



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #7

REQUESTED ACTION: Approval of the report and recommendations of the Criminal Justice Section and the Committee on Mandated Representation.

Attached is a report from the Criminal Justice Section and the Committee on Mandated Representation recommending an increase in the rates paid to private attorneys assigned to represent litigants pursuant to Article 18-B of the County Law. As noted in the report, these rates were last adjusted effective January 1, 2004. Since that time, the Office of Indigent Legal Services (ILS) was established to monitor, study, and make efforts to improve services provided pursuant to Article 18-B, and New York State has provided in the state budget funding to reimburse counties and cities for improvements to the provision of indigent legal services. However, ILS is not authorized to alter assigned counsel rates.

The report then examines increases in compensation for the state judiciary and lawyers accepting assignments in federal courts. With respect to the latter, the report notes that the Judicial Conference is authorized to increase rates, and assigned counsel rates have been regularly adjusted since 2002.

In its *Standards for Providing Mandated Representation*, originally adopted in 2005 and last amended in 2015, NYSBA has recognized the necessity of adequate compensation for the representation of indigent clients in order to ensure the continued participation of competent attorneys accepting assignments.

Accordingly, the report recommends that County Law §722-b be amended to increase assigned counsel rates and to provide annual review and adjustment as needed of these rates. Such increases should not result in an unfunded mandate to counties and should be effected at state expense.

This report was posted for comment in May 2018. The Chief Defenders Association of New York has submitted a letter supporting the report but recommending that there be an immediate increase in rates to represent 90% of the currently effective rate under the Federal Criminal Justice Act. The Committee on Children and the Law has submitted a letter supporting the proposal and recommending that, in addition, Attorneys for the Child and assigned counsel appearing in Family Court be included in such a rate increase.

The report will be presented at the June 16 meeting by Norman P. Effman, past chair of the Committee on Mandated Representation.

**NEW YORK STATE ABAR ASSOCIATION
CRIMINAL JUSTICE SECTION
THE NEED TO INCREASE ASSIGNED COUNSEL RATES IN NEW YORK**

In 2000, the Honorable Juanita Bing Newton stated:

If we are to ensure New York's longstanding commitment to the principles of Gideon and access to justice, unquestionably the compensation rate for assigned counsel must be increased." see NYSBA Criminal Justice Journal/Summer 2000/Volume 8/Number 1/Page 15.

The Judge's words are again relevant, as fees implemented in 2004 have stagnated for fourteen years.

New York State, in addition to county public defenders and conflict defender offices, as well as contractual relationships by counties with legal aid societies, relies on assigned counsel programs as an indispensable part of its justice system. These programs provide the appointment of private counsel by the Court to represent litigants in thousands of cases each year in the criminal and family courts of New York, as well as in parole matters where counsel is mandated.

Article 18-B of the County Law establishes a compensation paid to attorneys for assigned counsel work. The original statute for assigned counsel fees was \$15 per hour for work performed in court and \$10 per hour for work performed out of court. In 1977, it was amended to \$25 per hour for work performed in court and \$15 for work performed out of court. In 1986, the Legislature amended the County Law for New York's assigned counsel fees to \$40 per hour for work performed in court and \$25 per hour for work performed out of court. This covered misdemeanors and felonies, although there were higher caps for felony cases.

In January of 2000, the Unified Court System published a report authored by then Chief Administrative Judge Jonathan Lippman and Deputy Chief Administrative Judge Juanita Bing Newton. That report, *Assigned Counsel in New York: A Growing Crisis*, noted that fewer and fewer attorneys in New York were willing to accept these assignments under the \$25 and \$40 rate, leading to a crisis in the Assigned Counsel Program. The reason for the crisis was clear: the compensation paid to attorneys for assigned counsel work was woefully inadequate. The report recommended the elimination of the differential rates for in court and out of court work. It further recommended the establishment of separate rules for felony and non-felony work and an increase of the rate levels. The report by Judges Lippman and Bing Newton also recommended the establishment of a commission to review assigned counsel rates. It further concluded that state government should share the cost of assigned counsel compensation, which imposes considerable fiscal burden on local governments.

