

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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	:	Index No. 156916/2021
NEW YORK COUNTY LAWYERS	:	
ASSOCIATION, BRONX COUNTY BAR	:	
ASSOCIATION, BROOKLYN BAR	:	
ASSOCIATION, QUEENS COUNTY BAR	:	<b><u>REPORT OF ROBERT C.</u></b>
ASSOCIATION, RICHMOND COUNTY BAR	:	<b><u>BORUCHOWITZ IN SUPPORT OF</u></b>
ASSOCIATION, ASSIGNED COUNSEL	:	<b><u>PLAINTIFFS' MOTION FOR</u></b>
ASSOCIATION OF NEW YORK STATE, INC.	:	<b><u>PRELIMINARY INJUNCTION</u></b>
(ACA-NYS, INC.), METROPOLITAN BLACK	:	
BAR ASSOCIATION, MACON B. ALLEN	:	
BLACK BAR ASSOCIATION, LATINO	:	
LAWYERS ASSOCIATION OF QUEENS	:	
COUNTY, and ASIAN AMERICAN BAR	:	
ASSOCIATION OF NEW YORK,	:	
	:	
	:	
Plaintiffs,	:	
	:	
	:	
-against-	:	
	:	
	:	
THE STATE OF NEW YORK, THE CITY OF	:	
NEW YORK, NEW YORK CITY	:	
DEPARTMENT OF FINANCE, and SHERIF	:	
SOLIMAN, in his official capacity as	:	
Commissioner of the New York City Department	:	
of Finance,	:	
	:	
	:	
Defendants.	:	

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I am an attorney and a Professor from Practice at the Seattle University School of Law. I am the Director of The Defender Initiative at the School of Law. I outline my experience below.

**I. Assignment**

1. I have been asked by counsel for Plaintiffs in this action to provide an opinion on the impact on effective assistance of counsel of the current compensation for 18B panel attorneys in New York City. I have agreed to provide this opinion pro bono.
2. I have reviewed the following materials:
  - a. Letter from Chief Judge Janet Di Fiore March 2, 2021, to the New York Governor, Senate Majority Leader, and Assembly Speaker.
  - b. State of Judiciary Speech, Chief Judge Janet Di Fiore, February 26, 2019.

- c. Letter from Chief Judge Janet Di Fiore February 26, 2019, to the New York Governor, Senate Majority Leader, and Assembly Speaker.
- d. Written Submission of Deputy Administrative Judge of the NYC Family Court Hon. Anne-Marie Jolly For The Chief Judge's 2021 Hearing on Civil Legal Services in New York.
- e. Letter from New York City Family Court Judges Association to Governor Hochul, January 27, 2022.

## II. Summary of Opinion

3. It is my opinion that the \$75 per hour and \$60 per hour compensation rates for assigned counsel in New York City, unchanged since 2004, result in a severe, unreasonable, and unacceptably high risk that their clients will be denied effective assistance of counsel.

4. As outlined below, the low compensation rates have resulted in lawyers leaving the assigned counsel roles and in difficulty in finding lawyers to be appointed in both adult and child cases. The Chief Judge nearly two years ago described this as a crisis that cannot be ignored.

5. As Judge Anne-Marie Jolly has emphasized, there is a disproportionate impact on Black and Latinx persons.

6. To provide an example of the inadequacy of the \$75 and \$60 per hour rates, it is helpful to review the current assigned counsel hourly rate in South Dakota, \$101 per hour,<sup>1</sup> in a state that has a cost of living roughly half of what it is in New York, New York.<sup>2</sup> Further, the City of Edmonds, Washington, with a population of approximately 42,000,<sup>3</sup> is paying \$125 per hour for conflict counsel misdemeanor cases in its Municipal Court.<sup>4</sup>

7. I participated in a study of the compensation for assigned counsel in Wisconsin in 2015. We stated the following in our report, and in my opinion, this applies as well to New York:

Wherever and whenever the level of compensation creates a financial conflict between a worker's take home pay and the resources needed to do the job right a number of

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<sup>1</sup>Court Appointed Attorney Guidelines, available at <https://ujs.sd.gov/uploads/docs/CourtAppointedAttorneyGuidelines.pdf>, last visited January 29, 2022.

<sup>2</sup> Numbeo, Cost of Living Comparison Between [New York, NY](#) and [Sioux Falls, SD](#), at [https://www.numbeo.com/cost-of-living/compare\\_cities.jsp?country1=United+States&country2=United+States&city1=New+York%2C+NY&city2=Sioux+Falls%2C+SD&tracking=getDispatchComparison](https://www.numbeo.com/cost-of-living/compare_cities.jsp?country1=United+States&country2=United+States&city1=New+York%2C+NY&city2=Sioux+Falls%2C+SD&tracking=getDispatchComparison), last visited January 29, 2022.

<sup>3</sup> United States Census Quick Facts, <https://www.census.gov/quickfacts/fact/table/edmondscitywashington/PST045221>.

<sup>4</sup> Council approves social worker job description, increases hourly rate of on-call public defenders, MyEdmonds News, February 24, 2021, available at <https://myedmondsnews.com/2021/02/council-approves-social-worker-job-description-increases-hourly-rate-of-on-call-public-defenders/>.

potential impacts may result. Good workers will leave to take on more profitable endeavors. Those that remain will often do everything in their power to increase their take home pay by cutting costs of doing business wherever they can. Inexperienced people may also jump at the chance to get on-the-job training, as a trade-off for the inadequate income provided, raising doubts that the job being done is up to minimally effective standards.<sup>5</sup>

### III. Qualifications.

8. I have been affiliated with the Seattle University School of Law faculty since January 2007. Before joining the faculty, I was Director of The Defender Association in Seattle for 28 years. I was a staff attorney doing both trial and appellate work before becoming Director.

9. I graduated from Kenyon College in 1970 with a degree in Political Science, and from Northwestern University School of Law in 1973.

10. I am licensed to practice law in the State of Washington, and I am admitted to practice before the United States District Court for the Western District of Washington, the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States. I was certified under the Washington State Superior Court Special Proceedings Rules as qualified to be appointed as counsel in capital appeals and post-conviction proceedings. I am an inactive member of the California Bar. I have represented clients in cases at every level of state and federal court.

11. In 2014, I was recognized as an expert witness by the New York Supreme Court, Appellate Division, 3rd Judicial Department in a class action litigation. Hurrell-Harring v. State of New York, 119 A.D.3d 1052,1054 (Supreme Court, Appellate Division, 3rd Department, New York, 2014). The court found that I and two other experts “possess the requisite skill, training, education, knowledge and/or experience to qualify as experts on the operation of indigent defense systems and the evaluation of such systems in light of prevailing professional standards” and “possess specialized knowledge with respect to the operation of public defense systems, the professional standards applicable to such systems, and the impact of systemic shortcomings on the provision of counsel to indigent criminal defendants at all critical stages.” Hurrell-Harring v. State, 119 A.D.3d 1052, 1053-1054, 990 N.Y.S.2d 286, 288 (N.Y. App. Div. 2014).

In 2014, the parties entered into a settlement that included an agreement by the state of New York to develop caseload standards, provide counsel at all arraignment hearings, and improve the quality of public defense representation in five counties. As part of my work in that case, I conducted observations and interviews in Suffolk County and Washington County, New York.

