

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

PRESENT: Hon. LUCINDO SUAREZ, J.S.C.
Justice

PART AL 38

New York County Lawyers' Association

INDEX NO. 102987/2000

MOTION DATE 4-1-02

- v -

The State of New York and
The City of New York

MOTION SEQ. NO. 204

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

**NYS SUPREME COURT
RECEIVED
MAY 6 2002
KAS MOTION
SUPPORT OFFICE**

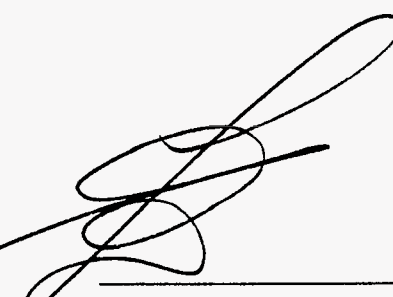
MOTION/C IS RESPECTFULLY RECEIVED T

JUSTICE

DATED: _____

J.S.C.

MOTION FOR PRELIMINARY INJUNCTION
Decided in accordance with the
ATTACHED ~~DECISION~~ ^{DECISION} DATED MAY 3, 2002

Dated: 5/3/2002 

Check one: FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : AL Part 38

Present: Honorable Lucindo Suarez, Justice

NEW YORK COUNTY LAWYERS' ASSOCIATION,

Plaintiff,

Index No. 102987/00

-against-

DECISION and ORDER

THE STATE OF NEW YORK and CITY OF
NEW YORK,

Defendants.

Recitation, as required by CPLR §2219(a) of the papers considered in the review of Plaintiffs motion for a preliminary injunction and declaratory relief is set out as follows:

<u>Papers Submitted</u>	<u>Dated</u>	<u>Court Numbered</u>
Notice of Motion, Affirmation in Support (Moseley) and Exhibits "A" through "W"	5-31-01	1, 2, 3
Memorandum of Law in Support	5-31-01	4
Affirmations of Angioletti; Carey; Checkam; Cohen; Cortese; Drinane; Farrell; Feck; Fishbein; Gage; Gelb; Gilman; Greemfoed; Leder; Leidholdt; MacFarlane; Marotta; Michaels; Milano; Raskin; Roberts; Schiff; Segal; Susser; Torres; Traub; Walter, and Zimmerman in Support	5-31-01	5
Expert Affidavits of Lefstein; Spangenberg; Spinak and Stiffman and Exhibits in Support	5-31-01	6
Deposition transcript of Justice James A. Yates	4-26-01	7
Affirmation in Opposition (Cohen) and Exhibits "1" through "6"	7-30-01	8, 9
Memorandum of Law (Olson) in Opposition	7-30-01	10
Affidavit of Katherine N. Lapp, in Opposition	7-27-01	11
Affidavit of John E. Stupp, in Opposition	7-27-01	12
Reply Affirmation in Support (McGee) and Exhibits "A" through "B"	8-06-01	13
Reply Memorandum of Law in Support (McGee)	8-06-01	14
Letter by Moseley with attachments "A" and "B"	11-13-01	15
Interim Order and Decision	1-23-02	16
Notice of Cross-Motion to Dismiss, and Memorandum of Law in Support (Pines)	3-14-02	17, 18
Affirmation in Opposition to Motion for Preliminary Injunction (Pines)	3-15-02	19
Affirmation in Opposition to Motion to Dismiss (Olson)	4-04-02	20
Affirmation in Further Support of Motion for Preliminary Injunction with further Exhibits (Moseley)	4-07-02	21

Equity and the administration of justice are at the core of this litigation. Herein lay two

competing jurisprudential doctrines: the promise of *Gideon*' pitted against the organic law that each branch of government should be free from interference by either of the other.

The issue in this motion for a preliminary injunction and declaratory judgment is whether New York State's failure to increase the current compensation rates for assigned counsel has rendered hollow the constitutional and statutory right to counsel and obstructs the judiciary's ability to function.

This Court finds serious and imminent danger of ineffective assistance of counsel to indigent litigants in the New York City family and criminal courts resulting from the inadequate compensation rates paid to assigned counsel; holds in abeyance a declaration, if at all, that the assigned counsel statutory scheme is unconstitutional as applied; and issues a mandatory preliminary injunction directing payment of an interim rate of \$90.00 an hour for in and out-of-court work.

The New York County Lawyers' Association seeks declarations, pursuant to CPLR 3001 that: (1) the State of New York is obligated to ensure that a sufficient number of qualified private attorneys are available and able to represent children and indigent adults in family and criminal proceedings in New York City; (2) the State's failure to raise the hourly rates of compensation paid to assigned counsel,' the distinction between the rates paid for in and out-of-court work, and the ceilings on total per case compensation have created a severe and unacceptably high risk that children and indigent adults will not receive meaningful and effective legal representation in

¹ *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1964), *see also*, *Gideon's Trumpet*, Anthony Lewis, (1964) Random House, Inc., New York Vintage Books Edition, March 1989.

