

# Ensuring Equal Justice for All Demands an Increase in Assigned Counsel Rates

By Hon. Juanita Bing Newton

## Introduction

Recently, I had occasion to consider the plight of an immigrant father who lamented that his efforts to be



reunited with his seven-year-old son were, in his mind, thwarted by an uncaring and inefficient judicial system. The boy was living with his mother's family since the mother's tragic death the previous year.

This is not another reflection on the much-publicized Elian Gonzalez saga. Rather, it is a reflection on one of the first letters of complaint I

received after my appointment in July 1999 as the Deputy Chief Administrative Judge for Justice Initiatives. The father, a Bronx resident, claims to have been granted custody of his son upon his wife's death. However, despite that determination, he has been denied access to his child due to pending abuse charges brought by his in-laws, who have physical custody of the boy and refuse to turn him over to the father. Although more than a year had elapsed, the case was still on the Family Court docket. This gentleman could not understand how the system permitted such intolerable delay when so much was at stake and why the case was repeatedly adjourned because "the attorneys were never available."

The whole world waited for the Circuit Court of Appeals to render its decision in the Gonzalez case. Indeed, some in the media suggested that the court was taking far too long to issue its determination. How would this same media person react if the case had to proceed through the Family Court, dependent on assigned counsel, rather than the expedited review it received in the federal court. My guess is that her reaction would be one of dismay and outrage to learn that a similar case could take a year or so to resolve.

I was recently reminded that delays in proceedings are becoming more commonplace than ever before as a colleague relayed a not-so-atypical situation that occurred in the Criminal Term of Supreme Court. A presiding judge realized that a trial could not be had in a criminal matter, where the defendant had been incarcerated for more than a year, because his assigned counsel was simply too heavily burdened with other commit-

ments. Upon a motion by the assigned counsel to be relieved, the request was granted by the court, with the obvious consent of the defendant, and another 18-B attorney assigned to the matter. To the dismay of the court and the defendant, the newly appointed attorney, upon learning at the first appearance that the case was trial ready, advised the judge that he could not possibly try the case within the coming year because of his commitments to even older cases. It is difficult to juxtapose a two-week turnaround in the Circuit Court of Appeals in the Gonzalez case with the extraordinary delay in this New York City trial-ready case.

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Whether we look at these two cases in light of a high profile case or on their own merits, we should be uncomfortable that the courts' ability to resolve serious matters in a reasonable time period is dramatically being compromised. Regrettably, such delays are not uncommon in the Criminal and Family Courts of New York State. A principal reason is the growing shortage of attorneys available to accept assignments to represent indigent individuals. 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.

## History of Assigned Counsel in New York

New York courts historically have had the inherent authority to appoint counsel to represent indigent persons charged with a crime.<sup>1</sup> However, that power did not authorize compensation of counsel except in capital cases.<sup>2</sup> Moreover, assignments generally did not occur until after the preliminary stages of the criminal proceeding and were rarely made in misdemeanor cases.<sup>3</sup> In 1961, legislation was enacted, permitting, but not requiring, counties to establish public defender offices

or contract with legal aid societies to represent indigent criminal defendants.<sup>4</sup> Some counties proceeded to do so, but most continued to rely on the traditional system of judicial appointment of uncompensated counsel.<sup>5</sup>

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Two years later, in 1963, the United States Supreme Court handed down its landmark decision in *Gideon v. Wainwright*,<sup>6</sup> forever altering the legal landscape for indigent people charged with crimes. In *Gideon*, the Court held that the Sixth Amendment’s guarantee of assistance of counsel to those accused of a crime requires the states to provide counsel to criminal defendants charged with a felony who cannot afford to retain counsel. In poignant language, the Court recognized that within our justice system, the guarantees of a fair trial were not attainable unless indigent criminal defendants were provided with attorneys.<sup>7</sup> Shortly after the *Gideon* decision, the New York Court of Appeals extended the Supreme Court’s holding, determining that all criminal defendants in New York, not merely those charged with a felony, have the right to assignment of counsel if they are unable to afford an attorney.<sup>8</sup>