12. I am an expert witness in Allen v. Edwards, a pending case involving a challenge to the public defense system in Louisiana.

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<sup>5</sup> Justice Shortchanged: Assigned Counsel Compensation in Wisconsin, The Sixth Amendment Center (2015), at 1, available at [https://sixthamendment.org/wp-content/uploads/2015/04/6AC\\_wjusticeshortchanged\\_2015.pdf](https://sixthamendment.org/wp-content/uploads/2015/04/6AC_wjusticeshortchanged_2015.pdf).

13. In December 2020, I presented an expert witness declaration in Buckley v. Asotin County, NO. 20-2-00163-02, Superior Court of Washington for Asotin County. I was asked to offer my opinion on the following question: Does a county's providing an unlicensed attorney to serve as a public defender fall below Washington's standards for public defense services?

14. I have previously provided expert testimony and/or reports in several other actions relating to the ability of public defenders to provide effective assistance of counsel to indigent defendants.

- a. In 2005, I served as an expert witness in Best v. Grant County, a class action seeking injunctive relief from systemic ineffective assistance of counsel in Grant County, Washington. I provided testimony, and, after depositions and motion hearings, the parties entered into a settlement that established per-attorney caseload limits and other requirements.
- b. In 2009, I submitted an affidavit as an expert witness in support of a summary judgment motion filed by the Kentucky Public Advocate in a declaratory judgment action involving excessive public defender caseloads. I concluded that the defenders had excessive caseloads and inadequate resources. Although the trial court dismissed the lawsuit on ripeness grounds, the Kentucky Governor shortly thereafter announced a new \$2 million allocation for public defense.
- c. I submitted a declaration as an expert witness in support of a motion filed by the Miami Dade County Public Defender in *State of Florida v. Bowens*, 39 So. 3d 479 (Fla. Dist. Ct. App. 2010), to withdraw because of excessive caseloads. The Florida Supreme Court agreed that the Public Defender had demonstrated cause for withdrawal based on his office's excessive caseloads. *Public Defender v. State*, 115 So. 3d 261, 279 (Fla. 2013). My declaration is available at [https://law.seattleu.edu/media/school-of-law/documents/faculty/publications/boruchowitz/Mo\\_to\\_Withdraw\\_Exhibit\\_DRCBdecMiami.pdf](https://law.seattleu.edu/media/school-of-law/documents/faculty/publications/boruchowitz/Mo_to_Withdraw_Exhibit_DRCBdecMiami.pdf).
- d. In November 2015, I testified (by video) as an expert witness in the Orleans Parish Criminal District Court in support of a motion filed by the Orleans Public Defender to suspend the assignment of new cases. I testified that the defenders' excessive caseloads undercut their ability to provide effective representation to their clients.

15. I have also served as an expert witness in cases involving claims by individual defendants of ineffective assistance of counsel.

- a. In 2007, I served as an expert witness regarding effective assistance of counsel on behalf of the defendant in an evidentiary hearing before King County Superior Court in Washington. The Court of Appeals granted the petition to withdraw the guilty plea. *In re Pers. Restraint of Gay*, 142 Wash. App. 1001 (Wash. Ct. App. 2007).
- b. I served as an expert witness regarding effective assistance of counsel for an accused person in a federal habeas corpus proceeding challenging a persistent offender conviction. *Thorne v. DuCharme*, C97-1280Z (W. D. Wash.) (2001). After my deposition testimony, the parties stipulated to an order to issue a writ of Habeas Corpus and to direct the Superior Court of the State of Washington to vacate the judgment and conviction in the state trial court.

16. I participated in three meetings from September 2015 to December 2017 of the National Legal Aid and Defender Association's Defender Research Consortium Quality Indicators Working Group. This effort culminated in NLADA's publication of National Indicators of Quality Indigent Defense in January 2018.

17. I serve as the Assessor for Public Defense Services for the City of Edmonds, Washington. In 2020, I served on the Edmonds Mayor's Municipal Court judge selection committee. The Edmonds City Council recently approved my recommendation to increase the hourly compensation for conflict counsel from the former \$50 per hour to \$125 per hour. I had recommended initially a phased-in increase, but the Council was persuaded that it should raise the rate now to \$125 to be more comparable to what the city pays other counsel and to be able to recruit and retain competent counsel.

18. At the School of Law, I have taught a seminar on Right to Counsel, a Clinic on Right to Counsel, and Criminal Procedure Adjudicative classes. I co-taught in the Youth Advocacy Clinic. My teaching in the clinics has included classroom training on trial practice and ethical considerations, discussion of related criminal procedure issues, and representation of defendants in prosecutions in King County Superior Court, Snohomish County Superior Court, and Kittitas County Superior Court. I represented two of the clients in appeals to the Washington Court of Appeals.

19. I also serve as the Director of The Defender Initiative at the School of Law. Among other projects, The Initiative conducted a comprehensive investigation of misdemeanor public defense in the United States [a joint effort with the National Association of Criminal Defense Lawyers (NACDL)]. As an outgrowth of that work, I was the primary researcher and co-author of a report published by NACDL in 2009 entitled *Minor Crimes, Massive Waste, The Terrible Toll of America's Broken Misdemeanor Courts* (NACDL, 2009) that surveyed the law on right to counsel in misdemeanor cases and examined actual representation across the country. For that project, I reviewed recent case law and ethical opinions relating to caseloads, and conducted site visits in Pennsylvania, Arizona, and Washington State. The report analyzed issues relating to caseloads, available resources, the components of effective representation, including use of investigation, training, supervision, compensation, diversion of cases out of the court system, and ethical issues relating to misdemeanor representation. The report has been cited in more than 60 law review and journal articles.

20. In 2009, The Defender Initiative received a grant from the Foundation to Promote an Open Society to advocate for increased provision of counsel in misdemeanor courts. The Foundation provided additional funding for 2010-2011 and 2011-2012, which allowed me to expand the work beyond Washington into Kentucky, New Hampshire, and South Carolina.

21. The Defender Initiative also for several years received grant funding from the U.S. Department of Justice to provide technical assistance on public defense. I worked with The Sixth Amendment Center (6AC) on that grant.

22. On the federal grant, working with The Sixth Amendment Center (6AC), a subcontractor for The Defender Initiative, I conducted site visits in a number of Utah counties culminating in a report to the Utah Judicial Council entitled *The Right to Counsel in Utah: An*

Assessment of Trial-Level Indigent Defense Services (2015). We prepared a similar report for the Mississippi Supreme Court Task Force on Public Defense and the Mississippi Office of the State Public Defender for which I conducted site visits in a number of Mississippi counties. We consulted with the staff of the Michigan Indigent Defense Commission. I spoke about standards to the Michigan Supreme Court. We completed assessments in Illinois and New Hampshire. For the Illinois assessment, I made three site visits to the Cook County Public Defender and wrote a report on my visits. For the New Hampshire assessment, I conducted interviews and made court observations by video, focusing on Cheshire County, and wrote a report on my work. For both reports, I provided editing comments on the final state reports.

