District Court, which has jurisdiction over nearly all the criminal cases on the County's West End. Located in Central Islip, the District Court has two separate arraignment parts. Defendants who are taken into custody at arrest and detained are arraigned in Part D-11 that day if arrest occurs early in the day; if the arrest is later in the day, they are held overnight and arraigned the next day in D-11. Part D-11 operates seven days a week so no defendant is held for more than 24 hours prior to arraignment. Defendants who are issued appearance tickets at arrest and scheduled for arraignment on a specified future date are arraigned in District Court's Street Arraignment Part (SAP). SAP operates Monday through Friday.

Prior to the Settlement, the SCLAS and the ACP had programs in place for representation of defendants at arraignment in District Court. The SCLAS has traditionally staffed D-11, and several staff attorneys and a supervisor are present to provide arraignment representation. In 2015, with funding from both the ILS Counsel at First Appearance competitive grant and an ILS Distribution grant, the ACP assigned three attorneys to cover D-11 arraignments on a rotating basis for those defendants whom SCLAS cannot represent due to a conflict. With the same funding, the ACP has three attorneys who represent defendants at SAP arraignments every weekday. The foregoing combined arraignment coverage is comprehensive: no defendant arraigned in Suffolk County District Court is without counsel at arraignment, unless the defendant refuses counsel.<sup>20</sup>

The SCLAS also provides counsel at arraignment in the small number of cases in the West End courts that do not participate in the District Court system.<sup>21</sup> Individual staff attorneys are assigned to these courts, and these attorneys handle arraignments which occur at regularly scheduled court sessions and off-hour arraignments which occur during business hours.

### **2. East End: weekday arraignments**

Prior to the Settlement, SCLAS had been providing defense counsel at arraignments that occur in the East End's two largest justice courts: Riverhead and Southampton Town Courts, which account for approximately 70% of East End arraignments. SCLAS assigns attorneys to these courts, and these attorneys represent defendants at arraignments during regular court sessions and off-hour business hour arraignments. In 2013, using funding from ILS's Counsel at First

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<sup>20</sup> The SCLAS data reveals that few defendants refuse representation at arraignment. During the three-month reporting period for which SCLAS sent data to ILS, six defendants refused defense counsel representation at arraignment.

<sup>21</sup> These include West End village courts that handle lower level criminal and vehicle and traffic cases. There are also five smaller outlying District Court courthouses that handle civil cases and local town ordinance violations. The SCLAS attorneys provide representation on the arraignments of people arrested for a local law ordinance violation case for which they could be incarcerated.



Appearance competitive grant, SCLAS expanded this arraignment program to the Southold and East Hampton Town Courts by hiring two full-time attorneys to cover arraignments in these courts conducted during regular court sessions as well as weekday off-hour arraignments. At the time of the Settlement, this left a gap in arraignment coverage of the five remaining East End courts that handle criminal cases: Quogue, West Hampton Beach, Southampton Village, Sag Harbor, and Shelter Island. Thus, the 2015 Counsel at Arraignment Plan provided SCLAS the funding needed to hire two additional attorneys to provide arraignment representation in these additional East End justice courts. As set forth in our 2016 Update report, the SCLAS recruited and hired two attorneys, who began working on October 17, 2016 to ensure that there is full weekday arraignment coverage on the East End.

In mid-2017, to better assess how well its East End weekday arraignment programs were working, the SCLAS began asking defendants who apply for assigned counsel if they were represented at arraignment. They recorded all negative responses, and reported this data to ILS. Over the course of several months, there emerged a pattern of a relatively large number of defendants with cases in Riverhead Town Court who responded negatively. This data is not completely reliable, since it relies on self-reporting and the SCLAS' own data about arraignments reveals that sometimes defendants erroneously responded negatively. Still, by June 2018, there was reason to believe there was a systemic flaw in the East End arraignment program for Riverhead Town Court arraignments.

After looking more carefully at the data and consulting with ILS, the SCLAS determined that there was not always defense counsel at the arraignments of defendants arraigned on an appearance ticket. This is because Riverhead Town Court has regular court sessions on Mondays, Tuesdays, and Wednesdays, which are staffed by SCLAS attorneys. However, Thursdays and Fridays are reserved for "special sessions," such as trials, hearings, and motion arguments. Since court is not always in session, there is not always a SCLAS attorney present in Riverhead Town Court on these days. Yet, occasionally on these "special session" days, a defendant will appear for arraignment on an appearance ticket.

