

From My Vantage Point*

By Jonathan E. Gradess

Small Victories are Victories Nonetheless

In the midst of the largest fiscal crisis in a quarter century, the Legislature in early May passed a reform of indigent defense services in New York State. While it will not end the crisis in public defense services, it does begin to pave the road in the right direction. For the first time in 38 years, during this 40th anniversary year of *Gideon*, the State has agreed to support the public defense function by providing a projected 20 percent on top of what localities are already paying.

As part of the two-house budget bill, the Legislature enacted changes substantially the same in form as the Governor's proposed 18-B reform. Fees for misdemeanors will be raised to \$60.00 per hour. Fees for all other cases (felonies, appeals, family court cases, law guardian representation and other appointments governed by Article 18-B of the County Law and Article 35 of the Judiciary Law) will be raised to \$75.00 per hour. While the distinction between misdemeanors and other cases is unfortunate, the abolition of the in and out of court differential is important and long overdue.

Against our advice and urging, caps are retained in the statute, but they are substantially raised. In jurisdictions that have strictly applied caps, this will be a blessing. The misdemeanor cap is increased threefold to \$2400 per case, and the cap in felony and other cases is increased to \$4400 per case. Importantly, in raising the amount for experts and investigators, the bill makes clear that the new rate under County Law section 722-c is \$1000 "per investigative, expert or other service provider." Exceptions to all these limits may be sought by showing that extraordinary circumstances require higher hourly or total case payments.

The effective date for raising these fees is January 1, 2004. Under the terms of the bill, any jurisdiction may, by local law, increase assigned counsel fees immediately.

Despite our recommendation that the Legislature index assigned counsel fees to the cost of living, and despite a provision in the Volker/Lentol New York State Public Defense Commission Act (S.1894/A.5394) that would have accomplished this, the enacted bill instead creates a seven member task force to evaluate the sufficiency of the rates and to report back three years hence. This task force, with members appointed by the Governor, Assembly, Senate, and Judiciary, also includes candidates recommended by the New York County

Lawyers Association, the Association of the Bar of the City of New York, and the New York State Bar Association. It must hold at least two public hearings on the subject and make a report in January 2006.

The bill creates an Indigent Legal Services Fund in the custody of the Comptroller and the Commissioner of Taxation and Finance. Four revenue streams feed this fund, which it is estimated will generate \$65 million per year. Of this amount, \$25 million is designated for law guardian payments; the remainder is to be distributed pursuant to a formula to counties and the City of New York. Localities may use these funds as they see fit as long as the funds are used to improve the quality of the local public defense system (public defender office, assigned counsel program or legal aid society).

Distribution of funds to localities begins in 2005 and will be made under a formula based on the amount spent by a jurisdiction in the preceding year. A locality's local expenditure will be calculated by the Comptroller as a percentage of total indigent expenditures by counties and New York City. That same percentage of the fund will be returned to localities, which must certify that they spent the same amount in the preceding fiscal year as the year before or that a measurable increase in quality can be demonstrated. For the first time in New York State history, the examination of the use of experts and investigators, caseload limits, training, resource and similar issues is part of the funding calculus.

The Legislature wisely kept the administration of this new system out of the Division of Criminal Justice Services and the Office of Court Administration. Whether it was wise or even constitutional to place it in the Comptroller's office remains to be seen. We will offer assistance to the Comptroller in an effort to make this scheme work.

Could there have been more? Yes. New York could have achieved real oversight in an independent public defense commission. As an alternative or in combination with a Commission, standards could have been written into the bill. The Legislature could have staffed an effort to provide real assistance to improve county systems. All of these options could have been exercised, but we are where we are.

We know that the problems we daily see and you daily live through will not go away because of this bill, which not been signed when the *REPORT* went to press. Yet, we are happy with any step forward. What is imperative is that we continue to strive for quality public defense systems, standards, oversight, and the assurance that our clients not be lost in the celebration of small victories.

That said, we should celebrate this small victory. Thirty-eight years is a long time. ♪

* The *REPORT* will periodically feature a column by the Association's Executive Director on major issues concerning public defense in New York State.