

From My Vantage Point*

by Jonathan E. Gradess

NYSDA Urges AC Fee Increase—And More

With the leaders of all three branches of state government now on record in support of increasing the rates at which assigned counsel are compensated (see p. 3), NYSDA is working to assure public defense lawyers—and their clients—real, lasting relief from the years of neglect that have driven many dedicated lawyers from public defense work and wreaked havoc with the practices of those who remained.

Reasonable AC Rates Long a NYSDA Priority

Since it was founded in 1967, our Association has been in the vanguard of the struggle for increased assigned counsel fees. We were responsible for efforts to raise the fees in 1978, and our monograph, “Assigned Counsel Fees: Time for a Change” (1985), written as part of our Backup Center contract, helped bring about the 1986 increase.

The majority of our members are assigned counsel practitioners. When the Backup Center was founded, our secretary was Nat Zablow, the assigned counsel administrator of Nassau County; our treasurer was Sanders Heller, the assigned counsel administrator of St. Lawrence County. At least five members of our Board of Directors must be assigned counsel plan administrators or assigned counsel panel members. Unlike other bar associations, our bylaws require that one of our Board’s vice presidents be from an assigned counsel plan. We have assisted Davis Polk in the current NYCLA assigned counsel fee litigation and tried to help fashion an improved complaint in the recently filed Nassau County matter.

Last year, we were appointed to Judge Juanita Bing Newton’s assigned counsel committee and urged a unitary rate, the removal of caps, the raising of fees, and the improvement of public defense services generally for clients. Despite reservations concerning the devil we anticipated in the details, we helped shape consensus that resulted in the report, “Assigned Counsel Compensation in New York: A Growing Crisis.” Daily, we help assigned counsel lawyers in cases across this state, and our comments in the press and before the Legislature regarding the need to raise assigned counsel fees speak for themselves. We are on record and remain unequivocally committed to an assigned counsel fee increase.

Call for a State Commission is Consistent with Increased Fees

Our Association’s recognition of the need for a unified public defense system and recent suggestion that this be

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

accomplished by the creation of a public defense commission at the state level (see report on Board resolutions, *Backup Center REPORT*, Vol. XV, #6), have raised in some the suspicion that we oppose raising assigned counsel fees. The absurdity of a suggestion that we are not committed to an increase in the assigned counsel rates should be clear from the facts with which this article began.

Calls for increased assigned counsel fees and for the establishment of a statewide public defense commission and an office of defense services are not mutually exclusive. The latter call has long been the subject of debate within our Association and is the subject of current debate elsewhere. If the timetable had been different, we would have been pleased to build greater consensus around the issue of a unified defense system before floating the idea in the Legislature. Nevertheless, circumstances are what they are. If now is the time that public defense issues are being aired and acted upon, now is the time we must ensure that the needs of the whole defense and client communities are addressed.

Our members interested in assigned counsel fees, assigned counsel lawyers throughout this state, and anyone interested in increasing fees to assigned counsel lawyers must know what occurs in real life in Albany and in counties when change takes place. Over the Public Defense Backup Center’s two decades, we have been contacted numerous times by counties seeking to reduce the cost of their public defense plan by switching from assigned counsel programs to public defender or vice versa. Our role has been to attend to their formal request, retrieve data from their county, to sometimes write reports, but always to fight to secure the best representation for clients, to try and inform local governments of the requirements of the Constitution, and to work with them to ensure that client needs are served and that cost per case issues trail behind, not override, concrete issues concerning zealous representation.

Our experience should inform those who are uncomfortable with a unified public defense system. It would not at all surprise us if the State offered a raise in assigned counsel fees contingent upon the right of county attorneys to review and appeal vouchers, so that assigned counsel lawyers would have to wait for and fight for any increased payment. It is possible for someone to suggest that any rate increase be contingent upon the requirement that partial payment programs be routinized, or that eligibility standards be ridiculously tightened, injuring clients who should be categorically eligible for defense services. We foresee a cats-cradle of strings that could be attached to the increase in current rates: that assigned counsel lawyers periodically handle cases for no fee; that assigned counsel programs be administered through comptroller offices; that only state experts be used in assigned counsel cases; that caps be placed on the amount

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to call an officer present at the defendant's arrest. The trial court should not have instructed the jury that the prosecutor had made the officer available for the defense counsel to call as a witness. Further, the trial court should not have stated that the defense counsel "apparently chose not to" call this witness. The defendant was prejudiced by these actions because the jury was led to believe that the defense was now obligated to call the witness. *See People v Roman*, 149 AD2d 305. The error was not harmless. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Giaccio, J])