² As used herein, the terms "assigned counsel" or "panel attorneys" refers to private attorneys assigned to represent children and indigent adults pursuant to Article 18-B of the County Law, §245 of the Family Court Act, or §35 of the Judiciary Law.

violation of the New York and United States Constitutions; and (3) the rate-setting provisions of §722-b of the County Law, §245 of the Family Court Act, and §35 of the Judiciary Law are unconstitutional as currently applied to the representation of children and indigent adults in New York City.³

In addition to declaratory relief, NYCLA seeks a mandatory preliminary injunction, pursuant to CPLR 6301, directing that: (1) the rate of compensation for assigned counsel in all family and criminal trial and appellate proceedings in New York City shall be \$100 per hour to ensure that a sufficient number of qualified private attorneys are available and able to provide children and indigent adults with meaningful and effective legal representation in these proceedings; (2) there shall be no distinction between the hourly rates paid for in and out-of-court work; (3) there shall be no ceilings on total per case compensation; and (4) the \$100 per hour rate shall be effective immediately and remain in effect until such time as the State may modify the assigned counsel system, consistent with its constitutional obligations.

Finally, NYCLA seeks further injunctive relief to take effect two months after the above orders have been issued requiring the State to: (1) ensure that sufficient numbers of assigned

³ NYCLA commenced this action contending that New York State's failure to currently provide sufficient compensation to ensure court appointed private counsel for the indigent pursuant to County Law §722-b, Family Court Act §245(b), and Judiciary Law §35(2), has resulted in systemic deficiencies in the assigned counsel system in the Supreme, Criminal and Family Courts in New York City, which has created a risk that indigent adults and children will be denied their rights to meaningful and effective assistance of counsel and due process of law, thereby violating their constitutional and statutory rights pursuant to Article I, section 5 and 6 of the New York State Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Defendants moved to dismiss the complaint, arguing, *inter alia*, that: plaintiff lacked standing, its claims were non-justiciable, the Governor was not a necessary party, and plaintiff failed to state a claim for tortious interference. This Court ruled that NYCLA had: direct standing to sue on claims that the State's failure to increase the statutory rates of compensation interfered with plaintiffs responsibilities to provide and maintain a list of available and adequately trained attorneys for the family and criminal courts' assigned counsel panels; third party standing on behalf of its members' indigent clients; and organizational standing to represent those NYCLA members who are panel members of the assigned counsel plan in New York City. This Court also found plaintiffs claim for declaratory relief justiciable, but dismissed all claims against the Governor, and dismissed plaintiffs claims for tortious interference. *See, NYCLA v. Pataki*, 188 Misc.2d 776, 727 N.Y.S.2d 851 (2001). The decision is currently on appeal.

counsel are available each day to staff the intake parts in the New York City Family Court; (2) review the total number of hours billed by assigned counsel every three months and to prevent any attorneys who have billed 2,000 hours or more work during the prior 12 months from accepting any new assigned cases until their billed hours fall below this limit; and (3) enforce all existing standards, guidelines and rules of the Assigned Counsel Plan and Law Guardian Programs pertaining to the conduct and performance of assigned counsel. These additional measures, NYCLA submits, are necessary to ensure that all children and indigent adults who are entitled to counsel are assigned attorneys able to provide them with meaningful and effective legal representation.

The State argues that the City of New York has a substantial interest in the subject matter of the preliminary injunction, especially in light of NYCLA's reference to contempt sanctions should the City fail to comply with any order this Court may issue, and therefore this Court should not consider the issues implicated by NYCLA's request for preliminary relief without affording the City an opportunity to be heard. On January 23, 2002, this Court issued an interim decision and order directing NYCLA to file and serve the City of New York with a supplemental summons and complaint. The City of New York interposed its answer and cross moved to dismiss, pursuant to CPLR 3211, contending NYCLA did not set forth a cause of action against it. That motion is denied to the extent that the City of New York remains a necessary party.

CPLR 1001(a) mandates joinder of a party in two situations: (1) where that party is necessary if complete relief is to be accorded between the persons who are parties to the action; or (2) where the unnamed party might be inequitably affected by a judgment in the action. *See, Castaways Motel v. CVR Schuyler*, 24 N.Y.2d 120, 125, 247 N.E.2d 124, 127, 299 N.Y.S.2d 148,

152 (1969) (non-parties are “indispensable” where the determination of the court will adversely affect their rights). “As to the latter requirement, ‘[t]he possibility that a judgment rendered without [the omitted party] could have an adverse practical effect [on that party] is enough to indicate joinder.’” *Hitchcock v. Boyack*, 256 A.D.2d 842, 844, 681 N.Y.S.2d 659, 661 (3d Dep’t 1998). Indeed, “the primary reason for compulsory joinder is to avoid a multiplicity of actions and to protect the non-parties whose rights should not be jeopardized if they have a material interest in the subject matter.” *Joanne S. v. Carey*, 115 A.D.2d 4, 7, 498 N.Y.S.2d 817, 819 (1st Dep’t 1986).