Effective January 1, 2004, assigned counsel rates were increased to \$75 per hour in and out of court for all matters governed by County Law §722 except for fees of \$60 per hour in and out of court for representation of a person who was initially charged with a misdemeanor or lesser offense and no felony.

The \$75 per hour rate included:

- a. felonies,
- b. violations of probation (felony convictions),
- c. appeals,
- d. SORA hearings,
- e. parole representation,
- f. family court representation,
- g. post judgment motions, Writs of Habeas Corpus, and CPL Article 440 motions if counsel is assigned.

Statutory maximums were established at \$2,400 when the \$60 rate applied and \$4,400 when the \$75 rate applied.

Compensation in excess of these amounts was permitted under extraordinary circumstances.

THE EXTENSION OF THE HURRELL-HARRING SETTLEMENT REFORMS FOR INDIGENT DEFENSE

Quality criminal defense of individuals who cannot otherwise afford counsel has been called of paramount importance in complying with the United States Supreme Court decision in Gideon v. Wainwright. In 2014, the State of New York negotiated a settlement in the Hurrell-Harring case, described further infra, based upon the alleged failure to provide the necessary level of indigent defense services in the counties which were sued. To ensure the fair and equal representation for all New Yorkers, the fiscal year 2018 budget included necessary resources for the state to fund 100%, of the costs, implemented incrementally, needed to extend the reforms provided in the Hurrell-Harring settlement to all 62 counties in New York.

RECENT REFORMS AND STATE AID IN PROVIDING MANDATED REPRESENTATION IN CRIMINAL CASES TO COUNTIES

A. NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES

Executive Law Article 30, §832(1), which became law in 2010, establishes the Office of Indigent Legal Services to “monitor, study and make efforts to improve the quality of services provided pursuant to Article 18-B of the County Law.”

ILS established its statewide Implementation Unit. This unit was to reach out to public defense leaders and local officials in every county and New York City to advance the interim and long range planning for counsel at arraignment, caseload relief, and initiatives to improve the quality of indigent defense. The Executive Law provided that each county and the City of New York shall, in consultation with the office, undertake good faith efforts to implement the plans for each of the reforms. See Executive Law §832(4)(a)(iii), (4)(b)(iii), and (4)(c)(iv).

ILS is therefore charged with the statutory responsibility of using the monies available through the Hurrell-Harring expansion to all 62 counties to improve the quality of indigent defense.

B. THE HISTORY AND THE CREATION OF ILS IN NEW YORK (REFORM AFTER DECADES OF FAILURE)

In 2018, William Leahy, the Executive Director of the Indigent Legal Service Office (ILS) published an article in the Indiana Law Review which reviewed the right to counsel in New York and the reform achieved after decades of failure (Indiana Law Review, Vol. 51, No. 1 [2018] - 3/20/18 pg. 145-165). That article documents the failures of New York in providing competent mandated representation to the period of reform presently underway. Mr. Leahy notes that from its inception in 1965 when County Law Article 18-B was signed into law, the right to counsel in New York was mired in dysfunction. The Law Review article notes that in May 2003, the State Legislature increased assigned counsel rates, established a revenue screen for limited state funding of indigent defense, and created the Indigent Legal Service Fund from which to distribute those funds to the counties and New York City. Mr. Leahy also notes that in 2004, this association established a special committee to Ensure Quality of Mandated Representation, now the Committee on Mandated Representation, which created comprehensive standards for institutional and assigned counsel providers. Reform of indigent defense in New York State came about in part as a result of the Chief Judge Kaye's Commission on the Future of Indigent Defense Services report issued on June 18, 2006. It concluded that New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused.

