

From My Vantage Point*

By Jonathan E. Gradess

The 90/90 Train is Headed Your Way

New York's public defense system is at once on the brink of collapse and reform. It has seen more attention and action in the last two years than in the last twenty. State trial courts upstate and down, as well as federal court, are addressing New York's stagnant assigned counsel rates. Concerned citizens and editorial boards are demanding change. Legislators have introduced bills, but none have passed.

Legislative Lethargy Continues

One wonders if the Legislature understands the implications of non-action.

I write this 24 hours from the end of the legislative session. Bills to create an Independent Public Defense Commission (S6789-A and A10075-A) languish. A one-house Assembly bill to raise rates (A.11862), introduced a few days ago, would raise rates to \$60 for misdemeanors and \$75 for felonies effective next April. It raises caps and creates a fund to collect revenue to assist localities to pay for public defense services.

This is too little too late.

The new bill wouldn't raise enough revenue. It provides no distribution formula and no structure for passing the money to counties. It creates no standards to protect clients. It will pass only one house, if at all. Given the crisis ripping at the right to counsel—unrepresented defendants, delayed Family Court proceedings, and frustrated panel members—this bill is not much to applaud. It also will not stop the train that is heading toward Albany at \$90/90 miles an hour.

Courts Are Overriding Statutory Rates

Courts looking at New York fees are concluding that justice requires rates of \$90 per hour, instead of \$40/25 (in-court/out-of-court). This corresponds to the recent raise for federal Criminal Justice Act lawyers.

The lawsuit brought by the New York County Lawyers' Association (NYCLA) in February 2000 is moving forward. On May 3, 2002, New York County Supreme Court Judge Lucindo Suarez issued a preliminary injunction setting rates at \$90 per hour. Trial has been set on the permanent injunction for July 29. Meanwhile Federal District Court Judge Jack Weinstein has ordered, in a class action, \$90 per hour for lawyers representing battered women who are respondents in Family Court (*Nicholson v Scopetta EDNY*). These cases present a clear rationale for

filing vouchers at \$90 per hour for assigned counsel work. While each case appears limited, geographically or to a subclass of plaintiffs, both were litigated in terms of what it takes to run a law office in this state.

In the past year or more, as fees stagnated and these cases moved forward, judges in a dozen or more jurisdictions began to take action to ensure representation in their courts. Finding extraordinary circumstances in the hemorrhaging of qualified attorneys from panels, burgeoning caseloads and the lack of available lawyers to fulfill the rights of clients, trial judges allowed fees above current statutory hourly rates. [See the Assigned Counsel Rates page in the Hot Topics section of our web site, www.nysda.org, for a list of cases and decisions.] These developments met OCA resistance. Chief Administrative Judge Jonathan Lippman amended Rule 127.2 on April 16, 2001 to permit administrative judges unilaterally to reduce these trial court orders.

Lawsuits challenging this *ultra vires* rule are burgeoning across the state. Unsuccessful Article 78 challenges initially dismissed by the First and Fourth Departments have now been converted into declaratory judgment actions. Initially brought *pro se* by the lawyers given enhanced rates, these cases are now in the hands of Hale and Dorr and Nixon Peabody. These firms have joined Davis Polk and Paul Weiss in recognizing the constitutional crisis and placing their resources in the service of indigent clients and their lawyers. Numerous bar associations and legal organizations including NYSDA, NYSACDL, NACDL, NYCLA and the Association of Justices of the Supreme Court have filed *amici* briefs in these fee cases and in actions brought by Broome County to prevent trial court judges from ordering extraordinary fees.

Recently, Madison County Family Court judge Dennis McDermott *sua sponte* ordered increased rates across the board in 12 Family Court cases. The lawyers had not sought extraordinary fees, making it hard to see how the order could be within the scope of the *ultra vires* administrative rule. Nevertheless, the administrative judge for the district summarily reduced the amounts ordered by Judge McDermott. No doubt this order too will be challenged.