New York State bears the ultimate responsibility to provide counsel to the indigent. *Gideon, supra*, 372 U.S. at 344, 83 S. Ct. at 796, 9 L.Ed.2d at 805. However, the City of New York is an indispensable party in the context of this preliminary injunction, as the New York State Legislature has passed on the responsibility of creating an assigned counsel plan to the individual counties, (*see* County Law §722⁴) and the expense of funding it to its political subdivisions. The Office of Court Administration funds the Law Guardian Program and the Mental Hygiene Legal Service Office. The executive branch covers the cost of representing indigent defendants in capital cases. Local governments and the Office of Court Administration contract with organizations to provide representative services pursuant to the procurement rules that govern them; i.e. the Legal Aid Society. The Legislature sets a statewide rate for private panel lawyers who represent indigent children and adults. The statutory cap provisions and compensation rates contained in Judiciary Law §35, Family Court Act §245(b),⁵ and County

⁴ County Law Article 18-A, (L. 1961, Ch. 365).

⁵ Family Court Act §245 sets forth the compensation schedule for attorneys assigned to represent the indigent by reference to Judiciary Law §35. *See*, Family Court Act §245(c). New York State, by statute, required the right to counsel before the United States Supreme Court extended the constitutional right to counsel to children

Law §722(b) are mandated by the Legislature. It sets the rates, whereas the localities administer and fund the program. The cases cited by City of New York for dismissal, *Jiggets v. Grinker* 148 A.D.2d 1, 543 N.Y.S.2d 414 (1st Dep't 1989), *rev'd on other grounds*, 75 N.Y.2d 411, 553 N.E.2d 570, 554 N.Y.S.2d 92 (1990), *Minino v. Perales*, 168 A.D.2d 289, 562 N.Y.S.2d 626 (1st Dep't 1990), are inapposite as New York State not only set the rate therein, but also shouldered the financial obligation. If complete relief is to be accorded among the parties to this action, the City of New York must remain a defendant as it has a substantial financial interest in the outcome and "might be inequitably affected by a judgment ..." (CPLR 1001, subd. [a]; *see, e.g., Matter of St. Luke's-Roosevelt Hospital Center*, 89 N.Y.2d 889, 675 N.E.2d 1209, 653 N.Y.S.2d 257 (1996) (court cannot impose cost of guardian ad litem on City of New York)) as it relates to the City's obligation under the County Law.

While ordinarily the function of a preliminary injunction is to preserve the status quo until a final determination upon the merits can be made, "[t]here is no question that in a proper case Supreme Court has power as a court of equity to grant a temporary injunction which mandates specific conduct ..." *McCain v. Koch*, 70 N.Y.2d 109, 116, 511 N.E.2d 62, 64, 517 N.Y.S.2d 918, 920 (1987); *see also, State v. Solil Management Corp.*, 128 Misc.2d 767, 491 N.Y.S.2d 243 (Sup. Ct. N.Y. Co. 1985) (an injunction may be used to either restrain or compel performance of an act). The decision whether to grant a motion for preliminary relief is committed to the sound discretion of the trial court. *See, Doe v. Axelrod*, 73 N.Y.2d 748, 750, 532 N.E.2d 1272, 1273, 536 N.Y.S.2d 44, 45 (1988); *Jiggets v. Perales*, 202 A.D.2d 341, 342, 609 N.Y.S.2d 222, 223 (1st Dep't 1994). The test is whether a movant has shown: "(1) a

involved in delinquency proceedings. *See, In Re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L.E.2d 527 (1967).

likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor." *Doc v. Axelrod, supra*, 73 N.Y.2d at 750, 532 N.E.2d at 1272, 536 N.Y.S.2d at 45; *Housing Works, Inc. v. City of New York*, 255 A.D.2d 209, 213, 680 N.Y.S.2d 487, 491 (1st Dep't 1998). Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail. *Scotto v. Mei*, 219 A.D.2d 181, 182, 642 N.Y.S.2d 863, 864 (1st Dep't 1996); *Faberge International Inc. v. DiPino*, 109 A.D.2d 235, 240, 491 N.Y.S.2d 345, 349 (1st Dep't 1985). In addition, where as here, the injunctive relief would upset the status quo and grant some form of the ultimate relief requested, the movant has the heightened burden of showing that extraordinary circumstances warrant the relief. *See, Rosa Hair Stylists v. Jaber Food Corp.*, 218 A.D.2d 793, 794, 631 N.Y.S.2d 167, 169 (2d Dep't 1995).