In the aftermath of these decisions, County Law Article 18-B was passed in 1965, memorializing New York’s commitment to ensuring access to justice for the indigent criminal defendants. The statute mandates that each county in the state provide for the assignment of counsel to indigent defendants charged with a crime from the time of arraignment.<sup>9</sup> Under the statutory framework, each county is required to adopt a systemic plan for furnishing counsel.<sup>10</sup> Quite significantly, the statute also directs each county (and within New York City, the City) to provide reimbursement and compensation for assigned counsel.<sup>11</sup>

Article 18-B is also the implementing statute for assignment of counsel for indigent adult litigants in Family Court.<sup>12</sup> Under § 262 of the Family Court Act, adults unable to afford an attorney are entitled to assignment of counsel in a range of Family Court proceedings, including abuse and neglect, family offense and child custody proceedings.<sup>13</sup>

## Assigned Counsel Compensation

Since its enactment, the 18-B statute has generated much debate and intense lobbying regarding the source of funding for assigned counsel. The counties, who are charged with the responsibility of bearing the costs of assigned counsel, have traditionally resisted rate increases due to the substantial fiscal implications, and the state government has been understandably reticent to override those concerns. The original statute provided for assigned counsel of \$15 per hour for in-court work and \$10 per hour for out-of-court work. The Legislature subsequently raised these rates in 1977 to \$25 for in-court work and \$15 for out-of-court work, and again in 1986 to \$40 for in-court work and \$25 for out-of-court work. Since 1986, however, assigned counsel rates have remained stagnant at the \$40 and \$25 level.<sup>14</sup>

While the 1986 increases were modest, the rates today—14 years later—are woefully inadequate. The fees are now the lowest hourly fees for assigned counsel work paid by all but one other state in the nation.<sup>15</sup> And that other state—New Jersey—has an extensive statewide public defender office and, thus, unlike New York, relies on assigned counsel to handle only a small portion of its indigent criminal cases. In fact, New York’s fees are so low that they do not even cover an average attorney’s hourly overhead expenses in many parts of the state, particularly New York City. Based upon a 1995 New York State Bar Association study of economics of law practice in New York, it is estimated that the average solo practitioner or small firm attorney in New York City actually loses money when performing assigned counsel work at the current rates.<sup>16</sup>

Moreover, assigned counsel fees pale in comparison to the rates that the state and local governments pay private attorneys for other types of legal work. For example, private bond counsel performing legal work for agencies such as the MTA, the State Dormitory Authority and New York City’s Education Construction Fund are paid fees ranging from \$175 to \$325 per hour.<sup>17</sup>

On the sole basis of fairness, assigned counsel, handling critical and sensitive matters in our courts, including abuse and neglect, child custody, domestic violence and preservation of constitutional rights, deserve a meaningful rate increase. When consideration is given to the crisis existing within our courts and justice system due to the consequences of the exceedingly low rates, no plausible argument can be made against immediate and substantial increases in assigned counsel rates.

## Dire Implications for Access to Justice in New York

The \$40 in-court and \$25 out-of-court fees for assigned counsel are completely out of line with today's economic realities. Consequently, we have seen a mass exodus of attorneys from the assigned counsel panels. As has been documented, fewer and fewer attorneys have been willing to take these assignments throughout the state.<sup>18</sup> For example, ten years ago there were over 1,000 attorneys actively taking criminal case assignments in the First Judicial Department, which covers Manhattan and the Bronx. Today barely 400 attorneys are actively taking these assignments—a decline of over 60%. The situation in the Second Department (which covers Brooklyn, Queens and Staten Island) is even worse—ten years ago, 940 attorneys were actively taking criminal case assignments, whereas today the number has dropped nearly 70% to about 300. Unfortunately, the decline in attorneys willing to take case assignments has occurred even as the demand for their work has increased. For example, in New York City alone, total arrest case filings were 15.2% higher than ten years earlier.