ILS and SCLAS consulted with Suffolk County Administrative Judge Randall Hinrichs about these missed appearance ticket arraignments, and he agreed to discuss this issue with the two Riverhead Town Court justices. These justices agreed to take steps to ensure that defense counsel is present at all arraignments, including appearance ticket arraignments. They have done so by encouraging law enforcement to issue appearance tickets returnable for the Monday, Tuesday, and Wednesday court sessions. In addition, because law enforcement officers still sometimes issue appearance tickets returnable for Thursdays and Fridays, the two justices now notify SCLAS if a defendant appears for an arraignment and there is no SCLAS attorney present. Because the Riverhead Town Court is minutes from the SCLAS office in Riverhead, attorneys can get to court quickly for these arraignments (or as SCLAS tell us, "before the judge has finished putting on his or her robe"). SCLAS reports that thus far, this system has been working well, and now in contrast to before, they are called to Riverhead Town Court to cover appearance ticket arraignments. SCLAS and ILS will continue to monitor the missed arraignment data to further assess how well this system is working and if there is a need to expand it to any other East End justice court.

### **3. East End: weekend and holiday arraignments**

In 2015, when ILS worked with Suffolk County to develop a plan for representation of all defendants at arraignment, one gap in arraignment coverage was East End weekend custodial arraignments, i.e., those arraignments which occur when a defendant is arrested on the weekend and taken into custody for arraignment in one of the nine East End courts. To fill this gap in arraignment coverage, the County recruited and contracted with five private attorneys willing to participate in an on-call rotation to cover these arraignments in the largest East End courts – Riverhead and the Southampton Town and Village courts. Two attorneys were assigned to Riverhead, two were assigned to the Southampton Town Court, and one attorney was assigned to Southampton Village Court. This program started on July 9, 2016. On the May 27, 2017, the County expanded the program by recruiting four more attorneys to provide weekend and holiday arraignment coverage in the next two largest courts: East Hampton and Southold.

While the program worked well in ensuring that there was counsel at the weekend custodial arraignments in these five courts, the County was struggling to administer the program and also worried that there was insufficient private attorney interest in expanding the program to the remaining four courts. It was decided that the program could be expanded and better run if it was administered by either the SCLAS or the ACP. Originally, because of the concern about private attorney interest, the County reached out to the SCLAS to assume responsibility for the program. But in late-September 2017, the ACP submitted a proposal which identified the attorneys willing to participate in the program. With this assurance that there was sufficient attorney interest in the program, the County in consultation with ILS agreed to transfer responsibility for the program to the ACP with the understanding that the program would cover all East End courts by January 1, 2018.

Accordingly, the ACP assumed responsibility for the program on January 1, 2018. Under this program, there are 12 attorneys who provide defense representation on weekends on a rotational basis: two for Riverhead Town Court; two for Southampton Town and Village Courts; two for Southold Town Court; two for East Hampton and Sag Harbor courts; two for Quogue and West Hampton; and one for Shelter Island. Fortunately, the ACP was able to recruit the one criminal defense attorney who lives on Shelter Island to cover weekend arraignments in that court. For the rotations that involve two courts (East Hampton/Sag Harbor and Quogue/West Hampton), the courts are geographically close together, and Daniel Russo, the ACP Administrator, has an agreement from the justices that they will stagger on-call arraignments if need be. Mr. Russo is available to advise the attorneys, give feedback, address any concerns justices have, and provide institutional support as needed. Mr. Russo also ensures that there is a protocol in place (and adhered to) for transferring arraignment paperwork to the SCLAS.

The ACP has also assumed responsibility for collecting and reporting the data related to this program, and working with ILS, the ACP developed data collection forms and a data collection and reporting protocol. During the first two quarters of 2018 (January 1 through June 30, 2018), this program provided defense representation at 264 arraignments.

Over the last nine months, both the ACP and the SCLAS have advised ILS that the program is working well in ensuring that there are defense attorneys at weekend arraignments and that the

arraignments paperwork is sent to the SCLAS first thing Monday morning or on the weekdays following a holiday.

