Host: Welcome to "Amici," news and insight from the New York Judiciary and Unified Court System. On today's Amici, we visit with William Leahy, director of the New York State Office of Indigent Legal Services

Mr. Leahy, the former chief counsel of the Massachusetts Committee for Public Counsel Services, came to New York in 2011 to set up New York's newly created Office of Indigent Legal Services. ILS was established "to monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law."

Host: How did the office come about – why was it established, why was it needed?

Mr. Leahy: Well, you go back really to 1965 when then the state legislature and then Governor Rockefeller responded to the Gideon decision by creating County Law Article 18B, which put the responsibility for providing counsel on the counties rather than the state. There were high hopes for that program, but in 2001 the principal architects of that program, Michael Whiteman, who was counsel to Governor Rockefeller, and former Assemblyman Richard Bartlett and former Senator Warren Anderson wrote to then-Governor Pataki and said, "Our high hopes have been a failure. There needs to be state control, state funding, state standards, and a uniform quality of representation."

That then led to the Kaye Commission, named for former Chief Judge Judith Kaye, in 2006, which issued its devastating report which identified the dysfunctional non-system that was not providing equal justice in all parts of New York State. It again called for all state-funded, state-run system.

So, that is really the background that led to the creation of the Office of Indigent Legal Services and the Indigent Legal Services Board in 2010, which came into being in 2011.

Host: I think what you are saying, and what the Kaye Commission said, is we have not met the mandate to provide legal services to criminal defendants?

Mr. Leahy: That is exactly right. That is what the Kaye Commission said. And the mandate of the office and the board is to improve the quality of representation in

the State of New York, and we take that to mean providing an acceptable and uniform quality of representation throughout the state.

Host: What your office does and what does it not do? For instance, do you represent clients?

Mr. Leahy: We do not represent clients. We do not provide direct services. Nor do we hire or fire or promote anyone with any of approximately 145 providers of indigent legal services and indigent defense services. What we do do is set standards and dispense state funds in two different ways to the counties.

We have quality improvement distributions that go annually to the counties, and the way that works is that the counties and indigent defense providers consult with one another and they make a proposal to us to improve the quality of services. If that passes muster with us, the state funding is dedicated to that quality improvement purpose.

The second thing we do is we have a series of competitive requests for proposals. We have done this with counsel at first appearance in 25 counties, we have done it with caseload reduction in 47 counties, and right now there is a proposal out for regional "Padilla" resource centers to comply with the mandate of the United States Supreme Court in the Padilla case.

So, those are some of the ways in which we are working with localities to improve the quality of representation.

Host: You mentioned the Padilla case. Can you explain what that decision was and how it factors in to this discussion?

Mr. Leahy: *Padilla v. Kentucky* is a 2010 United States Supreme Court case and it says that a lawyer has a responsibility to advise his or her client of the consequences of a guilty plea or a conviction. Most lawyers just don't have the wherewithal, and many programs don't have the wherewithal, to provide the assistance that is required. So, what we are doing is setting up six regional centers that will provide training, support, hotline advice, so that lawyers will be able to comply with their Padilla obligations.

Host: How is that going? Have it been well received?

Mr. Leahy: Well, I think it has been well received. That particular RFP is out right now. We certainly, expect to receive proposals from each of the six regions.

Host: So, with three years' perspective, where does New York stand in ensuring that the promise of *Gideon v. Wainwright* is fulfilled?

Mr. Leahy: Well, it's interesting. I have been looking through the Kaye Commission report and they have about nine principle deficiencies that are identified in there. Really, we are working on all but one of them. One of them is inadequate discovery in criminal cases. There has not, regrettably, been progress on that front. But with pretty much all the other problems that have been identified, we have either made some steps, or as a result of the *Hurrell-Harring* settlement that I am sure we will be talking about, we are embarking on some steps. The real problem and real obstacle to further progress is our inability so far to secure significant additional amounts of state funding to reduce caseloads among upstate indigent defense providers, to provide real representation for parents in family court, which is an extremely neglected area upstate, and to support assigned counsel programs which in too many counties exist more on paper than they do in reality in terms of guiding and supporting the private lawyers who provide a lot of the representation.

Host: I take it we are talking about a LOT more money?