23. In another project with 6AC, I helped to research and write a report on compensation for assigned counsel in Wisconsin, entitled Justice Shortchanged, Assigned Counsel Compensation in Wisconsin (2015). And in a project funded by the Michigan Indigent Defense Commission, I worked with 6AC and the National Legal Aid and Defender Association to evaluate the public defender office in Wayne County, Michigan, and to produce a report. The report led to major changes in the public defense practice in Wayne County.

24. For the 6AC, I helped with site visit evaluations of defender services in Oregon and Nevada.

25. I worked on site visit evaluations conducted by the National Legal Aid and Defender Association in Louisiana, Nevada, Idaho, Michigan, and Washington, D.C.

26. For 28 years I served as Director of The Defender Association in Seattle, a non-profit public defender program. In that role, I administered an office of approximately 125 staff, including as many as 90 lawyers. Among my duties, I was responsible for negotiating our contracts with government funders at the city, county and state level, advocating for resources from local government, seeking foundation and other private funding, negotiating building and equipment leases, addressing personnel and labor issues, and supervising and participating in training of staff. I also developed a successful proposal for a state capital defense assistance center funded by the Washington Office of Public Defense.

27. My office had contracts with local government. We worked to comply with performance guidelines and standards of the King County Bar Association, Washington Defender Association, Washington State Bar Association, and the National Legal Aid and Defender Association Performance Guidelines, and Washington law RCW 10.101.

28. As Director, I was co-counsel in two hearings in King County Superior Court that resulted in increased payments to The Defender Association for work in Wash. Rev. Stat. § 71.09 (i.e., sex offender commitment) cases. Our presentation included an analysis of the staffing requirements for and the financial impact of handling those cases, including extensive discussion of the budget.

29. Before becoming Director, I served as a staff attorney in misdemeanor, juvenile, felony, and appellate cases. While in the appellate division, I was co-counsel on a trial-level capital case in which, after an extensive motion practice, the state on the first day of trial dropped its request for the death penalty.

30. I have participated in state and national efforts to develop public defender standards and a model defender services contract, which have been published by the Washington State Bar Association (“WSBA”), the American Bar Association (“ABA”), and the National Legal Aid and Defender Association.

31. I was chairperson of the WSBA Criminal Law Section in 1981-1982 and 1984-1985. For more than sixteen years, I have served on the WSBA Committee on Public Defense and its successor Council on Public Defense (CPD). I am an emeritus member of the CPD.

32. I have been co-chair and then chair of a committee for the Council on Public Defense assigned to review standards and to develop performance guidelines. In that role, I have co-led an effort to amend the WSBA Indigent Defense Standards and to recommend defender performance guidelines to the State Supreme Court. The Council on Public Defense approved both the resulting amended Standards and new Performance Guidelines and recommended that the WSBA Board of Governors endorse them, which it did. We also developed proposed Performance Guidelines for Juvenile Defense Representation that were endorsed by the Board of Governors. I currently chair the Standards Committee and we recently developed a proposed amendment concerning persistent offender cases. I am a member of the CPD Independence Committee and the CPD Race Equity Committee.

33. I helped to draft the Washington State law requiring local governments to develop standards for public defense (enacted as RCW 10.101). The law requires, among other things, that:

[e]ach county or city . . . shall adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. Standards shall include the following: Compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination.”

RCW 10.101.030. The law provides that the WSBA Standards, “should serve as guidelines to local legislative authorities in adopting standards” under RCW 10.101.

34. In 1983, I helped to establish The Washington Defender Association (the “WDA”) and for 20 years served as its Founding President. During that time, the WDA established staff attorney positions providing technical assistance to defenders throughout the state and developed a legislative advocacy program working with the Washington Association of Criminal Defense Lawyers. We also developed the WDA Standards and obtained the endorsement of them by the Washington State Bar Association Board of Governors. The WDA Standards served as the basis for the WSBA Standards, key provisions of which have been incorporated into court rules by the Washington Supreme Court.

35. For many years, I have been a member of the ABA's Indigent Defense Advisory Group. I have also served on other ABA committees and a working group and on a number of state and local committees, all relating to criminal justice and public defense.

36. In 2007, I led a committee for the American Council of Chief Defenders that wrote a Statement on Caseloads and Workloads.

37. I am currently an emeritus member of the Washington State Minority and Justice Commission, a commission of the Supreme Court of the state of Washington that is charged with the mission of ensuring that all courts in the state of Washington remain free of bias so that justice may be adjudicated in a neutral and fair manner. I serve on the Juvenile Committee. I am serving on a committee planning the next Commission Symposium, on reparations.

38. I have presented or moderated panels at more than 135 events, mostly continuing legal education and judicial education seminars, in many states and in two Canadian provinces. I have spoken about public defense representation, the right to counsel generally and specifically in misdemeanor cases, criminal justice funding, death penalty case representation, racial disparity, sex offender commitment, jury selection, sentencing, legislative advocacy, legal ethics, defender caseloads and standards, representing mentally ill clients, pretrial release issues, and law and the Holocaust, and I have participated in a variety of trial skills and defender management training programs.

39. Among recent examples of presentations I have made, I organized and spoke at the February 28, 2020 Tenth Annual Conference on Public Defense at Seattle University School of Law. On March 6, 2020, I made a presentation on right to counsel in misdemeanor cases for a Seattle Journal for Social Justice Symposium on *Reforming Pre-Trial Release, Bail, and Parole*. On August 12, 2020, I was a guest speaker for the Seattle University Criminal Justice Department summer practicum course. On October 12, 2020, I spoke on The Cost of The Death Penalty for a college class on The Death Penalty at Penn State University, Harrisburg, Pennsylvania. On May 8, 2021, I was a co-presenter for a webinar hosted by the Southern Methodist University Human Rights Program on "A Costly Failure: Why the Death Penalty Must Be Abolished." I testified by video in a hearing of the Washington State Senate Law and Justice Committee on January 25, 2022, supporting a proposal to provide appointed counsel in post-conviction petitions.

40. I was an invited witness to the United States Senate Judiciary Committee on Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors, May 13, 2015, testimony available at <https://www.judiciary.senate.gov/meetings/protecting-the-constitutional-right-to-counsel-for-indigents-charged-with-misdemeanors>.

41. I have been an invited witness, Washington State Advisory Committee, U.S. Commission on Civil Rights, (1979), ABA/NLADA Hearing on Indigent Defense Funding, Boston (1982), and ABA "Hearings on the Right to Counsel 40 Years After Gideon v. Wainwright" (2003), Seattle, WA.

42. I was an invited participant, Public Affairs Conference Center seminar on Crime and Punishment, Kenyon College (1983).

43. I have written numerous articles for newspapers and bar journals, including the following: "We Need More Defenders," King County Bar Bulletin, May 2020, and "Prosecutors and Defense Attorneys Coordinate Coronavirus Response" King County Bar Bulletin, April 2020, "Caseload limits a win for public defenders, clients - and justice", Seattle Times, July 19, 2012; On Public Defenders and Excessive Caseloads, July 10, 2010 as a guest blogger for CrimProf Blog, a member of the Law Professor Blogs Network; "Citizen's Voice: Public defenders underfunded in Tennessee", Knoxville News Sentinel, June 5, 2010; "The Right to Counsel: Every Accused Person's Right", Washington State Bar News, January, 2004.