### **Suffolk County Arraignment Practice: Holistic Representation Begins at Arraignment**

Last year, SCLAS implemented in District Court a model of client representation that utilizes a team approach. Teams are comprised of attorneys, a paralegal, an investigator, and a social worker. The team approach is intended to foster a holistic model of client representation by not only enhancing the quality of legal representation, but also coordinating efforts to address the underlying causes and consequences of a client's criminal justice involvement. Many collateral consequences result from an individual's arrest, some of which affect the individual and her ability to participate fully in her own defense. These consequences may impact all aspects of a client's life, including loss of employment and income, loss of child care, loss of housing and interruption of medical or mental health treatment. Additionally, some clients present with medical, psychological and behavioral needs, including mental health, substance abuse, anger management, and poor parenting skills. Identifying the consequences of an arrest and conviction and identifying and addressing client needs as soon as possible fosters client rapport and trust and enhances clients' ability to engage in their defense. Doing so can also place the client in a better legal position and enhance opportunities for a favorable case outcome. For example, if a client's arrest is related to a substance abuse issue, the court and prosecution are more likely to agree to a favorable disposition if the client engages in treatment. A willingness to engage in treatment may also enhance the chances of a client being released pre-trial.

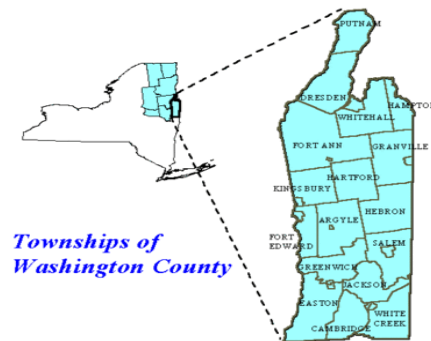
As part of SCLAS' holistic representation, they have implemented systems to connect clients with social workers at or soon after arraignment. There are now five social workers assigned to District Court and one in Riverhead who works with the Riverhead attorneys and East End attorneys. Although there is currently no social worker specifically assigned to the outlying East End courts, follow up referrals can be made to the Riverhead social worker.

All clients are interviewed by an attorney before arraignment. The attorneys have a "Social Work Needs Assessment" document to use to determine if a client could benefit from immediate or future social work services, or both. Attorneys have been trained by social work staff, including lessons on how to detect mental illness. If District Court attorneys meet a client who is stressed, detoxing, or has an odd affect, they will contact the social worker assigned to their team to meet with the client immediately, even if this meeting needs to occur in lock-up. The social worker will then conduct an intake assessment of the client and follow the case as needed, providing ongoing assistance and appropriate referrals.

Social workers can also be enlisted post-arraignment for a referral so that if attorneys see a need after arraignment, they can make a referral for services. After receiving the referral, the team social worker will contact the client, usually within a week and before the next court date. Teams meet on a weekly basis, and attorneys and social workers consult with one another individually to discuss clients and their needs. Social workers make follow-up calls, coordinate with treatment providers, obtain updates, and may meet with the client at subsequent court dates.

Like the SCLAS, the ACP is also promoting a holistic model of representation, and toward that end, hired a social worker in January 2018 to provide services to ACP clients. ACP attorneys are encouraged to involve this social worker in cases as soon as a need or a potential need is identified. Additionally, she actively reaches out to attorneys upon learning of new case assignments to remind them of the assistance she can provide them in meeting client needs. As set forth in the October 2018 report regarding caseload standard implementation, her services are being well-utilized. In addition to using the ACP in-house social worker, ACP attorneys may also retain a social worker to work as part of the defense team.

## WASHINGTON COUNTY



The Washington County Public Defender Office (PD Office) is responsible for ensuring the presence of counsel at all arraignments, which it does by staffing the regular court sessions and providing counsel for all custodial arraignments outside of regular court sessions.

Prior to the Settlement, representation at arraignments was sporadic and inconsistent. This was because with only one full-time attorney, Public Defender Michael Mercure, and seven part-time attorneys, the PD Office did not have the attorney staff needed to cover arraignments. Occasionally, a magistrate would contact the PD Office to see if an attorney was available to represent a defendant at arraignment, but typically this happened only in serious felony cases. In September 2015, the PD Office used ILS Distribution funding to transition three of the part-time attorneys to full-time. It was anticipated that this transition would allow the PD Office to provide defense counsel at arraignments during the regular criminal court DA sessions of the 24 town and village courts, as well as partial coverage of custodial, off-hour arraignments that occur during business hours.

As discussed further below, the 2015 Counsel at Arraignment Plan was designed to fill the remaining gaps in arraignment coverage.

To gauge the effectiveness of its arraignment programs, the PD Office has worked with ILS to develop protocols for tracking the number of arraignments covered and missed arraignments, and has effectively implemented these protocols so that each quarter, the PD Office sends this data to ILS. This data reveals that between July 1, 2017 and June 30, 2018:

- The PD Office's arraignment program resulted in defendants being represented at **2,113 arraignments**.<sup>22</sup>
- The PD Office **missed only 3 arraignments**.
- Defendants **waived or refused representation at arraignment in 12 cases**.

