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COURT OF APPEALS

STATE OF NEW YORK

TIMOTHY A. ROULAN,

Appellant,

-against-

No. 62

COUNTY OF ONONDAGA, ET AL.,

Respondents.

20 Eagle Street
Albany, New York 12207
March 18, 2013

Before:

ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 JUDGE GRAFFEO: Number 62, Roulan against
2 County of Onondaga.

3 Counselor, do you wish to reserve time for
4 rebuttal?

5 MR. PARRY: Yes, ma'am, two minutes,
6 please.

7 JUDGE GRAFFEO: Proceed.

8 MR. PARRY: My name is Jeffrey Parry.
9 Obviously I represent Mr. Roulan.

10 As an initial comment, I wish to point out
11 that we do not ask this court to make any
12 modifications or to vary, whatsoever, from the
13 present statute. And I think it's a very important
14 point to make; it's something I think the Fourth
15 Department missed.

16 JUDGE GRAFFEO: Well, how about we go to
17 the threshold issue of standing? Are the rights
18 under Gideon - - - are those possessed by an
19 individual defendant?

20 MR. PARRY: Ma'am, that's a wonderful
21 question. I'm literally thrilled that you brought it
22 up. County Law 18-B, by its own language, works in
23 concert with CPL 170.10 and 180.10. Literally, the
24 assignment of counsel, under 170.10 and 180.10,
25 clicks in the use of County Law 18-B. 18-B, all by

1 itself, were it not to affect 170.10, would not raise
2 a Constitutional issue, and we would not be even
3 discussing criminal defendants here. But the fact of
4 the matter is, is if the judge cannot operate under
5 170.10 because County Law 18-B bars - - -

6 JUDGE SMITH: But I think - - -

7 MR. PARRY: - - - him from it.

8 JUDGE SMITH: I thought Judge Graffeo's
9 question was whether - - - assume for the moment that
10 something is happening that violates the client's
11 Constitutional right. Can your client, Mr. Roulan,
12 in this proceeding, assert that?

13 MR. PARRY: No, sir, absolutely not. I
14 don't think we are.

15 JUDGE GRAFFEO: Well, standing requires an
16 injury in fact. Why don't you address that specific
17 component?

18 MR. PARRY: Injury in fact is Mr. Roulan is
19 a member of the 18-B panel. As an attorney he has
20 obligations to his client. Those obligations are not
21 permitted under the County Law in Onondaga County.

22 JUDGE PIGOTT: What's the biggest problem
23 that you've got here? Are you suggesting that the
24 Assigned Counsel Program is usurping the function of
25 the judges and that they have no recourse - - - the

1 judges have no recourse or that they are acquiescing
2 in what ACP is doing with respect to these vouchers?

3 MR. PARRY: All of the above sir, yes.

4 JUDGE PIGOTT: What's the - - - I mean,
5 what's the big deal? I know you argue about mileage.
6 You - - - you - - - if the assigned coun - - - if you
7 put in a voucher for - - - I forget what the max is
8 anymore. What's the max?

9 MR. PARRY: On a felony, sir, it's 4,400
10 dollars.

11 JUDGE PIGOTT: 4,400 dollars. And let's
12 assume you put it for 4,400 and they say we've got
13 budget crunches in Onondaga County, we're going to
14 authorize 3,000, and that goes to the judge. The
15 judge could still order 4,400. He can ignore what
16 their recommendation is because he says, you know,
17 this lawyer did a great job, I don't care what
18 Onondaga says, you don't get this kind of
19 representation for three grand and I'm going to order
20 the 4,400. It's going to get paid, right?

21 MR. PARRY: No, sir, it's never going to
22 get to the judge.

23 JUDGE SMITH: Why not?

24 MR. PARRY: Because there are rules in the
25 Onondaga County plan that prevent it from happening.

1 The administrator is specifically - - - there's a
2 specific rule that allows her to deny it. She can
3 send it back or she can change it herself. And the
4 attorney has no knowledge of it.

5 JUDGE GRAFFEO: Are you saying there's no
6 judges in Onondaga County that ever issue orders for
7 reimbursement that exceed the paperwork that's
8 submitted?