Arrest (Probable Cause)	ARR; 35(35)
Double Jeopardy (Lesser Included and Related Offenses)	DBJ; 125(15)
Identification (In-court)	IDE; 190(24)

People v Sanchez, No. 1998-07269, 2nd Dept, 10/23/00

Holding: The evidence was legally insufficient to find the defendant guilty of first-degree gang assault as the evidence failed to establish that the victim sustained a

"serious physical injury" within the interpretation of Penal Law 10.00(10). *See People v Amon-Ra*, 239 AD2d 200. For the same reason, the charge of second-degree gang assault must be dismissed. However, since the jury was instructed not to consider second-degree assault (Penal Law 120.05[2]) if it convicted on first-degree assault, double jeopardy principles will not be violated by a retrial on second-degree assault. *See People v Charles*, 78 NY2d 1044.

At the suppression hearing the prosecution was unable to establish that the defendant's arrest was supported by probable cause. That the defendant was present at the scene and took flight when the gun was fired are as consistent with his innocence as they are with his guilt. *See People v DeBour*, 40 NY2d 210. The arrest was unlawful and evidence that the defendant was identified in police lineups should have been withheld as the fruit of illegal police conduct. *See People v Dodt*, 61 NY2d 408. His conviction of fourth-degree possession of a weapon must be reversed. Prior to a new trial, the defendant is entitled to a hearing on whether there is an independent source for in-court identifications by any witnesses as to whom no hearing has yet been held. Judgment reversed, certain counts dismissed, new trial ordered on the remaining counts. (Supreme Ct, Queens Co [McGann, J at hearing; Rios, J at trial]) ⚖

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of all fees paid; or even, down the road, that contract bidding be an alternative to assigned counsel programs. Regrettably, over time, each of these ideas has been suggested by New York public officials.

One Community Needs One Voice

To prevent these and other developments guaranteed to lower the availability and quality of defense services, it is necessary in 2001 for the organized defense bar—public defenders, legal aid societies and not-for-profit corporations—and the private assigned bar—numerous assigned counsel programs and several thousand lawyers—to unite and speak with one voice. We must understand that the long-term interests of our clients lie in the supervision of the system by those committed to client-centered representation. This is not a time to allow measures invasive of the right to counsel as a *quid pro quo* for an assigned counsel rate increase. It is not the time to ally with those who would feel no shame at radically undermining the right to counsel, nor the time to promote one defender delivery mechanism over another. The defense community needs to stand together to improve, preserve, and enhance representation of the poor. ⚖

Job Opportunities

👉 **Always check the NYSDA Web site for the latest job notices:**
www.nysda.org

PRISONER'S LEGAL SERVICES OF NY seeks applicants for two **Staff Attorney** positions (Ithaca and Plattsburgh). Previous legal service or civil rights experience preferred. Recent graduates with interest in Public Interest law are encouraged to apply. Serious need for Spanish-speaking staff. Outstanding benefits package, liberal and flexible leave policies. EOE. Send resume, writing sample, and list of three references to Maria McGuinness, Human Resources Manager, Prisoners Legal Services of New York, 118 Prospect Street, Suite 307, Ithaca NY 14850; tel (607) 273-2283; fax (607) 272-9122.

THE LEGAL AID SOCIETY OF ORANGE COUNTY is seeking a **Staff Attorney** with criminal defense or family court background in the range of law clinic to three

years experience. Salary \$34,000 to \$47,000, excellent benefits. Send cover letter and resume to: Gary Abramson, Legal Aid Society, PO Box 328, Goshen NY 10924.

THE OSBORNE ASSOCIATION is seeking a **Family Ties Counselor** to implement parenting courses, child visitation services, and provide outreach to promote increased and improved relationships between incarcerated mothers and their minor children at Albion Correctional Facility. Required: Bachelor's degree in early childhood education, social work, or child psychology; 3 years experience as a counselor; experience working with families at risk and incarcerated women; excellent writing and communications skills; ability to multi-task; and a working knowledge of the NYS criminal justice system. Post-graduate courses in family development and family counseling a plus. Send cover letter and resume to: The Osborne Association, Inc., 135 East 15th Street, New York NY 10003; fax (212) 979-7652. ⚖