NYSDA has tried to help localities solve the public defense crisis by advocating for the state to increase funding for defense services. So far, we have been unsuccessful. Faced with reduced lawyer pools, higher caseloads, and a lack of financial aid from New York State, counties now see the \$90/90 railroad heading toward them. I fear they will change their defense services plans to stretch limited resources by diminishing an already-deficient public defense system. Many municipalities, preparing for the arrival of the \$90/90 train, will look to establish cheaper delivery systems with no guarantees of quality and justice.

(continued on page 31)

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

(Continued from page 9)

- News sources have recently reported that, earlier this year, an internal legal ruling by the DOJ Office of Legal Counsel cleared the way for the Attorney General to give state and local police departments the power to enforce federal immigration laws.

If this opinion becomes official DOJ policy, it may encourage local police departments to consider and negotiate immigration law policing partnerships with the Justice Department. A 1996 DOJ legal opinion had found that state and local police could temporarily detain or arrest noncitizens for violating the criminal provisions of the Immigration and Nationality Act, but not stop and detain them solely on suspicion of civil deportability. Florida will soon become the first jurisdiction to enter a policing partnership with DOJ. Others, including New York State, are considering it.

Immigrant Defense Project adds two new staff members

Defense lawyers contacting NYSDA's Immigrant Defense Project for backup support will soon encounter two new Project staff members.

On May 28, 2002, new staff attorney Saadia Aleem started work with the Project. Ms. Aleem will, among other tasks, take primary responsibility for the Project's new initiative to screen cases of immigrants facing deportation (see *Backup Center REPORT* Vol XVI, No. 5). She will

recruit, train, and mentor *pro bono* law firm attorneys to provide legal representation in initiative cases raising important legal issues. She will also be a new resource person for Association members and others contacting the Project's Tuesday and Thursday hotline number. Ms. Aleem comes to the Project from the Washington offices of Morgan, Lewis & Bockius, where she did *pro bono* deportation defense work. She is a 2001 graduate of New York University Law School, where she was a Root-Tilden-Kern Public Service Scholar, as well as a Robert McKay Academic Scholar. Ms. Aleem's hiring was made possible by grants from the Open Society Institute and the New York Foundation.

On August 1, 2002, former Project intern Aarti Shahani will begin a two-year New Voices Fellowship with the Project. Ms. Shahani's fellowship work as an organizer/advocate will include: holding clinics for immigrants and their families affected by the harsh impact of current immigration laws and policies; developing immigrant self-help materials; preparing and distributing newsletters; organizing advocacy events and public forums; and improving Project information management and administrative technologies. Ms. Shahani, who herself has family members affected by the harshness of the current immigration laws, is a 2002 graduate of the University of Chicago and interned with the Project during the summer of 2001. She and the Project were awarded a New Voices Fellowship by the Academy for Educational Development under a grant from the Ford Foundation. ♪

From My Vantage Point *continued*

(Continued from page 13)

Low Bid Not the Way for Localities to Lower Cost

Already we see localities looking for ways to lower costs. A bill allowing the County of Tioga to contract directly with private lawyers, eliminating the assigned counsel system, passed the Senate on June 20 but has thus far stalled in the Assembly. This bill deleted from the county law the requirement that the services of private counsel be rotated and coordinated by an administrator, and permitted the county to develop and approve a contract with private lawyers.

I don't expect this to be the last effort to abandon assigned counsel in favor of low bid contracting. Organized defenders and assigned counsel practitioners should join to oppose low bid alternatives that fail to serve clients.

Nor should the role of the private bar in handling criminal cases be abandoned as a cost saving measure. We must recognize that efforts to shift resources from assigned counsel plans to overburdened Legal Aid Societies and Public Defenders are not the answer; what is needed is more resources for all forms of public defense.

Need for Standards and Commission Clear

The recent history of public defense in New York State shows clearly that we need standards that protect clients, and an Independent Public Defense Commission to provide guidance to counties as they explore alternatives. At this extraordinary moment, as we all bring change to a system on the brink of collapse, it is critical that we protect the values that underlie what we are trying desperately to reform. ♪