9 MR. PARRY: It is extraordinarily rare;
10 actually, it's limited to two.

11 JUDGE PIGOTT: All right. But that's the
12 judges that make that determin - - - they could
13 override ACP.

14 MR. PARRY: Sir, were they to know about
15 it, yes.

16 JUDGE PIGOTT: That's - - - well, what do
17 you mean, they don't know about it? Let's assume you
18 are the lawyer, instead of Mr. Roulan.

19 MR. PARRY: Actually, once upon a time I
20 was, sir.

21 JUDGE PIGOTT: That's right. And so you
22 submit a voucher to ACP; at some point something's
23 going to happen to it or you're going to be on the
24 phone.

25 MR. PARRY: Yes, sir, you can be on the

1 phone all you want; it's not going to do you a bit of
2 good.

3 JUDGE SMITH: At some point can you go to
4 the judge? I mean, they aren't - - - you aren't
5 locked out of the courtroom?

6 MR. PARRY: Your Honor, there is a rule
7 that prohibits me from going to the judge, and if I
8 do, I can be thrown off the panel.

9 JUDGE PIGOTT: Can be or are?

10 MR. PARRY: I'm sorry?

11 JUDGE PIGOTT: Can be or are?

12 MR. PARRY: Actually, it's happened, sir.

13 JUDGE SMITH: Are there cases where people
14 have been at least threatened with that sanction?

15 MR. PARRY: Yes. And actually, sir, I
16 included in your papers the decision of Judge
17 Brunetti; incidentally, it's referred to colloquially
18 as the Brunetti decision. Mr. Zeigler brought the
19 matter to Judge Brunetti only because the bill had
20 not been paid for months.

21 JUDGE PIGOTT: For how many months?

22 MR. PARRY: I'm not sure exactly, sir.
23 Actually, I've got a couple of things in front of me
24 that are other bills, but under the Brunetti case I'm
25 not aware. But it was many months - - -

1 JUDGE SMITH: Are you say - - -

2 JUDGE GRAFFEO: Who creates the terms of
3 the plan? Is it the county bar that wrote the plan?

4 MR. PARRY: Actually, that's a matter of
5 some debate. The president of the - - -

6 JUDGE GRAFFEO: And who's on the executive
7 committee that reviews the - - -

8 MR. PARRY: Ma'am, I don't mean to sound
9 like a James Bond movie, but that's very difficult to
10 ascertain at any given time.

11 JUDGE PIGOTT: Well, it's a public
12 organization - - -

13 MR. PARRY: Yes, it is, except that Judge
14 Cherundolo denied me that knowledge at the trial
15 level on several occasions.

16 JUDGE PIGOTT: It's a mystery?

17 MR. PARRY: Yes, sir. Also, it changes
18 with great regularity.

19 Sir, I'm not going to mince words. We have
20 a little scandal down in Onondaga County. Nobody
21 wants to address that. This is here on a declaratory
22 judgment action and a contract action on liability
23 only.

24 JUDGE SMITH: We don't - - - I mean, your -
25 - - assuming you do have a scandal in Onondaga

1 County, we don't - - - we don't really have that
2 before us, do we? We have the validity of the rules,
3 as I understand it.

4 MR. PARRY: You do, sir. On the other
5 hand, I am begging to have this sent back for a
6 trial.

7 JUDGE GRAFFEO: Well, let me ask you this.
8 What's the impact of the pendency of the Hurrell-
9 Harring case?

10 MR. PARRY: The Hurrell-Harring case, of
11 course - - -

12 JUDGE GRAFFEO: You do have some individual
13 defendants from Onondaga County in that action,
14 correct?

15 MR. PARRY: Yes, actually, I represented
16 one of them. Ma'am, the Hurrell-Harring case, of
17 course, is directed at the criminal defendants. The
18 criminal defendants have certain Constitutional
19 issues that were unquestionably violated. We are - -
20 - the - - - this court can rule without even touching
21 the Hurrell-Harring case. The problem that you have
22 in Onondaga County - - -

23 JUDGE GRAFFEO: There's not going to be a
24 potential conflict at all in the determinations?

25 MR. PARRY: No, ma'am. The - - - you have

1 attorneys in Onondaga County that are doing a very
2 fine job of representing clients. They're simply not
3 getting paid for it; they're being discouraged from
4 doing it. It's a completely different matter. In
5 essence, you have mandatory pro bono work in Onondaga
6 County.