Mr. Leahy: We are talking about a lot more money. Just on the caseload issue, which is a huge one, our most recent cost estimate of what it take to bring providers in the 57 upstate counties into compliance with even maximum national caseload limits would be over $100 million annually.

Host: Is the long term solution here a state takeover of the indigent defense system?

Mr. Leahy: I think "takeover" is not the word I would want to use, but I think state standards, state direction, a state agency. I try to avoid the word "takeover" because it has a kind of militaristic sound to it and that is not the way the state should be improving the quality of representation. What the state should be doing if a state system comes in is work cooperatively with the counties and indigent defense providers in a way that builds efficiency and cooperation among neighboring counties. Certainly, the state is in a position to be more organized

and more consistent across county lines than a collection of individual counties is able to be.

Host: You held a similar position in Massachusetts. Would Massachusetts be a good model for New York to follow, recognizing the many demographic differences between the two states?

Mr. Leahy: It is basically a good model. It is a single agency. The buck stops in a single place. It is a single agency that governs standards in every case. It provides, I think, the best guarantee, of a uniform quality of representation for clients, which is really what is most important. I think Massachusetts is a good model. Every state is different and New York is infinitely more complex and complicated than Massachusetts, as well as much more populous and much larger. But ultimately, the answer is yes, I do think it is a good model to follow. It has been very successful in Massachusetts.

Host: That brings us to the recently settled a lawsuit, *Hurrell-Harring v. State of New York,* which was viewed as a pivotal case in which the plaintiffs sought major reforms to New York's manner of providing indigent legal services. Can you explain just what the case was about, and what the settlement does?

Mr. Leahy: Yes. I think the first thing to say about the *Hurrell-Harring* settlement is really does break new ground, and it does it in several ways. First of all, in the State of New York it marks the very first time that the state has stood up and acknowledged that it is a state's responsibility to comply with the Gideon mandate. It is a state responsibility, not a county responsibility. In the five counties that are covered in the settlement, the state has done that. I should add that the standards that have been put in place are very, very good, very strong, and we are very happy with them.

The other thing to say about the *Hurrell-Harring* settlement is the state vested responsibility for implementing the settlement with the Indigent Legal Services office and board, in other words with an independent agency with an independent board. That is very appropriate, very promising in terms of the state's future involvement in the development of the state's involvement in New York.

Now, all that said the fact remains that the settlement covers five counties. So, we have in New York three groups of counties. We have the counties of the City

of New York who have achieved reasonable caseloads through state funding as of April 2014. We have five counties that have the promise of having adequate caseloads funded by the state through this settlement as early as the 2016-2017 fiscal year.

And then we have 52 counties that are covered only by the $4 million we have in our budget to provide caseload reduction and support of assigned counsel programs. That is entirely inadequate as compared to the $105 million need. What can't be tolerated is those 52 counties continue to be left out and treated as third-class citizens. That really must be addressed, and it needs to be addressed in real time. It needs to be addressed this year, 2015.

Host: Is that how it has to be done, through the budget, or will it take more litigation?

Mr. Leahy: Well, if it's not done in the budget process there will be more litigation. I am quite sure of that.

The state having stepped up and acknowledging what it acknowledged in the Hurrell-Harring settlement, is on very shaky grounds in terms of trying to defend a lawsuit that a county might file, or an external organization might file.

Host: Access to justice, of course, is a major prerogative of Chief Judge Lippman. What is the long term goal of your office vis-à-vis the chief judge's vision?

Mr. Leahy: Well, access to justice is a very important component of the *Hurrell-Harring* settlement.

There is a wonderful section which requires our office to prepare eligibility standards outside of New York City. This should be a process that opens the doors of the courthouse, with counsel, for people who presently are not receiving counsel. As set out in the settlement document, and in law, if you cannot afford to hire a lawyer one must be appointed for you. We receive frequent reports that that standards is not being met in many of the courts in the State of New York.

That is something that is going to be very important, very consistent with the access to justice program that the Chief Judge is justly recognized for.

Host: It sounds as if *Hurrell-Harring*, even though it directly affects only a small part of the state, is a really significant development.