44. I have written the following law review and journal articles:

- a. "Judges Need To Exercise Their Responsibility to Require That Eligible Defendants Have Lawyers", 46 Hofstra Law Review 35 (2017).
- b. Fifty Years After Gideon: It is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own, 11 Seattle J. of Soc. Just. 891 (2013).
- c. Sexual Predator Law--The Nightmare in the Halls of Justice, 15 University of Puget Sound Law Review 827 (1992).
- d. Victimless Crimes, 57 JUDICATURE 69 (1973).

45. I wrote a Book review on Professor Alexandra Natapoff's *Punishment Without Crime, How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* for the NACDL Champion, published in the May 2019 edition, available at <https://www.nacdl.org/Champion.aspx?id=55712>.

46. I was appointed counsel in *State v. K.A.B.*, 14 Wn. App. 2d 677, 682, 475 P.3d 216, 220 (2020), winning reversal of a juvenile conviction on appeal because of ineffective assistance of counsel and an erroneous trial court ruling. The prosecutor agreed to dismiss the case upon remand.

47. I am an active member of two committees of the National Association for Public Defense (NAPD), the System Builders and the Workload Committees. During 2021, I alternated with another former chief defender facilitating an NAPD monthly "Town Hall" meeting of defender leaders. I also served on the committee that recommended selection of the new Executive Director of NAPD.

48. In arriving at my conclusions in this matter, I have relied on the following:

My nearly 48 years of experience in public defense; New York Office of Indigent Legal Services Standards for Establishing and Administering Assigned Counsel Programs, BLACK LETTER STANDARDS WITH COMMENTARY; American Bar Association Ten Principles of a Public Defense Delivery System; Washington CrR 3.1 Stds. Standards for Indigent Defense; relevant federal and state law as to what constitutes effective assistance of counsel, including the Sixth Amendment to the U.S. Constitution and Article 1 Section 6 of the New York Constitution; ABA Standards for Criminal Justice Defense Function (ABA Standards for Criminal Justice: Prosecution and Defense Function, 3rd ed., 1993); National

Legal Aid and Defender Association (“NLADA”) Performance Guidelines for Criminal Defense Representation (NLADA, 1995; 4th Printing, 2006); Washington State Bar Association Standards for Indigent Defense Services; Washington Defender Association Standards for Public Defense Services; Washington State Bar Association PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION; American Council of Chief Defenders Statement on Caseloads and Workloads (2007); American Bar Association Eight Guidelines of Public Defense Related to Excessive Workloads (2009); and New York Rules of Professional Conduct.

#### **IV. Description of the Problem by the Judges**

49. Chief Judge Janet Di Fiore made clear in a letter two years ago that the inadequate compensation for assigned counsel was diminishing the quality of representation:

Without fair and adequate compensation to ensure an adequate pool of well-qualified assigned counsel, the overall quality of our indigent legal representation system is diminished and the important policy goals of many recent enactments implicating the rights of children and criminal defendants, including the Raise the Age legislation, may be compromised.<sup>6</sup>

50. In her 2019 State of the Judiciary Report, the Chief Judge cited a Commission report “concluding that our parental legal representation system is overwhelmed and underfunded, often resulting in inadequate legal services with harmful consequences for children and families and, ultimately, the communities we all live in and call home.” She called for increasing assigned counsel rates.

51. In the same 2019 report, the Judge stated:

...our state continues to rely on the hundreds of private attorneys or assigned counsel who provide legal representation to indigent criminal defendants and family court litigants in many areas of the state. Without fair and adequate compensation for these attorneys, a vital component of the system is at risk.

52. In a March 2, 2021, letter, Judge Di Fiore repeated her concerns, saying that “New York’s continuing failure to adequately compensate assigned counsel impedes our criminal and family justice systems as they strive to protect the rights of the most marginalized and vulnerable in our society.”<sup>7</sup> She noted that since 2013 more than a third of the lawyers on the attorney for the child panels have left the program, leading to increased delays.

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<sup>6</sup> Letter from Chief Judge Di Fiore to the Governor, Senate Majority Leader, and Assembly Speaker, February 26, 2019.

<sup>7</sup> Letter to Governor, Senate Majority Leader, and Assembly Speaker of New York, March 2, 2021.

53. The Chief Judge repeated that without appropriate compensation to ensure an adequate pool of well qualified counsel, “the overall quality of our indigent legal representation system is diminishing....”<sup>8</sup> She described an increase in funding as essential.

54. Deputy Administrative Judge of the NYC Family Court Anne-Marie Jolly has made similar conclusions about the Family Court’s difficulty in finding qualified lawyers. She noted a significant decrease in the number of attorneys on the 1<sup>st</sup> and 2<sup>nd</sup> Departments’ assigned counsel panels. She reported that as of August 2021, there were only 300 attorneys available to accept court assignments on custody and visitation cases for the city. She said, “This is just far too few attorneys for the thousands of cases which require the assignment of counsel.”<sup>9</sup> The lawyer caseloads had increased to the point where they often were unable to accept new assignments. She noted that the 3<sup>rd</sup> and 4<sup>th</sup> Departments also had experienced a significant decrease in attorneys on their panels. She said, “This trend is primarily attributed to the fact that the compensation rate of \$75/ hour has not changed over the last 17 years.”

55. Judge Jolly noted that overbooked attorneys cannot appear on all of their cases, causing delay. She also wrote, “The attorneys also have limited time available to meet with and prepare their clients for their cases resulting in the parties feeling that their representation is inadequate.” She added that high quality legal representation “would likely result in more meaningful final orders, greater litigant satisfaction, less potential for future court appearances on modification and/or violation petitions, and a reduction in court calendars.”<sup>10</sup>

56. Judge Jolly called for adding more lawyers, social workers, and investigators and increasing the funding for civil legal services providers, with supportive staff. She wrote:

It is fair and obvious to state that quality legal representation serves many purposes, including favorably impacting a party’s perception of the Court and understanding the role of the court as a fair arbiter of conflict. With quality legal representation, individuals are provided with more knowledge – knowledge about family law as it relates to their legal rights, knowledge about court room procedures, knowledge about their legal obligations and knowledge about the consequences of non-compliance with orders.<sup>11</sup>

57. The judge added that “For too long, there has been a perception and feeling by many, the majority of whom are Black and people of color, that race and ethnicity inform litigants’ experience of the Family Court.” She noted the report commissioned by the Chief Judge that found that the Family Courts were under-resourced and perpetuate a dehumanizing experience that has had a disparate impact on Black and Latinx litigants, creating a second-class system of justice for people of color in New York.<sup>12</sup>

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<sup>8</sup> Id.