7 JUDGE READ: So what are you asking from us
8 exactly?

9 MR. PARRY: Onondaga County has to get out
10 of two lines of work. They have to stop trying to
11 assign attorneys to clients, and they have to get out
12 of compensation.

13 Now, as a matter of black letter law - - -

14 JUDGE SMITH: You - - -

15 JUDGE GRAFFEO: Are you saying they can't
16 have a plan under 722-(3)?

17 MR. PARRY: No, ma'am, they must have a
18 plan under 722, but 722 does not encompass
19 assignment.

20 JUDGE SMITH: So you're saying their job is
21 to hand a list of lawyers to the judge and they're
22 done?

23 MR. PARRY: No, sir. They have to rotate
24 and they have to cut checks. It's literally put in
25 722.

1 JUDGE SMITH: Okay. So they make a list
2 and they have a function to count - - - to say, okay,
3 you're next on the list. And when the judge approves
4 money they can - - - they can write a check, but they
5 can't recommend the amount to the judge?

6 MR. PARRY: No, sir, they can't. And the
7 reason they can't is also contained in 722.
8 Specifically, it's in 722-b. 722-b says that
9 everyone assigned according to the plan is entitled
10 to be compensated according to the plan.

11 JUDGE GRAFFEO: Does that mean any other
12 counties that have a plan that also has a dollar
13 figure per hour, that those plans are invalid, as
14 well?

15 MR. PARRY: Ma'am, as you might imagine, I
16 have done a study on many, many counties, and
17 actually I'm somewhat well traveled myself. I have
18 been a member of other plans, and I have found no
19 place that operates like this.

20 JUDGE SMITH: Well, is this the only place
21 - - -

22 JUDGE GRAFFEO: Well, my question was do
23 any other counties set a dollar amount - - -

24 MR. PARRY: I have never run into it,
25 ma'am.

1 JUDGE GRAFFEO: - - - for hours in or out
2 of court? So - - -

3 MR. PARRY: I - - - I have never run into
4 it, ma'am.

5 JUDGE GRAFFEO: - - - if they did, would
6 they all be invalid then?

7 MR. PARRY: That section of the plan would
8 be invalid, yes, ma'am; it's up to the judge.

9 JUDGE SMITH: I want to come back to what
10 you were saying a few minutes ago, that lawyers who
11 dare to question what the plan says, or take it to
12 the judge can be threatened with or actually excluded
13 from the panel. What is the clearest specific
14 evidence you have on that?

15 MR. PARRY: Mr. Roulan's testimony, sir, in
16 his 50-h hearing.

17 JUDGE SMITH: He says that he got kicked
18 off the panel or someone told him he was going to?

19 MR. PARRY: No, sir, I believe it says he
20 was threatened with it.

21 JUDGE GRAFFEO: So you want us to do
22 specifically what? What's the remedy you're asking
23 us to do?

24 MR. PARRY: The remedy is to get Onondaga
25 County out of the assignment business and to get them

1 out of the compensation business.

2 JUDGE READ: Well, are we supposed to
3 declare parts of the plan, then, to be contrary to
4 the statute? Is that what you're asking us to do?

5 MR. PARRY: Yes, ma'am.

6 JUDGE PIGOTT: It's not unknown for these
7 plans to give a list to the judges, and the judges
8 then pick from the list.

9 MR. PARRY: Sir, that's exactly what they
10 should be doing.

11 JUDGE PIGOTT: All right. So you have no
12 problem with that. But now if Judge Jones decides I
13 don't like this lawyer, there's no way in the world
14 I'm going to assign him, I don't care where he is on
15 the list, first, twelfth or fifteenth; the judge can
16 do that?

17 MR. PARRY: Sir, if the judge decided he
18 didn't like the part of the lawyer's hair, that is
19 absolutely up to him.