As a threshold matter, the State contends because NYCLA does not intend to prove that any particular family court disposition or criminal conviction has been entered into in violation of an individual's state or federal constitutional rights, its application for a mandatory preliminary injunction must be denied since there can be no sixth amendment violation in the absence of a conviction or adverse determination pursuant to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2025, 80 L.Ed.2d 799 (1984), and therefore NYCLA is unlikely to succeed on the merits. Furthermore, according to the State, NYCLA's reliance on *Luckey v. Harris*, 860 F.2d 1012 (11th Cir.1988) ("*Luckey I*") is misplaced since it misapplies controlling Supreme Court precedent and was ultimately dismissed on abstention grounds. *See, Luckey v. Harris*, 976 F.2d 673, 676-79 (11th Cir.1989). The linchpin of *Luckey I* can be found in two sentences: "[t]he sixth amendment protects rights that do not affect the outcome of a trial.

Thus, deficiencies that do not meet the ‘ineffectiveness’ standard may nonetheless violate a defendant’s right under the sixth amendment.” *Id.* at 1017.

Ordinarily, federal claims of ineffective assistance are judged case by case, after conviction, and measured against the Strickland standard. Strickland requires defendants to show that: (1) the attorney’s performance fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Kieser v. New York*, 56 F.3d 16, 18 (2d Cir. 1995)(quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698). Prejudice is presumed in cases where a defendant was represented by one not licensed to practice law (*Bellamy v. Cogdell*, 974 F.2d 302, 306 (2d Cir. 1992)(*en banc*), *People v. Felder*, 47 N.Y.2d 287, 391 N.E.2d 1274, 418 N.Y.S.2d 295 (1979)); the attorney is implicated in defendant’s crime (*United States v. O’Neil*, 118 F.3d 65, 71 (2d Cir. 1997)); the attorney slept during a substantial portion of the trial (*Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996)); upon a showing of an actual conflict of interest (*United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002)); and in the case of a civil action seeking prospective injunctive relief premised on evidence of likely constitutional violations. *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988); *Zarabia v. Bradshaw*, 185 Ariz. 1, 912 P.2d 5 (1996)(*en banc*)(protect the rights of indigent criminal defendants by ordering new compensation rates); *State v. Peart*, 621 So.2d 780 (Sup. Ct. La. 1993); *State of Mississippi v. Quitman County*, 807 So.2d 401 (2001); see also, Note, Rodger Citron, (*Un*)*Luckey v. Miller*, The Case for a Structural Injunction to Improve Indigent Defense Services, 101 Yale L.J. 481 (Nov. 1991).

In New York, to prevail on a claim of ineffective assistance, defendants must

demonstrate the “absence of strategic or other legitimate explanations for counsel’s alleged shortcomings” (*People v. Gil*, 285 A.D.2d 7, 12, 727 N.Y.S.2d 121, 126 (1st Dep’t 2001)); and that they were deprived of a fair trial by less than meaningful representation. *People v. Flores*, 84 N.Y.2d 184, 187, 639 N.E.2d 19, 21, 615 N.Y.S.2d 662, 664 (1994); *People v. Ford*, 86 N.Y.2d 397, 405, 657 N.E.2d 265, 269, 633 N.Y.S.2d 270, 274 (1995). In the absence of such a demonstration, New York courts will presume that defense counsel acted in a competent manner. *People v. Rivera*, 71 N.Y.2d 705, 709, 525 N.E.2d 698, 700, 530 N.Y.S.2d 52, 54 (1991). The presumption of effective assistance attaches on conviction, and is justified based on New York law imposing specific obligations on defense attorneys. *People v. Bennett*, 29 N.Y.2d 462, 466, 280 N.E.2d 637, 639, 329 N.Y.S.2d 801, 803 (1972); *People v. Droz*, 39 N.Y.2d 457, 462, 348 N.E.2d 880, 882, 384 N.Y.S.2d 404, 407 (1976); *see also*, 22 NYCRR §1200.32 (the duty to investigate both the law and the facts of each case).

Prejudice, as an aspect of the *Strickland* test, is examined more generally under the State Constitution in the context of whether defendant received meaningful representation. *See, People v. Hobot*, 84 N.Y.2d 1021, 1022, 646 N.E.2d 1101, 1103, 622 N.Y.S.2d 675, 676 (1995) (the test is whether counsel’s errors seriously compromise a defendant’s right to a fair trial).

While the inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case. The purpose is to ensure that a defendant has the assistance necessary to justify society’s reliance on the outcome of the proceedings.