The story is similar in Family Court as is evidenced by the plight of the Bronx immigrant father. Panels have diminished in size over the last decade while filings have soared—with a third more case filings in recent years compared to ten years ago.<sup>19</sup> In short, because of inadequate fees for assigned counsel work, we now have dramatically smaller numbers of attorneys handling a significantly larger number of cases. This acute shortage of appointed counsel severely undermines the processing of Criminal and Family Court cases, to the great detriment of crime victims, families, prosecutors and defendants and ultimately the public.

More and more, we are experiencing serious disruptions within the courts as the system struggles to operate without an adequate number of experienced attorneys willing to take assigned counsel cases. We are seeing the repercussions at all stages of Criminal and Family Court proceedings. At preliminary criminal proceedings, it has become increasingly difficult to secure assigned counsel to staff the arraignment parts in Criminal Court. This has severely strained efforts to comply with the legal mandate that an arraignment be held within 24 hours of arrest.<sup>20</sup> When assigned counsel are not available, court staff must search the courthouse to locate private attorneys willing to staff the arraignment part on a temporary basis until the assigned counsel arrives in the part, if at all.

In light of the substantially larger numbers of cases that individual assigned counsel are handling in the criminal courts, they are increasingly absent, late or unprepared for routine court appearances and hearings.

And, for the same reason, it has become extremely difficult to schedule hearings and trials in cases in which more than one assigned counsel is involved. Moreover, as more inexperienced attorneys become part of the assigned counsel panels, the efficient processing of cases is frustrated as these attorneys are not as skillful in negotiating with their adversaries and otherwise moving their cases toward expeditious disposition.

When matters reach the trial stage, serious felony cases are repeatedly delayed because overburdened assigned counsel are often on trial in other cases on almost a continual basis. It is not uncommon to hear of murder trials nearly three years old that simply cannot proceed to trial because defense attorneys are tied up on trials in other cases. When this happens, prosecutors often have great difficulty securing their witnesses for

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trial, crime victims and their families are denied justice, and criminal defendants—many of whom are incarcerated while waiting for their cases to come to trial—are denied a speedy resolution of the charges against them.

The same situation is occurring in the Family Court. In the intake parts, there is an insufficient number of assigned counsel to accept cases. As a result, large blocs of cases—many of which include child abuse and neglect proceedings and matters in which juveniles are being held in custody—sometimes are not called and simply adjourned to a later date. This occurs even though immediate court intervention may be necessary. At other stages of the proceedings, matters are repeatedly delayed due to the unavailability of assigned counsel. The consequences can be quite severe, as in the case of the Bronx father who desperately seeks reunification with his child. As troubling is the fact that in Family Court, the scarcity of assigned counsel has meant that attorneys are not always assigned to represent indigent petitioners in family offense cases. When this occurs, victims of domestic violence are forced to make critical decisions on their own that may affect their future physical safety.



Clearly, the inadequate numbers of assigned counsel, who must juggle large caseloads, greatly impacts the quality of representation being provided to indigent defendants. Ineffective assistance of counsel is a true concern. The consequences for the defendants are obvious. What may not be so apparent is the drain on the courts as greater numbers of appeals are brought raising the issues of ineffective assistance at the trial level. Moreover, the apparent failure of the system to adequately provide quality representation for the indigent erodes the community's sense of justice and, consequently, its trust and confidence in the judiciary.<sup>21</sup>

This erosion of public trust is further implicated by the fact that the lack of adequate funding for assigned counsel disproportionately impacts persons of color. For example in 1991, while African-Americans made up 12% of the nation's population, they comprised more than 30% of the families living below the federal poverty line.<sup>22</sup> Similarly, Latinos comprised 9% of the general population, but 26% of families living below the poverty level.<sup>23</sup> The words of Professor Charles Ogletree succinctly illustrate the correlation between the lack of funding to indigent defense services and race:

[f]ailure to provide adequate assistance of counsel to accused indigents draws a line not only between the rich and poor, but also between white and black. . . . Recent reports indicate that unprecedented numbers of African-Americans, particularly young males, are involved in the criminal justice system. When discussing the inadequacies of the current system of providing counsel for the accused poor, one cannot ignore the correlation between race and poverty. If the criminal justice system deprives the poor generally . . . a burden will fall disproportionately on communities of color because of the greater incidence of poverty in these communities and, hence their greater reliance on public defender services.<sup>24</sup>

Certainly, morale among lawyers who represent indigent defendants, prosecutors and judges can only be eroded by such circumstances.

## A Practical Solution

The crisis within the justice system is universally recognized by the bench and bar as well as law enforcement and local government officials. Last fall, representatives of all components of New York's legal community convened to devise a solution. The result is a bill that is now pending before the legislature.

The bill most importantly proposes a substantial increase of assigned counsel fees to \$75 per hour for felony and Family Court work. For non-felony matters, the bill proposes that the rates be increased to \$60 per hour. These increases are essential if experienced criminal and family law practitioners are to take on these assignments once again.

The legislation also calls for the elimination of the existing two-tiered rates for in-court and out-of-court work—to encourage lawyers to devote sufficient time to out-of-court tasks that quality representation requires. It further proposes the creation of a bi-partisan commission to periodically review compensation rates, and to make non-binding recommendations for increases believed to be appropriate.

Lastly, the bill proposes that State revenue be used to pay for the rate increases. Practically speaking, it makes sense for the State to share the responsibility of meeting New York's obligation under *Gideon*, particularly since there is a discrete source of funding available that can pay for the entire cost of the rate increases proposed in the legislation. The State raises approximately \$70 million each year through the imposition of surcharges, ranging from \$5 to \$150, on individuals convicted of an offense—most of which finds its way into the State's General Fund. The legislation calls for this money to be returned to the criminal justice system, to pay for assigned counsel fee increases without any additional expense borne by the State.

Despite broad statewide support, across party lines and political ideologies, it is uncertain whether the proposal will be enacted this legislative session. While the court system remains committed to the bill and will continue to seek approval by the Legislature, it is exploring other mechanisms to raise the assigned counsel rates. In particular, it has recently announced a pilot project to collect unpaid court fines and surcharges that can be dedicated to increasing the assigned counsel rates. If the program proves successful, statewide expansion should be considered by the Legislature so that potentially tens of millions of dollars collected can be used for assigned counsel fee increases.

## Conclusion

The time is now for New York to correct a long-standing injustice within the assigned counsel system. We must increase the rates paid to assigned counsel, not only because it is the right thing to do, but more importantly because New York is constitutionally obligated to do so under *Gideon*. If we are to ensure equal justice for all, in the words of Learned Hand, we cannot ration justice.

## Endnotes

1. See Code of Crim. Proc. § 308 (originally enacted by L.1881, c. 442). See also *People ex rel. Whedon v. Board of Supervisors*, 192 A.D. 705 (3d Dept. 1920).
2. *Id.*
3. See Memorandum of Attorney General, 1965 N.Y. Legis. Ann., p. 34.
4. L. 1961, c. 365.
5. See Memorandum of Attorney General, 1965 N.Y. Legis. Ann., p. 34.
6. 372 U.S. 335(1963).
7. Specifically, the court stated:

Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

372 U.S. at 34.
8. *People v. Witek*, 15 N.Y.2d 392 (1965). The Supreme Court later extended the *Gideon* ruling to all criminal cases. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972).
9. Under the statute, “crime” is defined broadly as follows:

[A] felony, misdemeanor, or the breach of any law of this state or of any law, local law or ordinance of a political subdivision of this state, other than one that defines a “traffic infraction,” for which a sentence to a term of imprisonment is authorized upon conviction thereof.