On October 20, 2017, Washington County implemented a Centralized Arraignment Program. This program is now a core component of the County's arraignment coverage. This program, as well as Washington County's other arraignment programs, are discussed in more detail below.

## **Washington County's Arraignment Programs**

### **1. Regularly scheduled court sessions**

As previously stated, starting in September 2015, with the transition of three PD Office attorneys from part-time to full-time, the PD Office started providing arraignment coverage at the regularly scheduled DA sessions in the town and village courts. The PD Office assigns an attorney to each of the justice courts, and that attorney attends court on DA-nights and provides representation at all arraignments that occur during that court session. Generally, attorneys keep the cases at which they provide arraignment representation, unless there is a conflict or the defendant retains counsel.

The missed arraignment data the PD Office sent to ILS indicates that this program is working well, as there were no missed arraignments during any of these court sessions.

### **2. Regularly scheduled non-DA sessions: issuing appearance tickets for DA sessions**

Before the 2015 Counsel at Arraignment Plan, the PD Office was providing only infrequent representation at arraignments conducted during non-DA court sessions. Yet, law enforcement officers were occasionally issuing appearance tickets for these court sessions. As part of the 2015 Counsel at Arraignment Plan, it was agreed that instead of hiring more attorneys for the PD Office, it would be more efficient and less costly to obtain cooperation from the State and local law enforcement agencies to issue appearance tickets only for DA court sessions. The process of obtaining this cooperation is described in the ILS 2016 Update report; by April 2016, this program was in place.

The missed arraignment data the PD Office sent to ILS does not reveal any missed appearance ticket arraignments. Thus, it is evident that this program is working well.

### **3. Custodial off-hour arraignments: business hours**

Custodial off-hour arraignments occur when a person is arrested and taken into custody and brought before a magistrate for arraignment. These arraignments can take place any time of day or night, including during regular business hours when the court is not in session. Prior to the 2015 Counsel at Arraignment Plan, Washington County had no program for representing

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<sup>22</sup> In 13 of these arraignments, the PD Office learned of a conflict prior to arraignment and arranged for an attorney from the ACP program to represent the defendant.

defendants at custodial off-hour arraignments. To cover these arraignments, the 2015 Counsel at Arraignment Plan provided the funds needed to transition one more part-time PD Office attorney to full-time. This transition happened in August 2016.<sup>23</sup> The transition also bolstered the PD Office's capacity to provide arraignment representation at regularly scheduled DA court sessions.

This program worked well until it was replaced by the Centralized Arraignment Program (discussed below), as evidenced by the fact that, per the missed arraignment data the PD Office sent to ILS, none of the missed arraignments were custodial business hour arraignments.

#### **4. Custodial off-hour arraignments: nights, weekends, and holidays**

As described in the 2015 Counsel at Arraignment Plan, prior to the Settlement Washington County had no program in place to provide arraignment representation at custodial arraignments which occur outside business hours – i.e., on nights, weekends or holidays. To fill this gap, the 2015 Counsel at Arraignment Plan funded the creation of an on-call program in which attorneys would rotate to provide on-call arraignment coverage weekday overnights (4:30 p.m. to 8:30 a.m.), as well as during weekends and holidays. The plan included funding for two attorneys to be on call at the same time - a primary on-call attorney and a back-up attorney. While the 2015 Counsel at Arraignment Plan contemplated that PD Office attorneys would provide most of the on-call coverage, it provided funding for private attorneys to also participate in some of the on-call rotations.

The PD Office initiated the on-call program in May 2016 as a pilot with just a primary on-call attorney. Mr. Mercure was also notified of all off-hour arraignments and when necessary, he served as the back-up attorney. To ensure that the on-call attorneys were notified of these custodial off-hour arraignments, Mr. Mercure worked strategically to obtain buy-in from the magistrates who were responsible for this notification. In January 2017, the PD Office added the back-up attorney component of this program.

The missed arraignment data from the PD Office shows that the program worked very well, and from July 1, 2017 to October 20, 2017, when the program was replaced by the Centralized Arraignment Program, there were only three missed custodial off-hour arraignments.