Notably, New York is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence (*See, e.g., People v. Donovan*, 13 N.Y.2d 148, 154, 193 N.E.2d 628,

631, 243 N.Y.S.2d 841, 845 (1963)), and therefore this court finds the more taxing two-prong *Strickland* standard used to vacate criminal convictions inappropriate in a civil action that seeks prospective relief premised on evidence that the statutory monetary cap provisions and compensation rates currently subject children and indigent adults to a severe and unacceptable risk of ineffective assistance of counsel. This court further finds *Strickland's* reliance on post-conviction review provides no guarantee that the indigent will receive adequate assistance of counsel under the New York Constitution in the context of this action. Accordingly, because the right to effective assistance of counsel in New York is much more than just the right to an outcome, threatened injury is enough to satisfy the prejudice element and obtain prospective injunctive relief to prevent further harm.

Instructive on the issue of injury necessary to justify prospective relief is the Court of Appeals decision in *Swinton v. Safir*, 93 N.Y.2d 758, 720 N.E.2d 89, 697 N.Y.S.2d 869 (1999), where a probationary New York City police officer was discharged based on an ex-girlfriend's allegation of assault and attempted rape which were later recanted. The officer brought an Article 78 proceeding challenging his termination and sought a name-clearing hearing.⁶ The Court of Appeals agreed with the lower court that the probationary officer had no right to challenge his termination by way of a hearing, absent a showing (not present) that his dismissal was in bad faith or for some impermissible reason. The question for the Court however, was whether actual dissemination of the stigmatizing material to prospective employers was necessary to trigger the right to a name-clearing hearing, or whether proof of a likelihood of

⁶ In the context of public employment implicating a due process liberty interest, a name-clearing hearing affords a public employee an opportunity to prove the stigmatizing material in the personnel file is false. *Codd v. Velgen*, 429 U.S. 624, 627-628, 97 S.Ct. 882, 884, 51 L.Ed.2d 92, 96 (1977). The appropriate remedy is expungement, not reinstatement. *Bd. of Regents v. Roth*, 408 U.S. 564, 573, n.12, 92 S.Ct. 2701, 2707, n.12, 33 L.Ed.2d 548, 558, n. 12 (1972).

dissemination was sufficient. The Police Department argued that actual injury was necessary by dissemination of the stigmatizing material before the right to a name-clearing hearing was triggered. Their argument was that three Federal Circuit Courts insisted upon actual public disclosure: *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74-75 (1st Cir. 1990); *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139, 1148 (3d Cir. 1988); and *Olivieri v. Rodriguez*, 122 F.3d 406,408 (7th Cir. 1997). Unconvinced by the policy arguments expressed, the Court of Appeals rejected conflicting federal precedent, reinstated the complaint and concluded “proof of a likelihood of the occurrence of a threatened deprivation of constitutional rights is sufficient to justify prospective or preventive remedies under 42 U.S.C § 1983, without awaiting actual injury.” *Id.* 93 N.Y.2d at 765, 720 N.E.2d at 93, 697 N.Y.S.2d at 873 citing *Luckey v. Harris*, 860 F.2d 1012, 1017 (1st Cir.1988); *see also, Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001) (pretrial detainees were not required to show actual injury in challenging prison regulations which allegedly adversely affected their Sixth Amendment right to counsel by impeding attorney visitation).

The State contends *Swinton* is not analogous to the prospective injunctive relief sought by NYCLA because its claims are on behalf of unnamed and unidentified individuals who have not articulated any conduct by defendants that has violated, or is likely to violate, their rights, and that *Swinton* supports their view that to obtain injunctive relief, NYCLA must demonstrate an actual constitutional violation which is about to occur. NYCLA counters that proof of a likelihood of the occurrence of a threatened deprivation of the constitutional right, i.e., effective assistance of counsel and in some cases the delay in appointing counsel, is sufficient to justify prospective or preventive remedies without awaiting actual injury. Granting prospective relief to

secure constitutional standards in state proceedings based on evidence of the likelihood of depriving fundamental and statutory rights has long been within the province of the courts. See, e.g., *Pugh v. Rainwater*, 483 F.2d 778 (5th Cir.1973); *rev'd* in part on other grounds, *sub nom.*, *Gerstein v. Pugh*, 420 U.S.103, 95 S.Ct. 854, 43 L.E.2d 54 (1975). Evidence that minors and indigent adults will likely receive ineffective assistance of counsel in the family and criminal courts in New York City is sufficient to warrant judicial intervention in the form of a preliminary injunction.

The State acknowledges its duty to provide effective counsel to indigent litigants in the family and criminal courts, but argues that the expenditure of funds for the purpose of indigent defense or the manner by which it is provided is a complex societal and governmental issue best left to the legislative and executive branches, which are better suited to the task. This Court agrees with the proposition that the entirety of NYCLA's requested relief can only be had through the legislative process. However, this court finds NYCLA has satisfied its burden of showing a likelihood that indigent litigants in the New York City family and criminal courts are being denied effective assistance of counsel, as a result of the current compensation rates.

