



NEW YORK STATE  
BAR ASSOCIATION

# Report of the Criminal Justice Section and the Committee on Mandated Representation **The Need to Increase Assigned Counsel Rates in New York**

June 2021

**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 1<sup>st</sup>.

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.

Judge Juanita Bing Newton, again writing for the New York State Bar Association Criminal 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. This increase should apply to all assignments as defined under “Definition” in the NYSBA 2015 Revised Standards for providing Mandated Representation, which reads:

Mandated Representation - Legal representation of any person financially unable to obtain counsel without substantial hardship who is (1) accused of an offense punishable by incarceration; (2) entitled to or is afforded representation under §249, §262 or §1120 of the Family Court Act; Judiciary Law §35 including child custody and habeas corpus cases; Article 6-C of the Correction Law; §407 of the Surrogate’s Court Procedure Act; §259-i of the Executive Law; or §717 of the County Law; or (3) otherwise entitled to counsel pursuant to constitutional, statutory or other authority.

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.