<sup>9</sup> Written Submission of Deputy Administrative Judge of the NYC Family Court Hon. Anne-Marie Jolly For The Chief Judge’s 2021 Hearing on Civil Legal Services in New York.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

58. To change the “justice gap”, Judge Jolly called for expanding legal services to provide quality legal representation.<sup>13</sup>

59. The January 27, 2022, letter from the New York City Family Court Judges Association President Erick S. Pitchal to Governor Hochul outlines a series of problems that have led to “a crisis of justice in our Family Courts, where lack of timely access to counsel is infringing daily on the fundamental constitutional rights of indigent children and their parents, most of whom are Black and Brown.”<sup>14</sup>

60. Judge Pitchal noted the heavy loan burden that particularly young lawyers of color carry, and that if they are interested in Family Court work, they cannot join the panel and survive financially.<sup>15</sup>

61. The judge wrote: “As judges, we observe daily the heartbreaking impact the inadequate supply of attorneys has on the children and families who come before us, and it is not an overstatement to assert that our system for providing counsel to indigent litigants in Family Court is in a crisis.”<sup>16</sup>

62. Judge Pitchal emphasized the need to have a reasonable caseload to be able to provide effective assistance of counsel. He wrote, “The right to counsel is ephemeral if the lawyer has too many cases to be able to attend to the basic duties of lawyering. ... Equitable access to justice exists only when all parties have an advocate with the time and resources to provide effective representation.”<sup>17</sup>

63. The lack of lawyers is so severe that despite having hundreds of cases per day that need to be assigned to lawyers, there have been many days with no lawyers available to take cases. “Volunteers are impossible to come by, because all the attorneys are frantically trying to cover their scheduled matters and attend to emergencies on their existing caseloads, with no slack time to take on something new.”<sup>18</sup>

64. Judge Pitchal noted that some kinds of hearings must be done immediately. He wrote: “Every day, we are forced to make interim rulings when one side may be represented but the other is not because the pay rate for assigned counsel is too low”<sup>19</sup>.”

65. Judge Pitchal stated that all the lawyers are “maxed out” and that “anecdotal evidence strongly suggests that they are all carrying too many cases in order to do their jobs properly, not for want of trying.”<sup>20</sup>

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<sup>13</sup> Id.

<sup>14</sup> Letter from Judge Erik S. Pitchal, President of the New York City Family Court Judges Association to Governor Hochul, January 27, 2022.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id., case citations omitted.

<sup>18</sup> Id.

<sup>19</sup> Id, emphasis in original.

<sup>20</sup> Id.

66. Referring to the caseload standards for parents' attorneys set by the Office of Indigent Legal Services, Judge Pitchal wrote: "We have no doubt that there is not a single member of any assigned counsel panel in New York City Family Court whose cases are within these maximums."<sup>21</sup>

67. Similarly, referring to national standards for pending cases for attorneys representing children, the judge wrote, "we have serious doubts that any of the attorneys who appear before us are able to maintain this caseload limit given the dwindling numbers of lawyers accepting assignments."<sup>22</sup>

68. Judge Pitchal wrote that the basic standards of practice cannot be met when there are not enough attorneys. He listed the following examples:

Because of their staggering caseloads, assigned counsel are often unable to meet with their clients before court appearances. In Family Court, time on the record is the most precious commodity, and when an attorney has not met with the client in advance, the basic opportunity for meaningful advocacy is lost.

When clients are unable to reach their lawyers to discuss their case, they become understandably frustrated.... lack of ongoing communication with the attorney can have grave consequences for the outcome of their case.

When assigned counsel are stretched too thin and spend most of their work days on the record, they are unable to attend to the details of pre-trial preparation, including the crucial step of requesting and analyzing discovery materials. Far too often, a case scheduled for trial cannot go forward because assigned counsel assert that they have not been provided crucial discovery.

Concerning claims by the state, the judge wrote:

Too often, assigned counsel are too strained from their caseload to independently investigate these sorts of claims, and are left merely to parrot their client's on-the-record denials. If their workload were more manageable, attorneys could obtain third-party discovery which might corroborate their client's story – or, on the other hand, give them the basis for a frank counseling session with the client. Instead, clients with a favorable facts [sic] might not prevail, and some litigants are left with the impression that their lawyer is not fighting for them.

Concerning scheduling challenges for the court, the judge wrote:

There is simply no slack anywhere in the current system, and these problems all trace back to the insufficient numbers of attorneys accepting court assignments in Family Court.<sup>23</sup>

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<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

69. Judge Pitchal also criticized the presumptive cap on attorney fees.

OILS recommends that the minimum number of hours an attorney should devote to an Article 10 case to provide competent representation is 56 hours.<sup>12</sup> When one divides the statutory maximum per-case payment of \$4,400 by the statutory pay rate of \$75/hour, the result is 59 hours. In other words, current law requires a finding of extraordinary circumstances in order for the attorney to do more than three hours of work above the minimum necessary to provide competent representation. Any universe where doing the minimum is considered an extraordinary circumstance is fundamentally unjust. Eliminating the per-case cap will free assigned counsel to lean into every case and advocate zealously, unshackled from unreasonable statutory constraints.

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70. Judge Pitchal discussed the crisis 20 years ago when low 18-B rates led to “the unconscionable deprivation of core constitutional rights of our most vulnerable citizens.” He said that the legislature should act to remedy the downward spiral happening again “as more and more 18-B attorneys look for the exit due to crushing caseloads and inadequate compensation.”<sup>25</sup>

#### Losing Lawyers

71. Judge Pitchal has written, “we have lost countless capable attorneys from our assigned counsel panels.”<sup>26</sup> He attributed this, and the difficulty in finding new lawyers, to the \$75 per hour rate of pay.

72. New York’s experience in losing lawyers from the 18B panel is not unique. My experience in assessing the public defense situation in Louisiana, for example, was that the low compensation for Louisiana defender attorneys resulted in Districts losing attorneys.

### **V. Opinions**

#### **A. The \$60 and \$75 hourly fees Violate the ABA Ten Principles of a Public Defense Delivery System.**

73. Principle 8 of the ABA Ten Principles of a Public Defense Delivery System states that “assigned counsel should be paid a **reasonable fee in addition to actual overhead and expenses.**” [Emphasis added.] It states that there must be “parity between defense counsel and the prosecution with respect to resources.” ABA, *Ten Principles of a Public Defense Delivery System*, Principle 8 (2002). The comment to the principle notes that there “should be parity of workload, salaries and other resources (such as benefits).” *Id.*

74. The \$60 and \$75 per hour fees are not reasonable fees and are not in addition to actual overhead and expenses.

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<sup>24</sup> *Id.* Emphasis in original.

<sup>25</sup> *Id.*

<sup>26</sup> Letter, fn. 14.

75. 18B counsel have to provide their own benefits and retirement investment. If they take a vacation, they cannot bill for that time.

76. At \$75 per hour, with no benefits, a lawyer who spends 1800 hours a year in direct client representation would receive \$135,000 per year. At \$60 per hour, 1800 hours would yield \$108,000.<sup>27</sup> That lawyer must provide all overhead costs, including rental of an office, telephone, electronic legal research, compensation for any support staff, supplies, malpractice and office insurance, bar registration fees, and must provide for the lawyer's own health care and any retirement investment.<sup>28</sup> And the lawyer must pay taxes, including city, state, and federal taxes.

77. The typical law office spends 45 to 50 percent of its fee on the expenses of operating the office, including support staff salaries, rent, telephone, library, equipment, supplies and other facilities.<sup>29</sup>

78. A lawyer who earns \$135,000 a year and spends half of that on overhead will yield \$67,500 per year, without considering taxes.

79. Overhead and expenses in New York City can exceed half of the \$75 and \$60 figures. When this issue was litigated in 2003, there was "credible testimony that overhead expenses are more than \$72,000 per year for attorneys on the 18-B panel." New York Cty. Lawyers' Ass'n v. State, 196 Misc. 2d 761, 787, 763 N.Y.S.2d 397 (N.Y. Sup. Ct. 2003).