#### **The Centralized Arraignment Program Replaces the On-call Program**

Through implementation of the 2015 Counsel at Arraignment Plan, Washington County succeeded in meeting its obligation to provide defense counsel at the arraignments of all eligible defendants in the County. However, the PD Office's on-call program took a toll on the attorneys. On several occasions, Mr. Mercure expressed the concern that his attorneys would burn out after being on call weekday nights, weekends and holidays so often. Although very committed to

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<sup>23</sup> The PD Office began covering business hour custodial arraignments in May 2016, though the PD Office struggled to do so with its skeletal staff. Mr. Mercure was finally able to add the additional staff needed in August 2016, when one of his part-time attorneys Tom Cioffi, left to take the position of Supervising Attorney for the ACP. Mr. Mercure filled Mr. Cioffi's position with a new full-time attorney.

providing counsel at all arraignments, he was concerned that the on-call program, which often required long trips to and from court or between multiple courts long distances from one another, was not sustainable over the long term. He told us that attorneys were becoming reluctant to sign up for the nights and weekend on-call programs.

Fortunately, in mid-2017, County officials and magistrates began meeting to discuss creating a Centralized Arraignment Program under Judiciary Law § 212 (1)(w). By late-September, 2017, the New York State Office of Court Administration (OCA) had approved the plan submitted by the County (as required under Judiciary Law § 212(w)), and on October 20, 2017, Washington County's Centralized Arraignment Program was implemented, effectively replacing the PD Office on-call program.<sup>24</sup>

### **1. The structure of the Centralized Arraignment Program**

Like Onondaga and Ontario Counties, Washington County's Centralized Arraignment Program utilizes pre-arraignment detention. This is possible because of a 2016 amendment to the Correction Law authorizing Washington County to use its jail for pre-arraignment detention of defendants.<sup>25</sup> To minimize the transportation of defendants to and from court for arraignment, the County decided to locate its Centralized Arraignment Part (CAP) in the lobby of the County jail, which is also close to the Municipal Building where the PD Office is located. The jail lobby is a large open area. There is a metal half wall with a desk behind it which serves as the judge's bench. The bench area has a computer, printer and fax machine. A table adjoins the bench for counsel. The court area has seats for observers. Rooms for attorneys to interview clients are available to the right of the courtroom area through a locked door. This makes it easy for the PD Office attorneys to conduct confidential meetings with defendants prior to arraignment.

Defendants arrested in the County and taken into custody are transported to the County jail for arraignment. If the CAP is in session when the defendant is transported to the jail, the defendant is immediately arraigned. If the CAP is not in session, the defendant is detained until the next CAP session.

The local magistrates rotate as the presiding CAP judge. Attorneys from the District Attorney's Office regularly appear at CAP arraignment. The PD Office has scheduled attorneys on a rotating basis to ensure that every CAP session is covered.

To ensure that no defendant is detained for more than 12 hours, there are two CAP sessions every day of the year, a morning session and an evening session. The morning session runs from 7 a.m. to 9:30 a.m. and the evening session runs from 7 p.m. to 9:30 p.m. Defendants arrested after the CAP session has concluded are held at the jail for arraignment during the next CAP session. If there is no defendant in custody to be arraigned at the time the CAP session is to begin, the session will not commence. However, the CAP judge and designated attorneys from

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<sup>24</sup> The PD Office remains available to cover custodial arraignments during business hours. Since CAP began on October 20, 2017 and through June 30, 2018, the PD Office covered 37 custodial arraignments during business hours. One third of these (10) were in the town and village courts of Fort Edward and the town of Kingsbury, which are close to the PD Office. The other business hour custodial arraignments occurred in County Court.

<sup>25</sup> See Corr. Law 500-a(2)(o).

the PD Office and the District Attorney's Office are available by phone to immediately go to the CAP for an arraignment if defendant is arrested and transported to the jail during the 2 ½ hour CAP session.

Jail staff email the PD Office to notify them whether there are defendants in custody waiting to be arraigned and if there are defendants being transported to the CAP for arraignment. Once notified of a CAP arraignment, PD Office attorneys will go the CAP, obtain the arraignment paperwork, and interview the defendant prior to the arraignment. The number of arraignments at any one CAP session has varied from zero to seven. From October 20, 2017 through June 30, 2018, there were a total of 514 arraignments conducted in the CAP. This is an average of 1.98 arraignments per day.

ILS staff observed the Washington County CAP morning sessions on May 22 and June 14, 2018. Our observations confirmed that the CAP is conducted in a professional and respectful manner. Defense attorneys were provided the arraignment paperwork and had the time and space needed to speak confidentially with their clients before and after the arraignment.