Accordingly, this court issues a mandatory preliminary injunction directing the payment of an interim rate of \$90.00 an hour for in and out-of-court work. However, this court denies injunctive relief to require the State to review the total number of hours billed by assigned counsel every three months and to prevent any attorneys who have billed 2,000 or more hours to work during the prior 12 months from accepting any new assigned cases until their billed hours fall below this limit; and to require the State to enforce all existing standards, guidelines and rules of the Assigned Counsel Plan and Law Guardian Programs pertaining to the conduct and

performance of assigned counsel. The judiciary may not usurp the legislative function by judicial amendment of the statute. *See, Statutes* §368.

NYCLA must also show irreparable injury will result unless the specific preliminary relief requested is granted. The injury must be material and actual for which monetary compensation is inadequate. *See, People v. Canal Board*, 55 N.Y. 390,397 (1884); *Haulage Enterprises Corp. v. Hempstead Resources Recovery Corp.*, 74 A.D.2d 863,426 N.Y.S.2d 52 (2d Dep't 1980). NYCLA has provided uncontroverted evidence of material and actual injury: in neglect proceedings children and parents suffer when they are unnecessarily separated due to the unavailability of assigned counsel; in juvenile delinquency proceedings children suffer by continued detention in the absence of counsel; in the criminal context, defendants endure protracted pre-trial detention, particularly in homicides and "serious" felony cases. This court is not unaware of the continued increase in the criminal and family court caseload, and the continued decrease of panel attorneys resulting in inordinate case loads for those who remain.

NYCLA has satisfied its heightened burden of showing extraordinary circumstances to warrant preliminary injunctive relief in this case which has pitted the three branches of government against each other.

A fundamental precept of the separation of powers doctrine is that each branch of government be free from interference by either of the others in discharge of its peculiar duties. Of equal import is the fact that one branch of government may not encroach on or impede the other in carrying out its duties and responsibilities. *People ex rel Burby v. Howland*, 155 N.Y. 270, 49 N.E.775 (1895); *People v. Granatelli*, 108 Misc.2d 1009,438 N.Y.S.2d 707 (N.Y.Co. Sup. Ct. 1981). Pursuant to our tripartite system of government, the power to adopt laws is

solely within the prerogative of the legislature. N.Y. Const. Art. 3, § 1 (McKinney's 1999). In passing on the constitutionality of a statute, a presumption exists that the Legislature has investigated and found the existence of a situation which indicates the particular legislation is needed. *Maresca v. Cuomo*, 64 N.Y.2d 242, 475 N.E.2d 95,485 N.Y.S.2d 724 (1984); *Schulz v. State of New York*, 84 N.Y.2d 231, 639 N.E.2d 1149,616 N.Y.S.2d 33 (1994) (acts of the legislature enjoy strong presumption of constitutionality). Generally, in order to declare a statute or a provision thereof unconstitutional, the invalidity of the law must be demonstrated beyond a reasonable doubt. *Hope v. Perales*, 83 N.Y.2d 563, 575, 634 N.E.2d 183, 186, 611 N.Y.S.2d 811, 814 (1994); *City of New York v. State of New York*, 76 N.Y.2d 479, 562 N.E.2d 118, 561 N.Y.S.2d 154 (1990). When construing a statute the court may take into account the public interest advanced by the legislation. *Meyers Bros. Parking Sys., Inc. v. Sherman*, 87 A.D.2d 562,448 N.Y.S.2d 198 (1st Dep't 1982); *aff'd*, 57 N.Y.2d 653,439 N.E.2d 882,454 N.Y.S.2d 73 (1982).

New York State adopted Article 18-B in 1965 in response to the decisions of the New York Court of Appeals in *People v. Witek*, 15 N.Y.2d 382, 207 N.E.2d 358,259 N.Y.S.2d 413 (1963) and the United States Supreme Court in *Gideon v. Wainwright*,*supra*. Then-Attorney General Louis Lefkowitz and the New York State Department of Law drafted the statute based upon the Federal Criminal Justice Act of 1964 (18 U.S.C. §§3006 *et seq.*)⁷ and the Legislature enacted the statute without hearings or reports. *See, People v. Johnson*, Mar. 18,2001 N.Y.L.J. 19, col. 2 (Sup. Ct. N.Y. Co.)(Kahn, J.). The legislative history makes clear that the compensation rates were intended to provide attorneys with a reasonable basis upon which

⁷ CJA attorneys recently received a raise to \$90 dollars an hour. *See*, Pub. L. No. 107-77 (amending 18 U.S.C. § 3006(a)); *see also*, Federal Counsel Get Rate Hike, N.Y.L.J., April 3, 2002, col. 4, p.1.