80. Defenders need private meeting space for client conferences. The New York City Bar recently posted availability of offices starting at \$950 per month for an 8 x 12 office. Printing and copying were extra costs.<sup>30</sup> Even if a lawyer decided to operate with no support staff, no landline telephone, no books, and only a laptop for equipment, the lawyer still would have to pay for the laptop, malpractice insurance, electronic legal research, cell phone service, bar registration fees, software, some kind of backup system for files, and the lawyer's own business insurance, health insurance, and retirement investment. The lawyer would need to join the NY State Defender Association and probably the NY Criminal Defense Lawyers Association and the NY Criminal Bar Association. Those fees and dues add to the yearly

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<sup>27</sup> I am using the 1800 hours figure here as I know some people use that number, but I believe the number should be lower. The Washington Defender Association standards recommend 1,650 hours directly representing clients per year. See Washington Defender Association, Standards for Public Defense Services, Standard Three (Commentary) (2007). The Office of Management and Budget ("OMB") has advised agencies that of the 2,088 hours attributable on an annual basis to a federal employee, each employee works only 1,744 hours per year, which reflects hours worked after the average amount of annual, sick, holiday, and administrative leave used. Performance of Commercial Activities, OMB Cir. No. A-76, IV-8 (revised) (Aug. 1983).

<sup>28</sup> See, generally, Sixth Amendment Center et al., *Justice Shortchanged--Assigned Counsel Compensation in Wisconsin* (Fred T. Korematsu Center for Law and Equality May 2006) 28, available at [http://sixthamendment.org/wp-content/uploads/2015/04/6AC\\_wjjusticeshortchanged\\_2015.pdf](http://sixthamendment.org/wp-content/uploads/2015/04/6AC_wjjusticeshortchanged_2015.pdf).

<sup>29</sup> See Harrison Barnes, *Overhead Ratios Of A Law Firm*, Law Crossing, <http://www.lawcrossing.com/article/900010148/Overhead-Ratios-of-a-Law-Firm> (last visited January 7, 2022).

<sup>30</sup> New York City Bar web page at <https://www.nycbar.org/member-and-career-services/small-law-firm-overview/office-space-available>. Last visited January 8, 2022.

overhead cost. Any Continuing Legal Education costs that are not included in those associations' membership would add to overhead.

81. At some point, experienced attorneys will want and need a space larger than 8x12 and will benefit from having support staff. Those attorneys increasingly will be unwilling to work for \$75 or \$60 per hour.

82. In addition to overhead and expenses, lawyers have to pay their education debt, which can erode their income substantially.

83. Manhattan District Attorney Chief Assistant District Attorney Karen Friedman-Agnifilo in 2018 recognized the impact of law school debt and the cost of living in New York City:

To ensure justice and fairness without fear or favor, prosecutors and indigent defense agencies must be able to recruit and retain the brightest legal minds. A low starting salary combined with the twin burdens of tremendous law school debt and the cost of living in New York City make it extremely challenging for our offices to recruit recent law school graduates in the competitive legal labor market.<sup>31</sup>

84. In 2019, Jared Trujillo, the president of the Association of Legal Aid Attorneys, said that “two-thirds of its staff attorneys come to Legal Aid with significant student loan debt, some owing \$200,000 or more.”<sup>32</sup>

85. Law school tuition can be quite high. Even at the City University of New York (CUNY), which “is committed to making legal education accessible and affordable to everyone”, the tuition and fees for in-state students total \$16, 013 per year. <sup>33</sup> With books, the cost of a legal education at CUNY exceeds \$50,000.

86. The Education Data Initiative has reported that the average law school graduate owes \$160,000 in student loan debt.<sup>34</sup>

#### The \$75 and \$60 Hourly Rates are Below What Counsel Can Earn Elsewhere

87. Clio.com reports that the average hourly rate for criminal lawyers in New York is \$241 per hour.<sup>35</sup>

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<sup>31</sup> David Brand, ADAs, Public Defenders Demand Pay Parity, Queens Eagle, October 26, 2018, at <https://queenseagle.com/all/2018/10/26/adas-public-defenders-demand-pay-parity>.

<sup>32</sup> Sonia Weiser, Lawyers by Day, Uber Drivers and Bartenders by Night, New York Times, June 3, 2019, available at <https://www.nytimes.com/2019/06/03/nyregion/legal-aid-lawyers-salary-ny.html>.

<sup>19</sup> CUNY School of Law web page, <https://www.law.cuny.edu/financial-aid/tuition/>, last checked January 7, 2022.

<sup>34</sup> Average Law School Debt, Education Data Initiative, at <https://educationdata.org/average-law-school-debt>, last checked January 7, 2022.

<sup>35</sup> How much do lawyers charge in New York, Clio.com, at <https://www.clio.com/resources/legal-trends/compare-lawyer-rates/ny/>. Last visited January 29, 2022.

88. Two large law firms in New York recently announced that “first-year associates will see their base pay rise from \$205,000 to \$215,000, while eighth-year associates will see their pay jump from \$365,000 to \$385,000.”<sup>36</sup>

89. The area median income for a three-person family in New York City in 2021 was \$107,400.<sup>37</sup>

90. An example of what lawyers can earn in a Defender office is reflected in a recent job opening description for senior assistant public defender in Schenectady. The salary was listed at \$80,764 and the position includes health insurance, vacation and personal leave, and membership in the New York State Retirement System.<sup>38</sup> “Rent Prices in Schenectady, NY are 70.06% lower than in New York, NY.”<sup>39</sup>

91. Saratoga County listed an assistant public defender position for a lawyer with two years of relevant experience with a salary of \$94,188, “Plus Excellent Benefits & Retirement Package.”<sup>40</sup>

**B. The \$60 and \$75 Fees Result in an Unacceptable Risk that the 18B Lawyers will Violate their Ethical Responsibilities**

92. The New York Rule of Professional Conduct 1.7 prohibits representing a client if a reasonable lawyer would conclude that

(2) there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.<sup>41</sup>

93. Counsel has the obligation to be thoroughly prepared. The Commentary to Rule 1.7 provides in part:

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<sup>36</sup> David Thomas, “N.Y. law firms raise starting salaries to \$215,000 as lawyer pay race continues”, Reuters, January 20, 2022, at <https://www.reuters.com/legal/legalindustry/ny-law-firm-raises-starting-salaries-215000-lawyer-pay-race-continues-2022-01-20/>, last visited January 29, 2022.

<sup>37</sup> Area Median Income, NYC Housing Preservation and Development, <https://www1.nyc.gov/site/hpd/services-and-information/area-median-income.page>, last visited January 7, 2022.

<sup>38</sup> Job listing posted 1/3/2022, New York State Defender Association, at <https://www.nysda.org/page/Jobs>, last checked January 7, 2022.

<sup>39</sup> Numbeo, Cost of Living Comparison Between New York, NY and Schenectady, NY, available at [https://www.numbeo.com/cost-of-living/compare\\_cities.jsp?country1=United+States&country2=United+States&city1=New+York%2C+NY&city2=Schenectady%2C+NY&tracking=getDispatchComparison](https://www.numbeo.com/cost-of-living/compare_cities.jsp?country1=United+States&country2=United+States&city1=New+York%2C+NY&city2=Schenectady%2C+NY&tracking=getDispatchComparison), last visited January 29, 2022.