County Law § 722-a.
10. Specifically, County Law § 722 requires that the county provide representation to persons financially unable to afford counsel by one of four alternative methods: (1) creation of a public defender office; (2) contracting with a legal aid society; (3) creating an assigned counsel plan; or (4) implementing a combination of any of the foregoing alternatives.
11. County Law § 722-b.
12. See Family Court Act § 262(c).
13. Law guardian representation is not governed by Article 18-B; rather, it is provided pursuant to contracts that the Office of Court Administration enters into with a legal aid society, or by way of panels of private attorneys that are established and administered by the Appellate Division in each of the State’s four judicial departments. Family Court Act § 243.
14. In addition to the frozen rates, the statute provides that total fees paid to assigned counsel per case are capped at \$800 for Family Court matters and misdemeanors, and at \$1200 for felonies and appeals. County Law § 722-b. See also Family Court Act § 245(c) (providing that law guardian assignments be compensated pursuant to the rates established in § 35(3) of the Judiciary Law—i.e., \$40 per hour for in-court work and \$25 per hour for out-of-court work). In 1987, the Legislature eliminated the in-court/out-of-court differential for assigned counsel appellate work. L. 1987, c. 317. Thus, attorneys handling appeals in criminal and Family Court cases are compensated at a flat rate of \$40 per hour.
15. See “Rates of Compensation Paid to Court Appointed Counsel in Non-Capital Felon Cases at Trial: A State-by-State Overview,” Spangenberg Group (November 1999).
16. “Assigned Counsel Compensation in New York: A Growing Crisis,” New York State Unified Court System (January 2000) at 8.
17. See Daniel Wise, *City Will Increase Hourly Rates for Future Bond Counsel*, N.Y.L.J., October 15, 1999, p. 1, col. 3.
18. “Assigned Counsel Compensation in New York: A Growing Crisis,” New York State Unified Court System (January 2000) at 9-12.
19. *Id.* at 12.
20. See CPL § 140.20(1) (requiring that arrested persons be brought to court for arraignment “without necessary delay”); *People ex rel. Maxian v. Brown*, 77 N.Y.2d 422 (1990) (upholding lower courts’ determination that a delay in arraignment in New York City of more than 24 hours is presumptively unnecessary under the statute).
21. On point, United States Attorney General Janet Reno, in addressing the implications of insufficient funding for indigent defense, opined:

[t]he right to counsel is critical not only to defendants and defense lawyers, but to all of us. The right to an attorney helps guarantee that any outcome, be it guilt or innocence, is just and definitive. No prosecutor wants to prosecute someone whose defense counsel lacks the necessary skills and experience to put up a defense, and face the likelihood of having the conviction reversed on appeal. Certainly the prosecutor wants to secure a conviction, but not if it is based on a constitutional shortcut. The Supreme Court has repeatedly emphasized that the right to counsel is a bedrock constitutional rule. In this sense, we all have a stake in vigilant protection of that right. That is because we all have a stake in our justice system’s fundamental fairness and accuracy . . . unfortunately the promise of *Gideon* is not completely fulfilled. Indigent defendants do not invariably receive effective assistance of counsel . . . [s]ometimes it is caused by a lack of resources. Sometimes it stems from the absence of a structure in the state to provide adequately for the indigent. But such failings inevitably erode the community’s sense of justice and the aspiration of our system to equal justice under the law.

*USA Today*, March 18, 1997.
22. Administrative Office of the United States Courts, Guide to Judiciary Policies and Procedures, Appointment of Counsel in Criminal Cases, Volume VII, Chapter II at 2.28 A.
23. Bureau of the Census, Department of Commerce, Statistical Abstract of the United States, National Data Book at 473 (1993), cited in, Note, *Racism in Our Courts: The Underfunding of Public Defenders and the Disproportionate Impact upon Racial Minorities*, 22 Hastings L.Q. 219, 234 (1994).
24. Charles Ogletree, *Toward a More Effective Right to Assistance of Counsel, An Essay on the Public Defender for the 21st Century*, 58 WTR Law & Contemp. Probs. 81, 82 (1995).

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