Mr. Leahy: It is a very significant development. It is going to result in counsel at first appearance for every criminal defendant in those five counties. It is going to result in a fresh look at what an appropriate caseload standard should be for public defenders, which is very important and long overdue. The standards we have been using go back to 1973. We will be taking a fresh look at those. That will be a very important development. The quality improvement provisions in the settlement guaranteeing that a client will be seen by his or her lawyer early on in a private setting, that forensics will be brought into play, that motion practice and investigation will be robust and expected – all of these are real game changers and indications that the settlement is indeed extremely important.

Host: Is it mainly or purely a financial issue? Even if the money is available, are there enough attorneys willing to do this type of work?

Mr. Leahy: When Anthony Lewis wrote "Gideon's Trumpet," he said, and I am paraphrasing, the question is going to be whether the lawyers who provide the services under this new requirement are going to feel supported. Will they have the time to do the job correctly? Will they be paid for the work they do, not paid in a munificent way but paid at an appropriate public sector remuneration? If those questions are answered in the affirmative, then surely there will be enough lawyers.

Now, the other piece is some of these counties don't have enough lawyers, they don't have enough experts, they don't enough investigators, they don't have enough sentencing support.

We have a proposal for state funded regional support centers, so that every judicial district outside of New York City would have state-funded support under the direction of the Indigent Legal Service office here in Albany. There would be a training expert. There would be a forensic expert. There would be an appellate expert. There would be a criminal defense expert. There would be a parent representation expert.

All of them would be available to work with the local providers, and not only be a resource for them but to also encourage inter-county cooperation. We have several regional programs going on already in upstate and Western New York – an

appellate program, an Ulster and Dutchess conflict program where each county provides representation for the other county's conflict cases. So, there are a lot of possibilities to break down some of the deficiencies, particularly in upstate New York, that have prevented them from doing the job for clients as it should be done.

Host: How far do you think we are in attaining the new paradigm you describe?

Mr. Leahy: Well, we've got a lot of work ahead of us. The funding piece is very daunting. My belief, grounded in my experience in Massachusetts, is that you set up the standards -- the appellate standards, the trial standards, the assigned counsel program standards – in an appropriate way and you set up the programs as we have been doing, even if they are initial programs, and build the foundation of the mansion you are building. Then, you just work constantly for the funding to make that vision a reality.

Host: The board recently approved a $950,000 increase in its 2015-16 state budget to pay for new compliance duties resulting from the proposed settlement of. What exactly will be done with those funds?

Mr. Leahy: Before I answer your question, I should add that we have also sought $800,000 additional dollars for additional staffing to do our ongoing work to improve the quality of representation state wide. But with specific reference to *Hurrell-Harring*, there is important work to be done. Each county is totally different and dispersed.

So, the first thing we want to do is we want to hire an eight-person staff. We envision an attorney staff of five, headed by a chief implementation attorney. Then we envision three paralegals, at least one of whom and preferably two of whom would have research expertise because there is a lot of data gathering and a lot of research needs built into the settlement. So, that is our hope. We feel that each county deserves the attention of a person who is going to work with them during what is going to be a very intensive one to two year process to get each county on the right footing and making sure we are collecting the data that is going to be necessary to show that the state's investment in this settlement is well spent and well directed.

Host: It almost seems as if the five counties included in the settlement are a test lab or microcosm for how this can be approached statewide.

Mr. Leahy: It could be, but I don't want the attention focused on them to cause anyone to overlook the fact that testing is going on all over the state. I mean, we just announced our fifth annual funding distribution. Almost every county is experimenting, pushing itself, investing in the provision of counsel in a way that it hadn't before, whether it is an investment in funding or new ideas because the funding really hasn't grown much yet. So, it is a very exciting time. It is not the way, I suppose, that the authors of Judge Kaye's commission's report wanted. It hasn't operated that way and in politics and in life things sometimes don't. But there are a lot of seeds in the ground and we hope that many of them are going to flower.

Host: Any closing thoughts? Anything you would like to add?

Mr. Leahy: I think I tried to slip in most of the things I wanted to say that weren't necessarily in the questions! I just think the *Hurrell-Harring* settlement has the chance to not only put New York on the right path for New York, but it has a real chance to put New York in the forefront of the national discussion on how we are complying with the Gideon decision.

Host: Thank you, Mr. Leahy. And thank you for listening to this edition of "Amici." If you have a suggestion for a topic on Amici, call John Caher at 518-453-8669 or send him a note at jcaher@nycourts.gov