<sup>40</sup> Id.

<sup>41</sup> Rules of Professional Conduct available at <https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdf>.

### Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

94. When lawyers are not adequately compensated, they have a disincentive to be thoroughly prepared.

95. As a report by The Sixth Amendment Center and The Defender Initiative at Seattle University pointed out:

Both unreasonable compensation with no allowances for overhead expenses and flat fee contractual arrangements to represent the poor in criminal courts are constitutional violations precisely because each pits the attorney's financial well-being against the client's right to conflict-free representation. A lawyer can be pushed into thinking about how to make the representation profitable in addition to, and potentially in opposition to, the stated interest of the client.<sup>42</sup>

96. The New York Rule of Professional Conduct 1.3 DILIGENCE, states in part: "A lawyer shall act with reasonable diligence and promptness in representing a client."<sup>43</sup>

97. To be thoroughly prepared, lawyers must investigate the case. As the Performance Guidelines of the National Legal Aid and Defender Association, Guideline 4.1 Investigation, states:

(a) Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.<sup>44</sup>

98. The New York State Office of Indigent Legal Services has outlined the scope of tasks that lawyers need to undertake to provide effective client-centered representation, including communication with clients and conducting creative negotiations, developing a theory of the case, and advocating for the best possible disposition. And lawyers need to develop expertise in adolescent development when representing adolescent and young adult clients.<sup>45</sup>

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<sup>42</sup> Sixth Amendment Center et al., *Justice Shortchanged--Assigned Counsel Compensation in Wisconsin* (Fred T. Korematsu Center for Law and Equality May 2006) 16, available at [http://sixthamendment.org/wp-content/uploads/2015/04/6AC\\_wijusticeshortchanged\\_2015.pdf](http://sixthamendment.org/wp-content/uploads/2015/04/6AC_wijusticeshortchanged_2015.pdf).

<sup>43</sup> See Rules, fn. 27 supra.

<sup>44</sup> Performance Guidelines of the National Legal Aid and Defender Association, available at <https://www.nlada.org/defender-standards/performance-guidelines/black-letter>, last visited January 11, 2022.

<sup>45</sup> New York State Office of Indigent Legal Services Standards for Establishing and Administering Assigned Counsel Programs July 1, 2019, p. 24-26, available at <https://www.ils.ny.gov/files/ACP%20Standards%20with%20Commentary%20070119.pdf>.

99. As the New York Supreme Court pointed out, “meaningful and effective assistance requires that attorneys accomplish certain basic tasks in all cases.” New York County Lawyers’ Ass’n v. State of New York, 196 Misc. 2d 761 (Sup. Ct. N.Y. Cnty. 2003). Citing New York appellate cases, the Court said attorneys must interview and counsel their clients, conduct an independent investigation and develop evidence, and adequately prepare for and actively participate in proceedings at each stage of a case.

100. The low hourly fees have resulted in fewer lawyers being willing to take the cases. It is likely that the ethical challenge has contributed to lawyers leaving the panels. The lack of lawyers results in the remaining lawyers having too many cases and not being able to prepare properly or even to make their court appearances, as Judge Jolly noted.

101. The low hourly fees make it likely that lawyers, considering their own financial well-being, will minimize their overhead, not use support staff, and will seek other, higher-paying work that will take away their time and energy from appointed cases.

**C. The Lawyers working for the Legal Aid Society Have Received COLA Increases While the 18B Lawyers Did Not, and they Have Vacation and Insurance Benefits that the 18B Lawyers are Not Provided.**

102. In the collective bargaining agreement between the Legal Aid Society (LAS) and the Association of Legal Aid Attorneys, the lawyers received a 2% COLA effective July 1, 2020, and another 2% COLA July 1, 2021. (Memorandum of Agreement extended to June 30, 2022.) The LAS attorney salaries effective July 1, 2018, ranged from \$53,582 to \$119,248.

103. These COLA increases reflect a recognition that the lawyers need assistance in meeting the increase in cost of living. The 18B lawyers have the same needs to meet cost of living as the Legal Aid Lawyers but have not received COLA increases.

104. The LAS attorneys also have between 12 and 14 weeks of paid parental leave and medical and dental benefits, paid sick leave, and after one year of service, the employer contributes 6.5% of covered salary to the retirement plan. Depending on experience, the lawyers have between 20 and 27 workdays annual leave with pay for vacation and religious observance.<sup>46</sup> 18B lawyers do not have those benefits.

**D. Appointed Counsel Rates in other Jurisdictions Can Inform an Assessment of the inadequacy of New York’s \$60 and \$75 fees.**

105. The South Dakota Supreme Court set public counsel compensation hourly rates at \$67 per hour in 2000. To provide into the future a reasonable fee, the court mandated that “court-appointed attorney fees will increase annually in an amount equal to the cost-of-living increase that state employees receive each year from the legislature.” Assigned counsel

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<sup>46</sup> Collective Bargaining Agreement Between The Association of Legal Aid Attorneys, UAW 2325 (AFL-CIO) and The Legal Aid Society (NYC) 2016-2019.

compensation in South Dakota rose to \$99 per hour in 2021,<sup>47</sup> and \$101 for 2022.<sup>48</sup> Consumer prices including rent are 103.53 per cent higher in New York City than in Sioux Falls, South Dakota.<sup>49</sup> To match the buying power of the South Dakota assigned counsel for rent, New York City would need to pay more than \$200 per hour to assigned counsel.

106. The Federal Criminal Justice Act hourly rate for assigned counsel has risen to \$158 per hour.<sup>50</sup>

107. As mentioned above, the City of Edmonds, Washington, pays its conflict panel counsel attorneys \$125 per hour for city misdemeanor cases.<sup>51</sup> The cost of living in New York is approximately 28 per cent higher than in Seattle, and the cost of living in Seattle is approximately 8.5 per cent higher than in Edmonds, Washington.<sup>52</sup> So, to have the same impact in New York of the \$125 per hour rate in Edmonds, the New York rate would have to be \$172.5.

108. Effective July 1, 2019, the Los Angeles County Indigent Criminal Defense Program established hourly rates from \$81 for misdemeanors to \$114 per hour for grade 4 felonies and \$125 per hour for “sexually violent predator” cases. There is a misdemeanor per diem rate of \$350.<sup>53</sup> The cost of living in New York, New York, is approximately 29.4 per cent higher than in Los Angeles.<sup>54</sup> To have the same impact in New York of the \$114 per hour rate in Los Angeles would require a rate of \$147.52. And there has been inflation of 8.66 percent between July 2019 and December 2021.<sup>55</sup> The \$147.52 rate would be \$160.29 if one takes into account inflation.

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<sup>47</sup> Letter from South Dakota State Court Administrator to State Bar of South Dakota (Nov. 13, 2020), <https://tjs.sd.gov/uploads/docs/2021CourtAppointedAttorneyFees.pdf>.

<sup>48</sup> See fn.1., supra.