## **2. Issues from implementation of the Centralized Arraignment Program**

There have not been any significant issues associated with implementation of the Centralized Arraignment Program. As expected when a new program is implemented, magistrates have had questions about the scope of their authority while sitting as a judge in the CAP session, such as their authority to sign warrants and the issuance of Orders of Protection. OCA has responded to these magistrate inquiries.

Overall, County officials and the PD Office attorneys have been very pleased with how the program is going.

## **3. Custodial arraignments pre-and-post Centralized Arraignment Program**

In the late summer of 2018, ILS reviewed the data the PD Office has sent to determine if the number of custodial arraignments has changed since the Centralized Arraignment Program was implemented. We compared the daily average of custodial arraignments from January 1, 2017 to October 20, 2017, when the Centralized Arraignment program began, to the daily average of custodial arraignments in the five-and-a-half-month period after implementation of the Centralized Arraignment Program (October 20, 2017 through March 31, 2018). We did so because prior to implementation of the Centralized Arraignment Program, there was a concern that having pre-arraignment detention might incentivize law enforcement officers to rely more on custodial arraignments. The data we examined however, showed no meaningful difference in the number of custodial arraignments prior to and after Centralized Arraignment Program implementation.

We also looked at release rates of defendants at arraignment, comparing the release rate prior to and after implementation of the Centralized Arraignment Program, and found that there was a slight increase in release rates after implementation of the Centralized Arraignment Program. This is a positive trend.



However, our analysis suggested at least one systemic issue of concern in Washington County regarding custodial arraignments. Specifically, both before and after implementation of the Centralized Arraignment Program, there were a relatively high number of custodial arraignments for cases in which the top charge was a misdemeanor or violation. This is an issue that speaks to law enforcement practices – i.e., at arrest, the arresting officer decides whether to detain a person or issue an appearance ticket, and it appears that officers are often detaining people on non-felony cases. ILS has shared this information with County officials and the judiciary in the hopes of sparking a dialogue about law enforcement practices, and whether appearance tickets can and should be used more often.

#### **4. County specific benefits of the Centralized Arraignment Program**

Implementation of the Centralized Arraignment Program has resulted in several concrete benefits. Most significantly, it has eliminated the need for PD Office attorneys to drive long distances with short notice during business hours, overnight, and on weekends and holidays. Additionally, because there are now set times for custodial arraignments, attorneys have less disruption and more control over their work days and personal lives. In these ways, the Centralized Arraignment Program has increased staff morale and avoided attorney burn out.

The missed arraignment data the PD Office has sent to ILS indicates that the program is working well, and there have been no missed Centralized Arraignment Program arraignments. Previously most of Washington County’s missed arraignments were off-hour custodial arraignments; since custodial arraignments are now conducted in the CAP, the number of missed arraignments in Washington County has decreased significantly. Indeed, all three of the missed arraignments disclosed in the PD Office missed arraignment data occurred prior to Centralized Arraignment Program implementation; there have been none since.

#### **The Washington PD Office’s Efforts to Improve Arraignment Practices**

Over the last year, Mr. Mercure has started to address certain arraignment issues by taking a coordinated approach. One concern that arose from a review of the arraignment data was the practice of town and village court magistrates regarding warrants. The PD Office arraignment data revealed a relatively high number of arraignments on warrants. Mr. Mercure was also concerned that many of these warrants were issued in non-felony cases. Magistrates often issue warrants for failure to appear and for failure to pay court-imposed debt (i.e., fines and fees). PD Office attorneys have begun to regularly educate magistrates about when warrants are and are not appropriate. For example, attorneys are advising the magistrates that defendants should not be incarcerated for failure to pay court debt unless there has been a hearing to determine if the non-payment is willful or a function of the defendant’s inability to pay.<sup>26</sup> It is hoped that over time, this effort to advocate for clients will produce a change in the magistrates’ warrant practices.

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<sup>26</sup> This principle is supported by a September 13, 2016 Memorandum from OCA’s Office of Justice Court Supports (OJCS) addressed to “All Town and Village Court Justices,” in which, quoting the case *Bearden v. Georgia*, 461 U.S. 660 (1983), OJCS noted the constitutional prohibition against “punishing someone for his poverty,” and thus urged town and village court magistrates to exercise “great care” in issuing warrants for failure to pay court fines.

## **ADVANTAGES AND DISADVANTAGES OF THE CENTRALIZED ARRAIGNMENT PROGRAMS**

As previously stated, implementation of Centralized Arraignment Programs is the significant change for Washington, Onondaga, and Ontario counties. The programs have been in place for several months: nearly twelve months in Washington County; ten months in Onondaga County; and five months in Ontario County. During this time, we have had the opportunity to make preliminary assessment of advantages and disadvantages of Centralized Arraignment Programs, which is discussed below.