20 JUDGE PIGOTT: And then if the - - - they
21 say that the vouchers are subject to nonpayment or
22 reduction and that you're given fifteen days to
23 object and then it goes to the judge.

24 MR. PARRY: No, sir. If the voucher is
25 subject to reduction, it goes to three levels of

1 appellate review within the Assigned Counsel system
2 itself.

3 JUDGE PIGOTT: It ultimately gets to the
4 judge.

5 MR. PARRY: Some day, hopefully.

6 JUDGE PIGOTT: Okay.

7 JUDGE SMITH: As I understand it, you're
8 saying that these bar plans have to - - - can't
9 review the vouchers, they've got to stop reviewing
10 the vouchers, the claims for reimbursement should go
11 directly to the judge?

12 MR. PARRY: Yes, sir.

13 JUDGE PIGOTT: Why should - - - why - - -

14 JUDGE SMITH: If we don't - - - if we don't
15 give you that relief, is there some - - - is there
16 some lesser relief you're seeking in the alternative?

17 MR. PARRY: Sir, to begin with, one of the
18 things - - - and I realize that my time is expired,
19 but one of the things that I am concerned with is the
20 court must understand that these various functions
21 work together to deny payment. For example, I have
22 vouchers in front of me and I have documents in front
23 of me where someone is denied eligibility for
24 assigned counsel after the case is over with.

25 JUDGE SMITH: I - - - okay, I understand -

1 - - what you're really saying is a lot of things
2 happen that drive you crazy, and you say they're
3 outrageous, and maybe they are. One way to solve
4 that problem is to say cut out the middleman; the
5 Assigned Counsel Plan can't review vouchers anymore;
6 everything goes directly to the judge. If we should
7 decide that we're not prepared to do that and that we
8 think the Assigned Counsel Plan does have some
9 advisory role to play, is there some relief we can
10 give you that will ameliorate your problem?

11 MR. PARRY: Yes, sir. Actually, I would -
12 - - I've also practiced civil law for a number of
13 years. I don't see what's wrong with the judge and
14 the Assigned Counsel Plan getting the voucher at the
15 exact same time. Everybody's on board, and nothing
16 appears in front of the judge ex parte.

17 JUDGE PIGOTT: Yeah, but nobody - - - you
18 know, the judges have jobs to do, too. And the last
19 thing they want to do is sit around with a stack of
20 these, assuming that they're, you know, in the
21 criminal part, and the ACP does a nice thing. I
22 mean, they say, you know, this is - - - this is time
23 that was spent, this is - - - you know, everything's
24 great, sign it. Or they say, it's 4,400 but we think
25 it's 3; the judge can sign it or not. What's

1 interesting to me, you're saying there are some that
2 never get to a judge.

3 MR. PARRY: Yes, sir.

4 JUDGE PIGOTT: Never get to a - - - I mean,
5 isn't that - - -

6 MR. PARRY: Never ever.

7 JUDGE PIGOTT: Isn't that a fe - - - it's
8 not a felony, I guess, but - - -

9 MR. PARRY: Sir, believe me, I've been a
10 criminal defense lawyer for a long time; it smells to
11 me.

12 JUDGE PIGOTT: Okay.

13 JUDGE GRAFFEO: You'll have your rebuttal.

14 MR. PARRY: Thank you, ma'am.

15 JUDGE GRAFFEO: Mr. Fellows?

16 MR. FELLOWS: Judge Graffeo, just to be
17 clear, it's the statute that sets the maximum amount
18 and the maximum hourly amount, and not the plan.
19 That's part of Article 18-b.

20 JUDGE GRAFFEO: Well, the plan reflects it,
21 correct?

22 MR. FELLOWS: The plan implements the
23 statute.

24 JUDGE PIGOTT: Right, but you've got - - -

25 MR. FELLOWS: And Judge Pigott, the ACP is

1 a membership corporation. The members are the
2 directors of the Onondaga County Bar Association.
3 Those directors elect a board of directors of ACP.
4 It's not a mystery.