<sup>49</sup> Cost of Living Comparison Between Sioux Falls, SD and New York, NY, at [https://www.numbeo.com/cost-of-living/compare\\_cities.jsp?country1=United+States&country2=United+States&city1=Sioux+Falls%2C+SD&city2=New+York%2C+NY](https://www.numbeo.com/cost-of-living/compare_cities.jsp?country1=United+States&country2=United+States&city1=Sioux+Falls%2C+SD&city2=New+York%2C+NY).

<sup>50</sup> See, Increases to CJA Hourly Rates and Case Compensation Maximums, Federal Defender Services web page at <https://www.fd.org/news/increases-cja-hourly-rates-and-case-compensation-maximums>, last visited January 10, 2022.

<sup>51</sup> Council approves social worker job description, increases hourly rate of on-call public defenders, MyEdmonds News, February 24, 2021, available at <https://myedmondsnews.com/2021/02/council-approves-social-worker-job-description-increases-hourly-rate-of-on-call-public-defenders/>.

<sup>52</sup> Cost of living comparison Seattle to New York, Numbeo, at [https://www.numbeo.com/cost-of-living/compare\\_cities.jsp?country1=United+States&city1=Seattle%2C+WA&country2=United+States&city2=New+York%2C+NY&amount=100000&displayCurrency=USD](https://www.numbeo.com/cost-of-living/compare_cities.jsp?country1=United+States&city1=Seattle%2C+WA&country2=United+States&city2=New+York%2C+NY&amount=100000&displayCurrency=USD), last visited January 30, 2022. “Overall, Edmonds, Washington is 8.5% cheaper than Seattle, Washington.” <https://www.bestplaces.net/cost-of-living/seattle-wa/edmonds-wa/50000>.

<sup>53</sup> Indigent Criminal Defense Program web page of Los Angeles County Bar Association, available at <https://www.lacba.org/resources/indigent-criminal-defense-appointments>, last visited January 30, 2022.

<sup>54</sup> Numbeo, Cost of Living Comparison Los Angeles to New York, at [https://www.numbeo.com/cost-of-living/compare\\_cities.jsp?country1=United+States&city1=Los+Angeles%2C+CA&country2=United+States&city2=New+York%2C+NY&amount=100000&displayCurrency=USD](https://www.numbeo.com/cost-of-living/compare_cities.jsp?country1=United+States&city1=Los+Angeles%2C+CA&country2=United+States&city2=New+York%2C+NY&amount=100000&displayCurrency=USD), last visited January 30, 2022.

<sup>55</sup> CPI Inflation Calculator at [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm), last visited January 30, 2022.

**E. The \$75 and \$60 Hourly Fees Violate the New York State Office of Indigent Legal Services Standards for Establishing and Administering Assigned Counsel Programs**

109. The New York State Office of Indigent Legal Services (ILS) Standards for Establishing and Administering Assigned Counsel Programs provide in part:

Quality representation by counsel in criminal and family law matters ensures the proper functioning of our justice system. Without adequate funding, these Standards cannot be met, and effective assistance cannot be provided.<sup>56</sup>

110. The ILS states in its preamble to the Standards: “The government must adequately fund public defense services and structure ACPs so that lawyers can remain independent, meet their ethical obligations, and deliver quality representation.”<sup>57</sup>

111. The \$75 fee and \$60 fee do not meet the ILS Standards.

**VI. Conclusion**

112. In addition to my opinion about the impact of low fees and the facts I have cited above, the statements by the judges that I have quoted above support a conclusion that in many cases, there is either an actual denial of counsel or constructive denial of counsel or ineffective assistance of counsel for clients represented by 18-B attorneys. When a court conducts a hearing without counsel for the accused who is entitled to counsel, as Judge Pitchal reported is happening, that is an unconstitutional denial of counsel. When a lawyer is barely more than a warm body standing next to a client because the lawyer has not communicated adequately with the client or conducted necessary investigation and preparation, that is constructive denial of counsel. Both the U.S. Supreme Court and the New York Court of Appeals have made clear that constructive denial of counsel is unconstitutional.

There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.

Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. ...

Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a

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<sup>56</sup> New York State Office of Indigent Legal Services Standards for Establishing and Administering Assigned Counsel Programs July 1, 2019, p. 18, available at <https://www.ils.ny.gov/files/ACP%20Standards%20with%20Commentary%20070119.pdf>.

<sup>57</sup> Id., at 2.

presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

U.S. v. Cronin, 466 U.S. 648, 658-60, 104 S.Ct. 2039, 2046-47 (1984).[footnotes and citations omitted.]

113. New York's highest court has followed the spirit and rule of Cronin:

...the right that plaintiffs would enforce—that of a poor person accused of a crime to have counsel provided for his or her defense—is the very same right that *Gideon* has already commanded the states to honor as a matter of fundamental constitutional necessity....

As plaintiffs rightly point out, the absence of representation at critical stages is capable of causing grave and irreparable injury to persons who will not be convicted.

Hurrell-Harring v. State, 15 N.Y.3d 8, 26, 27, 930 N.E.2d 217, 227, 904 N.Y.S.2d 296, 306 (2010).

114. When there is a systemic severe risk of ineffective assistance of counsel, the courts must act. The Federal Court for the Western District of Washington issued an injunction against two cities to remedy their failure to provide effective representation:

Mere appointment of counsel to represent an indigent defendant is not enough to satisfy the Sixth Amendment's promise of the assistance of counsel. While the outright failure to appoint counsel will invalidate a resulting criminal conviction, less extreme circumstances will also give rise to a presumption that the outcome was not reliable. For example, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, if there is no opportunity for appointed counsel to confer with the accused to prepare a defense, or circumstances exist that make it highly unlikely that any lawyer, no matter how competent, would be able to provide effective assistance, the appointment of counsel may be little more than a sham and an adverse effect on the reliability of the trial process will be presumed....

A system that makes it impossible for appointed counsel to provide the sort of assistance required by the Sixth Amendment works irreparable harm: the lack of an actual representational relationship and/or adversarial testing injures both the indigent defendant and the criminal justice system as a whole. ...

This Court has broad authority to fashion an equitable remedy for the constitutional violations at issue in this case.

Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1131, 1133–34 (W.D. Wash. 2013).

115. The Chief Judge of New York has concluded that the existing compensation rate for assigned counsel is diminishing the quality of representation. One of her colleagues in

Family Court, Judge Jolly, has concluded that the low rate has led to a dramatic reduction in the number of lawyers willing to take appointments. She noted that the lawyers have limited time to prepare and often are unable to attend court hearings. Both judges noted the delays in court hearings because of the lack of lawyers. Judge Jolly, citing a report commissioned by the Chief Judge, discussed the “dehumanizing experience that has had a disparate impact on Black and Latinx litigants, creating a second-class system of justice for people of color in New York.”

116. The Supreme Court of New York nearly 19 years ago found that the failure to increase compensation for assigned counsel and to address other funding restrictions “created a severe and unacceptably high risk that children and indigent adults are receiving inadequate legal representation in New York City in violation of the New York and United States Constitutions.” New York County Lawyers’ Ass’n v. State of New York, 196 Misc. 2d 761,790 (Sup. Ct. N.Y. Cnty. 2003).

117. In my opinion, there is an equally severe and unacceptably high risk today that children and indigent adults in New York City are receiving inadequate legal representation when they are represented by lawyers being paid \$60 or \$75 per hour.

Date: February 1, 2022



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Robert C. Boruchowitz WSBA #4563