C. HURRELL-HARRING SETTLEMENT

As noted above, in October 2014, a settlement in the Hurrell-Harring lawsuit mandated the state to remedy the four major areas of deficiency in the counties which were parties to that lawsuit.

That settlement acknowledged the state's responsibility to comply with Gideon. Mr. Leahy also notes in his law review article that the state vested the duty to implement the reforms of the settlement in ILS, which had the expertise and independence necessary to do the job.

On January 17, 2017, the Governor announced the extension of the Hurrell-Harring reforms throughout the state at the state's expense.

Approximately one year ago, again as reported by ILS Executive Director Leahy, the April 10, 2017 state budget contained statutory amendments which amended the County Law to specify that the cost of implementing the reform plans "shall be reimbursed by the state to the county or city providing such services." The Executive Law amendments included one which gave the ILS the authority to craft and implement plans for statewide implementation of the improvements mandated by the settlement. Nothing, however, authorized ILS to alter the legislatively imposed assigned counsel rates.

INCREASES IN COMPENSATION FOR THE STATE JUDICIARY AND FOR ATTORNEYS ACCEPTING ASSIGNMENTS IN FEDERAL COURT

a. Judicial Salary Increases

Beginning in June 2015, the New York State Commission on Legislative, Judicial, & Executive Compensation was given the task of evaluating and making recommendations with respect to compensation for New York State judges as well as other state officials. That commission, in the present fiscal year, approved a set of recommendations that would boost salaries for Supreme Court judges from what was \$174,000 a year to nearly \$193,000 a year beginning on April 1st.

The increase in salaries for Superior Court judges reflects the need for judicial compensation that attracts and retains qualified people. Similar efforts at the federal level have led to salaries of federal district judges of approximately \$208,000 per year.

Assigned state judges went without raises from 1999 until 2012 when their salaries were increased from \$136,700 to the previous amount of \$174,000.

b. Comparison to Federal Compensation and Expenses of Appointed Counsel

In non-capital federal cases, hourly rates to attorneys appointed in criminal matters have been adjusted regularly since 2002. The maximum hourly rates in federal cases are as follows:

May 1, 2002 through December 31, 2005	\$90.00
January 1, 2006 through May 19, 2007	\$92.00
May 20, 2007 through December 31, 2007	\$94.00
January 1, 2008 through March 10, 2009	\$100.00
March 11, 2009 through December 31, 2009	\$110.00
January 1, 2010 through August 31, 2013	\$125.00
September 1, 2013 through February 28, 2014	\$110.00
March 1, 2014 through December 31, 2014	\$126.00
January 1, 2015 through December 31, 2015	\$127.00
January 1, 2016 through May 4, 2017	\$129.00
May 5, 2017 through March 22, 2018	\$132.00
March 23, 2018 to present	\$140.00

(Chapter 2, §230: Compensation and Expenses of Appointed Counsel) (Guide to Judiciary Policy Volume 7: Part A)

In 1964 the Criminal Justice Act was enacted by Congress to establish a comprehensive system for appointing and compensating lawyers to represent defendants financially unable to retain counsel in federal criminal proceedings. The Criminal Justice Act was amended in 1970 to authorize districts to establish federal public defender organizations as an institutional provider for indigent defendants.

As noted in the chart above, private “panel” attorneys are presently paid an hourly rate of \$140 in non-capital cases. These rates include both attorney compensation and office overhead.

The federal system also provides case maximums for compensation presently set at \$10,900 for felonies, \$3,100 for misdemeanors and \$7,800 for appeals. As in New York, maximums may be exceeded when higher amounts are certified by the court.

Private attorneys are appointed to provide representation, and their compensation is made in accordance with Criminal Justice Act (CJA), 18 USC §3006A, and the Guide to Judiciary Policy. See: 18 USC §4109(a)(1).