### **Advantages of Centralized Arraignment Programs**

The Centralized Arraignment Programs implemented in the three *Hurrell-Harring* counties have achieved the goal set forth in Judiciary Law § 212(1)(w) to “facilitate the availability of public defenders or assigned counsel for defendants in need of legal representation” at arraignment. In all three counties, providers have reported that the Centralized Arraignment Programs have made it far easier to schedule attorneys and ensure the presence of defense counsel at arraignment. In this regard, the Centralized Arraignment Programs have significantly alleviated the burdens of the on-call programs they replaced. As detailed above, in Onondaga, Ontario, and Washington counties, providers had significant concerns about the sustainability of their on-call programs. In Onondaga County, for example, the ACP had increasing difficulty recruiting panel attorneys to volunteer to be on call. In Ontario and Washington counties, the Public Defender Offices could make participating in the on-call programs a job requirement, but doing so created morale problems and the risk of losing more experienced assistant public defenders who were becoming fatigued from the program. Additionally, in all three counties, there were genuine concerns that the on-call programs jeopardized the safety of attorneys who had to drive long distances, often late at night, on rural roads, and sometimes in inclement weather. Indeed, Mr. Mercure once told ILS that he was constantly in fear that one of his attorneys would get in a car accident after hitting a deer in the road, or even a moose.<sup>27</sup>

Centralized Arraignment Programs also benefit defendants by allowing defense counsel to be better prepared for custodial arraignments. As described above, in Onondaga, Ontario, and Washington counties, defense attorneys typically are notified of the arraignments in advance, and thus can meet with defendants beforehand. In Ontario and Washington counties, defense attorneys also have the arraignment documentation in advance, which allows them to not only be better prepared, but also to identify issues that should be discussed with defendants during their pre-arraignment meetings. (It is worth reiterating here that, as previously stated, in Onondaga County defense attorneys are not always getting the documentation in advance. This is a problem that must be resolved).

There are other benefits to Centralized Arraignment Programs. Having a known time and location for custodial arraignments is a significant advantage for everyone involved in arraignments, including the public defense provider, district attorney, judge, and law

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<sup>27</sup> Part of Washington County is in the Adirondack Park, where there is a real concern of car accidents because of moose in the road. See <http://www.dec.ny.gov/press/114815.html>.

enforcement officer. Everyone knows when and where to be for arraignments, and law enforcement officers no longer need to call around to locate a judge who has jurisdiction of and is willing to conduct the arraignment. It can also facilitate connecting defendants to needed resources.

Having a known time and location is also a significant advantage for people in the public who want to observe arraignments, including the loved ones of defendants. Previously, defendants' loved ones would not know that a custodial arraignment was occurring yet alone the time and location. Now, members of the public know of the set time and location for custodial arraignments; and defendants' loved ones are often notified of the arraignment in advance. This benefit is most acute in Ontario County. As stated earlier, prior to implementation of the Centralized Arraignment Program in Ontario County, members of the public could not observe weekend arraignments without obtaining special clearance to be admitted to the jail. Now, there is public access to these arraignments. According to Ms. Lapp, having a Centralized Arraignment Program has increased the number of times that defendants' loved ones attend arraignments.

The logistical advantages of the Centralized Arraignment Programs are not limited to the model used in the three *Hurrell-Harring* counties which utilize pre-arraignment detention and a single location for arraignments. Another Centralized Arraignment Program model is a "hub-court" model that involves creating a court rotation system amongst some of the justice courts – e.g., three local courts rotate as the location for custodial off-hour arraignments on a weekly schedule. This too would simplify the logistics for defense attorneys and greatly reduce the burden on arraignment attorneys' work schedules and personal lives.

### **Disadvantages of the Centralized Arraignment Programs**

As previously stated, all three *Hurrell-Harring* Centralized Arraignment Programs utilize pre-arraignment detention. The loss of liberty that results from pre-arraignment detention can impose significant hardships on defendants, including loss of employment, a crisis in child care, interruption of mental health or medical treatment, or other consequences. Stakeholders in each county were attentive to this issue and made sure that pre-arraignment detention was limited to twelve hours. Using appearance tickets more often, which negates the need for pre-arraignment detention, diminishes the harm of Centralized Arraignment Programs that use pre-arraignment detention. And as set forth above, it seems the implementation of the Centralized Arraignment Program in Onondaga County has, in fact, increased the use of appearance tickets and reduced the incidence of detention at arraignment.