5 JUDGE SMITH: But you do - - -

6 MR. FELLOWS: It's well known.

7 JUDGE SMITH: But you do get vouchers and
8 you look at them, sometimes for longer than Mr. Parry
9 would you to look at them, and you do cut them down?

10 MR. FELLOWS: Your Honor, first of all, let
11 me - - - in answering that question, let me make
12 clear, there is no rule that says a panel attorney
13 may never chal - - - go to a judge and challenge an
14 amount.

15 JUDGE SMITH: Okay. I didn't - - -

16 MR. FELLOWS: It's important I say that.

17 JUDGE SMITH: I didn't think there was - -

18 -

19 MR. FELLOWS: And - - -

20 JUDGE SMITH: But - - -

21 MR. FELLOWS: - - - what happens, Your
22 Honor, is when you go on the panel, you agree to
23 abide by the panel rules; you agree to submit your
24 vouchers to the plan. The executive director reviews
25 them, and then they go to court.

1 JUDGE SMITH: But what happens to a lawyer
2 who submits it, waits a year and a half, hears
3 nothing, and says I've waited long enough, I'm going
4 to the judge. Has he violated the panel rules?

5 MR. FELLOWS: Absolutely not, because he
6 submitted it in the first place. What the rule says
7 - - -

8 JUDGE PIGOTT: Are you sure there's nothing
9 in your rules that forbids the lawyers from
10 communicating with the judge?

11 MR. FELLOWS: What the rule says, Judge
12 Pigott, is you must submit it first to ACP before - -
13 -

14 JUDGE PIGOTT: After that - - -

15 MR. FELLOWS: - - - you go to the court.

16 JUDGE PIGOTT: - - - you can call the
17 judge?

18 MR. FELLOWS: Yes.

19 JUDGE PIGOTT: I thought there was
20 something - - -

21 MR. FELLOWS: And that happens.

22 JUDGE PIGOTT: I thought there was
23 something in there, though, that - - - that alluded
24 to or said that it's a violation of the plan or the
25 rules to contact the judge.

1 MR. FELLOWS: Before ACP rules on it,
2 Judge, but there - - -

3 JUDGE PIGOTT: Why - - -

4 MR. FELLOWS: - - - there - - - may I - - -

5 JUDGE PIGOTT: Why even then?

6 MR. FELLOWS: Well, Your Honor - - -

7 JUDGE PIGOTT: What are you doing telling
8 the lawyer that he can't talk to a judge?

9 MR. FELLOWS: Because he's a panel member
10 and he's agreed to the panel rules.

11 JUDGE SMITH: You said before ACP rules on
12 it; can ACP - - - can sometimes take quite a while,
13 he says.

14 MR. FELLOWS: And Judge Smith and Judge
15 Pigott, let me - - - let me - - -

16 JUDGE PIGOTT: No, I get - - -

17 MR. FELLOWS: - - - address one underlying
18 fact - - -

19 JUDGE PIGOTT: - - - wait a minute, wait a
20 minute, wait a minute, let me stop you.

21 MR. FELLOWS: - - - is that - - -

22 JUDGE PIGOTT: Let me stop you for a
23 minute. I said to you that there was this rule that
24 said you can't talk to a judge, and you said that's
25 because it's in the rules. I get that. I'm

1 wondering - - -

2 MR. FELLOWS: And - - -

3 JUDGE PIGOTT: - - - why would you ever - -
4 - you personally, the county executive, the bar
5 association of Onondaga County, ever tell a lawyer
6 you can't talk to a judge?

7 MR. FELLOWS: Because what the rule says,
8 Judge, is you've got to submit to ACP first before
9 submitting it to the judge.

10 JUDGE PIGOTT: No, talk to the judge.

11 MR. FELLOWS: Once ACP - - -

12 JUDGE PIGOTT: Why can't he call the judge
13 and say, Judge, I've got a problem with ACP, I've got
14 six of them sitting over there.

15 MR. FELLOWS: Because first - - -

16 JUDGE PIGOTT: Wait a minute; I'm almost
17 done. And I've got a 4,400-dollar voucher coming
18 your way, and if I don't get this thing done I'm not
19 paying my rent. So would you please call ACP and
20 tell them that you know that you've got the People v.
21 Jones case and you want to get it paid. You would
22 say that's a violation of the ACP rules that could
23 get you thrown off the panel, right?