assigned lawyers could carry out their profession's responsibility to accept court appointments, without either personal profiteering or undue financial sacrifice. *See, People v. Brisman*, 173 Misc.2d 573, 582 n.4, 661 N.Y.S.2d 428, 429 n. 4 (Sup. Ct. Bx. Co. 1996).⁸ Participating attorneys currently receive \$25 and \$40 per hour for out-of-court and for in-court work, respectively, with an \$800 monetary cap for misdemeanor and Family Court cases and \$1,200 for felony and appellate matters. Compensation in excess of these rates may be obtained from the trial court on a case-by-case basis under "extraordinary circumstances," subject to administrative review. *See*, 22 N.Y.C.R.R. §127.2(b).⁹ These rates have been in effect since 1986 - sixteen years, and are currently equivalent to \$1.95 and \$16.95 an hour before taxes for out-of-court and in-court work, respectively, for a sole practitioner maintaining a New York City law practice, as presented in the affidavit of Dr. Lawrence H. Stiffman, a specialist in legal economics, submitted by NYCLA and uncontested by either the State or the City. One report estimates that a single attorney in a New York Law office of five attorneys or less, which is the most common arrangement for assigned counsel, pays an hourly overhead of **\$34.75**; rates in New York City are higher. *See*, Chief Administrative Judge Jonathan Lippman, Assigned Counsel Compensation in New York: A Growing Crisis, (2000)(hereafter A Growing Crisis). A lawyer paid 18-B rates will lose \$9.75 for every hour he works out of court and will profit only \$5.75 for every hour worked in court. A Growing Crisis at 8. The United States

⁸ Noting that a review of the Governor's Bill Jacket for the 1978 increase to the fees provided assigned counsel reveals that "many of those who commented on that bill viewed payment of reasonable compensation ... as necessary to attract competent attorneys to join the 18-B panels and to facilitate the critical social goal of providing quality legal representation to indigent defendants." *Id.*

⁹ The Rules of the Chief Administrator Part 127.2(b) as amended effective April 16, 2001, provide that vouchers for services rendered by counsel appointed pursuant to the Assigned Counsel Plan (County Law §722-b) which exceed the current statutory limit may be reviewed by the appropriate administrative judge.

Labor statistical data establishes that \$40 in 1986 dollars is equal to approximately \$65 in 2002 dollars. *See*, Inflation calculator at www.stats.bls.gov/. Moreover, the evidence suggests that compensating out-of-court work at a lower rate discourages preparation, and ultimately affects the quality of representation. A Growing Crisis at 18. Indeed, the distinction creates an economic disincentive for lawyers to perform adequate investigations and seek speedy disposition of all cases despite the particular facts. The more time spent on a case means a greater negative cash flow.

In addition, court administrators have recognized for years that New York's assigned counsel rates undermine both the operation of the courts and the quality of the representation provided to children and indigent adults. *See*, A Growing Crisis; the State of the Judiciary for the year 2002, at www.courts.state.ny.us/StaJud2002.pdf. New York State's official web-site boasts it has the 10th largest economy in the world "with a Gross State Product of \$593 billion" (*see*, www.state.ny.us/economy.htm), but current 18-B compensation rates "are now at a lower level than that paid by all but one other state in the nation." *See*, A Growing Crisis at p.1. There has been no indication that increasing 18-B fees has achieved priority status at the Capitol, despite suggestions of imminent legislation.¹⁰ Assigned counsel rates must be increased to levels sufficient to induce experienced and able criminal and family law practitioners once again to take on these assignments. Reference to the rates paid for assigned counsel work in the federal courts is particularly instructive in determining appropriate compensation levels. The federal district courts for the Southern and Eastern Districts of New York currently compensate attorneys in criminal cases at a rate of \$90 per hour. *See*, 18 U.S.C. §3006 (2002). Based on

¹⁰ Former Chairperson of the Governor's Task Force Katherine N. Lapp sought, *inter alia*, dismissal premised on imminent legislation. (*See*, Affidavit of Katherine N. **Lapp**, sworn to July 27th, 2001).

analysis of the overhead expenses incurred by New York City practitioners, and given the comparable importance of these cases, this is both compelling and necessary to assure indigents effective counsel in New York City.

This court, as any court of competent jurisdiction, is vested under the inherent powers doctrine “with all powers reasonably required to enable it to: perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful action effective ...” *Wehringer v. Brannigan*, 232 A.D.2d 206, 207, 647 N.Y.S.2d 770, 771 (1st Dep’t 1996); *appeal dismissed*, 89 N.Y.2d 980, 678 N.E.2d 491, 655 N.Y.S.2d 879 (1997).