Other potential disadvantages of Centralized Arraignment Programs are related to the fact that the arraigning judge is not always the judge of jurisdiction. Thus, some Centralized Arraignment Program judges may be reluctant to order release or set affordable bail at arraignment, wanting the defendants to be detained until the court of jurisdiction can make such decisions. Moreover, the judicial rotation system of the Centralized Arraignment Program may amplify the more punitive approaches of some judges regarding release; of course, just the opposite could also happen. ILS is looking carefully at the data available to discern if these are significant issues in the three *Hurrell-Harring* counties with Centralized Arraignment Programs. The data thus far

suggests that, overall, pre-trial detention has not increased since implementation of Centralized Arraignment Programs in the three counties.

One other potential disadvantage is that the availability of pre-arraignment detention might serve as an incentive for law enforcement to use appearance rickets less frequently and take more defendants into custody at arrest. However, as discussed above, in the two counties that have had Centralized Arraignment Programs the longest – Washington and Onondaga counties – this has not happened. In Washington County, there appears to be no change in law enforcement practices regarding the use of appearance tickets, while in Onondaga County, it seems that law enforcement officers are using appearance ticket more often.

On balance, the advantages of Centralized Arraignment Programs far outweigh the disadvantages. The Centralized Arraignment Programs in Onondaga, Ontario and Washington counties are working as intended and have facilitated counsel at arraignment representation.

## CONCLUSION

As more jurisdictions nationally and in New York implement programs for having counsel at everyone's first criminal court appearance, there is an emerging body of research showing that doing so may reduce the number of defendants detained pre-trial.<sup>28</sup> While we do not have access to data about judicial release decisions prior to implementation of the arraignment programs in the five *Hurrell-Harring* counties, the *Hurrell-Harring* providers have told us that, anecdotally at least, it seems that having counsel at arraignment has resulted in more defendants being released, either because judges are more apt to release someone on their own recognizance or under supervision or because judges are setting bail at more reasonable amounts.

As described in the 2016 Update report, despite the sheer amount of work involved in implementing and maintaining their counsel at arraignment programs, the *Hurrell-Harring* public defense providers continue to place a high value on these programs as necessary to fully honor the constitutional rights of their clients. They also continue to tell us that having counsel at arraignment allows for early and more effective case investigation; that it can diminish the imposition of punitive sanctions, such as loss of a license or an order of protection; and that it can foster enhanced trust and rapport building with clients. Indeed, providers report that improved communication runs both ways – by providing case information and explaining next steps to the client at arraignment, the attorney establishes immediate rapport with the client. Because clients appreciate that the attorney provided them with important information, they are more motivated to be full partners in their own defense and to provide complete factual accounts of the case and themselves upfront. Improved communication links directly to another benefit of

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<sup>28</sup> See, for example, a recent blog post by Alissa Pollitz Worden, Kirsten Morgan, Reveka Shteynberg, and ILS' Director of Research, Andrew Davies, about their federally funded research done in three New York counties that had just implemented counsel at first appearance programs at: <http://blogs.lse.ac.uk/usappblog/2018/08/28/guaranteeing-representation-at-first-court-appearances-may-be-better-for-defendants-and-cheaper-for-local-governments/>. Notably, the federal funding available made it possible for the researchers to cull data from court records and case files to determine judicial release decisions prior to implementation of the counsel at first appearance programs in these counties, which was used as the baseline for post-program implementation decisions.

counsel at arraignment – early identification of a client’s immediate and long term non-legal needs, such as child care, housing, or substance abuse treatment. Providers have shared with ILS that assisting clients with these needs further boosts the client’s focused participation in the defense.

Having counsel at arraignment also allows defense attorneys to learn case information early on, which empowers them to engage in more vigorous release and bail advocacy. For example, at an arraignment in Ontario County, the defense attorney learned that a client’s criminal history included multiple out of state felony convictions. The prosecution argued that because of these multiple prior felonies, the court lacked the authority to set bail. The arraignment attorney conducted some quick online research to review the elements of the out of state convictions and determined that because only one is a felony under New York law, the court had jurisdiction to release the defendant. With this information, the attorney successfully argued that the client should not be remanded without bail and persuaded the judge to set a bail in an amount which the defendant could post.

ILS will continue to work with the *Hurrell-Harring* counties not only to continue monitoring their counsel at arraignment programs to identify and resolve potential problems, but also to adopt arraignment practices that improve the quality of representation at arraignments.