24 MR. FELLOWS: Potentially, Judge, but let
25 me - - - the point is, as you observed, Judge, the

1 judges don't want the panel attorneys calling them.

2 JUDGE PIGOTT: Right.

3 MR. FELLOWS: The judges want ACP to
4 process these, review them, and submit them for - - -

5 JUDGE SMITH: But no one - - -

6 MR. FELLOWS: - - - approval.

7 JUDGE SMITH: If the judge says I'm not
8 interested in talking to you, go away and deal with
9 the panel, I understand that. What troubles some of
10 us more is the idea that the panel might say, oh, you
11 - - - oh, you went to court, we don't want any more
12 of your kind. These guys who go to court are not the
13 kind of lawyers we like.

14 MR. FELLOWS: You know, Your Honor - - -

15 JUDGE SMITH: He says that's what's going
16 on.

17 MR. FELLOWS: And what I wanted to address
18 a moment ago with you and with Judge Pigott is, as
19 you all know, we're in the Court of Appeals, and when
20 you're in the Court of Appeals you're supposed to
21 have built a record. No record has been built for
22 the anecdotal statements of Mr. Parry, most of which
23 I absolutely disagree with.

24 JUDGE PIGOTT: Well, he wants a trial.

25 MR. FELLOWS: If you want to come here and

1 get a declaratory judgment - - -

2 JUDGE PIGOTT: But he wants a trial.

3 MR. FELLOWS: Well, Your Honor - - -

4 JUDGE PIGOTT: Should he get one?

5 MR. FELLOWS: - - - then you build a record
6 that supports showing a trial. There were cross-
7 motions for summary judgment, and what they sought
8 before Judge Cherundolo was a declaration that the
9 plan, on its face, was invalid. And I cross-moved to
10 dismiss, Judge. And I was sort of surprised in the
11 Appellate Division when the Appellate Division was so
12 anxious to address the merits, because, Judge
13 Graffeo, there is no standing here for most of what's
14 being argued, as your first question indicated.
15 There is no injury, in fact. There's no - - -
16 there's no indigent defendant here - - -

17 JUDGE SMITH: But what about - - - what are
18 their - - -

19 MR. FELLOWS: - - - asserting their rights.

20 JUDGE GRAFFEO: On what basis does the
21 executive director adjust these vouchers?

22 MR. FELLOWS: For consistency with the
23 provisions of the plan - - -

24 JUDGE GRAFFEO: Which - - - which - - -

25 MR. FELLOWS: - - - which sets forth what's

1 payable and what's not payable - - -

2 JUDGE GRAFFEO: Which means what?

3 MR. FELLOWS: - - - and was approved by - -

4 -

5 JUDGE GRAFFEO: If they have local phone
6 calls they eliminate the - - -

7 MR. FELLOWS: - - - Judge Lippman.

8 JUDGE GRAFFEO: Could I get my question
9 out? Specifically, on what basis do they make these
10 adjustments? Are they just - - - are they just
11 adjusting items that are not reimbursable, or are
12 they adjusting the amount of reimbursable items?

13 MR. FELLOWS: Your Honor, I believe that
14 they fall under both categories. In some occasions
15 the executive director may say you've billed for
16 something that's not compensable under the terms of
17 the plans. In other provisions - - - cases, there
18 might be a case where the executive director
19 recommends that that is too much time for that
20 particular task.

21 JUDGE PIGOTT: Let me give you another - -
22 -

23 MR. FELLOWS: The panel attorney - - -

24 JUDGE PIGOTT: - - - possibility, because
25 this happened in Erie County. The county isn't

1 funding it fully and the county says - - - you know,
2 and I have - - - I understand, to the extent that
3 funds are allocated as, I mean, that's standard in
4 any public contract, so I'm not too worried about
5 that. But if the county starts putting pressure on
6 the ACP and says, you know, you're going to get X
7 number of dollars and I don't care how many cases
8 you've got, and all of a sudden ACP is trying to hold
9 this whole thing together with a limited amount of a
10 budget, that causes stress on the lawyers who are
11 saying I did my 4,400 dollars' worth; I did 12,000
12 dollars' worth of work on this case, and you're
13 cutting my 44 down to 3 and that's not fair. And the
14 county's pushing the other way.