Federal legislation provides a procedure for an annual review of appropriate federal rates. The Guide to Judicial Policy, Volume 7A, Ch 2; §23.20 provides as follows:

“§230.20 Annual Increase in Hourly Rate Maximums

Under 18 U.S.C. §3006A(d)(1), the Judicial Conference is authorized to increase annually all hourly rate maximums by an amount not to exceed the federal pay comparability raises given to federal employees. Hourly rate maximums will be adjusted automatically each year according to any federal pay comparability adjustments, contingent upon the availability of sufficient funds. The new rates will apply with respect to services performed on or after the effective date.”

NEW YORK MUST PROPERLY ADJUST ASSIGNED COUNSEL RATES TO ENSURE ADEQUATE COMPENSATION FOR ASSIGNED COUNSEL

Providing adequate compensation to the private Bar who participate in the Assigned Counsel Program is consistent with the New York State Bar Association’s standards for providing mandated representation which points out the advantages of assigned counsel:

“Although the County Law currently allows each county to devise its own configuration for a provider system, in a great majority of cases, a proper representation plan will establish a mixed representation system that integrates the use of institutional providers and assigned counsel. Such mixed representation systems can combine the advantages of institutional providers with the advantages of assigned counsel plans to engage a broad segment of the bar in achieving the objectives of the plan.” (See introduction New York State Bar Association Standards for Providing Mandated Representation approved as revised by the New York State Bar Association House of Delegates March 28, 2015).

The NYSBA standards recognize that adequate compensation is necessary to ensure the continued participation of quality, competent attorneys, willing to accept criminal assignments in our courts. See standards K-3 through K-5.

Justice Journal in September of 2000, argued that assigned counsel rates which were not in line with current economic realities create dire implications for access to justice in New York. The Judge was commenting on a mass exodus of attorneys from assigned counsel panels with fewer and fewer attorneys willing to take these assignments throughout the state. In that article, the Court documented the exodus of lawyers from the panels because of low assignment rates which resulted in an acute shortage of appointed counsel severely undermining the processing of criminal and family court cases. See Ensuring Equal Justice for all Demands an Increase in Assigned Counsel Rates; NYSBA Criminal Justice Journal/Summer 2000/Vol. 8/No. 1 page 17.

The federal system relies on a formula which automatically adjusts the assigned counsel rates based upon comparability to any federal pay adjustments. In New York, we have established a periodic review of judicial salaries to ensure appropriate compensation for our judges placing them almost on parity with the federal judicial system.

Legislation which would authorize an annual adjustment each year according to any judicial salary comparability would eliminate the need for any commission or other process for annual review of appropriate compensation.

New York has developed a similar formula with respect to the elected district attorneys' salaries. Judiciary Law §183-a provides that the district attorney of each county having a population of more than 500,000, exclusive of the boroughs of New York, shall receive an annual salary equivalent to that of a justice of the State Supreme Court for such additional compensation as the legislative body of such county may provide by local law. The legislation also provides a salary equal to that of a county judge in counties having a population of more than 100,000 and less than 500,000.

In order to avoid increase in salaries to district attorneys which would become an unfunded mandate upon the county, New York County Law §700(11)(b) provides in addition to other state aids provided additional state aid reflecting a percentage of the increase in salaries between January 1, 1999 would become state responsibility. The percentage of the difference ranges from 36% to 41% is dependent upon the county.

INCREASED COMPENSATION FOR ASSIGNED COUNSEL IN NEW YORK, THE MISSING LINK

Institutional providers of mandated services have seen an increase in state aid through the Indigent Defense Fund and the distributions and grants provided by ILS. Judicial salaries and district attorney salaries have been increased significantly over the past several years. Assigned counsel rates have remained stagnant for 14 years.

Article 18-B of the County Law §722-b established the present hourly rates for misdemeanors, felonies, and appellate representation. That statute must be amended to reflect appropriate compensation consistent with the increases that have occurred for the judiciary, elected district attorneys and compensation for assigned counsel in federal criminal cases. It is recommended

that annual review of these rates based on comparables, such as judicial and district attorney salaries, should be adopted to avoid the difficulties of regular legislative action to provide for any increase.