Accordingly, when legislative appropriations prove insufficient and legislative inaction obstructs the judiciary’s ability to function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the constitution by order of a mandatory preliminary injunction. *See, Commonwealth ex rel Carrol v. Tute*, 442 Pa. 45, 52, 273 A.2d 193, 197 (1971); *Zarabia, supra; Peart, supra; Quitman County, supra*. Concomitantly. “when the Legislature creates a duty of compensation it is within the court’s competence to ascertain whether the State has satisfied that duty and, if it has not. to direct that the State proceed forthwith to do so” (citations omitted) *NYCLA v. Pataki, supra*, at 780, 727 N.Y.S.2d at 854. Therefore. long standing maxims rooted in the doctrine of separation of powers must yield in equity on a showing that the State’s failure to raise the current compensation rates adversely affects the judiciary’s ability to function and presumptively subjects innocent indigent citizens to increased risks of adverse adjudications and convictions merely because of their poverty. *See, e.g., McCoy v. Mayor of New York City*, 73 Misc.2d 508, 342 N.Y.S.2d 83 (1973) (court can order New York City to pay for operation of the civil court, housing part); *accord, Carrol v. Tute, supra*.

NYCLA's uncontroverted evidence through official statistics, reports from independent groups, and affidavits and depositions from judges, court personnel, and bar leaders chronicles the adverse effects and the depth of the crisis of the current 18-B compensation rates on juvenile delinquency cases, abuse and neglect proceedings, appeal backlogs, arraignment overload, individual assigned counsel case overload, uncertified panel counsel, and prolonged delays. The Report of the Appellate Division First Department Committee on Representation of the Poor, which after lengthy investigation, including a public hearing with many of the same witnesses herein, concluded that: "[t]he entire system by which poor people are provided legal representation is in crisis. As a result of shamefully low rates of compensation of assigned counsel, lack of resources, support and respect, inadequate funding of institutional providers, combined with ever-increasing caseloads, New York's poor are too often not afforded the 'meaningful and effective' representation to which they are entitled under New York Law and the New York State Constitution." (March 23, 2001, at pp. 1-2); *see also, In re Nicholson*, 181 F. Supp.2d 182 (E.D.N.Y. 2002).¹¹

The balancing of the equities favors NYLCA. There is sufficient evidence to preliminarily conclude that the rates should be increased. Nevertheless, this Court declines, at this juncture, to issue a declaratory judgment finding unconstitutional those portions of the statute which set the compensation rates, the distinction between the hourly rates paid for in and out-of-court work, and the ceilings on total per case compensation, without presiding over a trial.

NYCLA has satisfied its burden of showing a likelihood of ultimate success on the

¹¹*In re Nicholson, supra*, concerned New York City's Administration for Children's Services board policy of removing children of battered women and the nature and quality of the assigned counsel program that represents victims of domestic violence. The court granted the motion for preliminary injunction and set compensation for panel attorneys assigned to represent the class at \$90 dollars an hour. Judge Weinstein's decision only affects approximately 4% of the cases brought in the New York City Family Court

merits, the prospect of irreparable injury if provisional relief is withheld, a balance of the equities tipping in its favor, and its heightened burden of showing that extraordinary circumstances warrant a portion of the requested relief. Therefore it is

ORDERED, that the City of New York's cross motion to dismiss is **denied**; and it is further

ORDERED, that NYCLA's motion for a preliminary injunction is **granted** to the extent that the City of New York is directed to pay assigned counsel the interim rate of \$90.00 an hour for in and out-of-court work. until modification of County Law §722(b) by the Legislature or further order of this court; and it is further

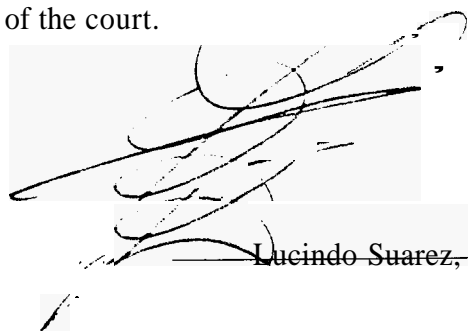
ORDERED, that the State of New York is directed to pay assigned counsel the interim rate of \$90.00 an hour for in and out-of-court work, as it relates to such representation in New York City, until it modifies Judiciary Law §35; and it is further

ORDERED. that the parties appear at IA Part 38. room 519. located at the New York County Supreme Court. 60 Centre Street. New York, New York on May 17, 2002 for a conference and to set a trial schedule; and it is further

ORDERED, that NYCLA post, pursuant to CPLR §6312(b), an undertaking with the clerk of the court in the amount of one hundred dollars (\$100.00).

This constitutes the decision and order of the court.

Dated: May 3, 2002



Lucindo Suarez, JSC