RESOLUTION

1. Legislation should be enacted to increase assigned counsel rates.
2. The rates of compensation should be comparable to the percentage increase of judicial and elected district attorney salaries.
3. The legislation should provide for an annual review and adjustment as needed of assigned counsel rates based on a formula using comparable compensation rates similar to the formula utilized by the Federal Criminal Justice Act.
4. The increase in rates should not result in an unfunded mandate to the counties and should be a state expense.

New York State Bar Association

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COMMITTEE ON CHILDREN AND THE LAW

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To: NYSBA Executive Committee
From: David Lansner, Chair
Committee on Children and the Law
Date: May 22, 2018
Re: Report regarding increasing the 18-B Rates

On May 16, 2018, the Committee on Children and the Law voted unanimously to support the Report by the Criminal Justice Section and the Committee on Mandated Representation that recommends raising the hourly attorney rate of pay pursuant to County Law Article 18-b. The Committee also voted to request that Attorneys for the Child and assigned counsel appearing in Family Court be included in such a rate increase.



CHIEF DEFENDERS ASSOCIATION OF NEW YORK

May 29, 2018

Kathleen R. Mulligan Baxter
General Counsel
New York State Bar Association
One Elk Street
Albany, New York 142207

Re: Criminal Law Section Resolution on Assigned Counsel Rate Increase

Dear Ms. Baxter:

As President of the Chief Defender's Association of New York (CDANY) I write to strongly support the resolution to be presented by the Criminal Justice Section to the House of Delegates on June 14, 2018 to increase and regularly review statutorily set assigned counsel rates in New York

CDANY is a membership organization of Public Defenders, Conflict Defenders, Executive Directors of non-profit Legal Aid Societies and Administrators of Assigned Counsel Programs throughout New York State. The members of CDANY are responsible for running the offices and programs that defend the vast majority of people facing arrest and child welfare allegations in New York State. Collectively, our members manage indigent defense programs that represented well over five hundred thousand individuals in 2017.

The report accompanying the resolution provides a thorough description of the growing concern with the inadequacy of assigned counsel rates and CDANY strongly supports the recommendations contained in the report. In particular, it is essential that Assigned Counsel Plan Attorneys (also referred to as 18b attorneys), be paid an hourly rate that is consistent with their exceedingly important mission of providing constitutionally mandated representation to people facing dire consequences.

We wholeheartedly adopt the report issued by the NYSBA Criminal Justice Section. We agree that adequate compensation is necessary to ensure the continued participation of good quality and competent attorneys in this vital function. The current rates, unchanged for over fourteen years, are not in line with current economic realities and have dire implications for access to justice in New York. We already see an exodus of attorneys from Assigned Counsel

Panels with fewer and fewer attorneys willing to take these assignments. We feel the passage of these resolutions will prevent this situation from becoming a crisis where some clients will have to wait weeks or months for an attorney to be assigned to them.

We do wish to address one issue regarding resolution number two.

Our concern is that while the report recommends increases that are automatic, it does not set a baseline hourly rate for an immediate, much needed increase. We believe the rates must be increased and then subject to automatic increases in the future.

We suggest that specific language be added to resolution number two so that it now would read:

“The rate of compensation should be set at 90% of the currently effective rate under the Federal Criminal Justice Act.”

(As of right now, the federal CJA rate is \$140.00 per hour. Ninety percent would be \$126 per hour.)

Once again, we thank the New York State Bar Association for bringing this critical issue to the floor of the House of Delegates. We hope that a resolution on this issue will gain traction with the governor and the legislature and help solve this critical problem facing the Assigned Counsel Programs throughout New York State.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Justine Luongo', with a stylized flourish at the end.

Justine Luongo
Chief Defender's Association of New York

cc: Norman Effman, NYSBA Vice President,
Eight Judicial District