15 MR. FELLOWS: Well - - -

16 JUDGE PIGOTT: That - - - I don't know if
17 that's legitimate or not, but that could be - - -

18 MR. FELLOWS: Once again, Your Honor, I
19 would say let's build a record that supports that
20 that's what happened to Mr. Roulan in this case, and
21 there is no such record before the Court of Appeals.
22 I would note - - -

23 JUDGE SMITH: There is a - - -

24 MR. FELLOWS: - - - that Mr. Roulan - - -

25 JUDGE SMITH: There is a rule - - - let me

1 focus specifically on the rule that says if you're
2 retained you can't thereafter be assigned, which I
3 could - - - I could understand the reason for that
4 rule. But as I read the rule, the way it's phrased,
5 it says if you try, if you're a retained lawyer who
6 tries to get assigned, you've violated the panel
7 rules. Isn't that interfere - - - isn't that
8 infringing on the court's prerogative?

9 MR. FELLOWS: Well, Your Honor, I would say
10 that there are many cases in which privately retained
11 attorneys are ultimately assigned and paid by the
12 plan, including one case I was here on last year in
13 which the lead counsel - - -

14 JUDGE SMITH: Then why - - - why does the
15 rule say - - -

16 MR. FELLOWS: - - - in the Smith v. Tormey
17 case - - -

18 JUDGE SMITH: Why does the rule say it's a
19 violation of the rules to ask?

20 MR. FELLOWS: Well, Your Honor, for the
21 policy reasons that the Fourth Department articulate,
22 which is we don't want the - - -

23 JUDGE SMITH: And I - - -

24 MR. FELLOWS: - - - panel attorneys
25 competing with - - -

1 JUDGE SMITH: I don't mean to cut you off,
2 because I can understand perfectly good policy
3 reasons for the rule. Still, isn't it a problem that
4 the rule, as it's phrased, the ACP rule, doesn't say
5 we will not approve vouchers for retained attorneys,
6 because I understood they don't have to approve
7 anything and the court can overrule them. It says it
8 is a violation of these rules for a retained attorney
9 to apply for compensation. Isn't that a problem?
10 Isn't the ACP, at that point, interposing itself
11 between the lawyer and the judge?

12 MR. FELLOWS: Well, no, Your Honor, because
13 it's between ACP and its panel attorney, who has
14 agreed to abide by these rules which say we're not
15 going to have privately retained attorneys then apply
16 to be appointed through the plan.

17 JUDGE SMITH: Okay. I understand - - - and
18 as to a lot of these - - - the problems that Mr.
19 Parry raises, you say, well, our role is only
20 advisory, and the judge can overrule us if he wants
21 to. This one, it seems, it's not clear to me that
22 you're saying that and it's not clear to me that the
23 record supports it. You're saying the panel, itself,
24 can enfo - - - without any judicial intervention,
25 essentially, enforce, through the sanction of

1 membership on the panel, can enforce the rule against
2 retained attorneys being assigned?

3 MR. FELLOWS: Well, Your Honor, when your
4 question says the record supports it, I would say the
5 record doesn't support it, because what I'd like to
6 see when I'm in the Court of Appeals is an allegation
7 that Mr. Roulan was a privately retained attorney and
8 Mr. Roulan tried to get appointed by the ACP and that
9 he was somehow sanctioned, rather than the anecdotal
10 statements - - -

11 JUDGE SMITH: Well, but there is - - -

12 MR. FELLOWS: - - - of Mr. Parry.

13 JUDGE SMITH: But there is the text of a
14 rule, which I can probably find, if I look long
15 enough.

16 MR. FELLOWS: Your Honor, the rule is in
17 the record, and I believe your question fairly
18 characterizes the rule that we don't want our panel
19 attorneys seeking to be - - - when they're in a - - -
20 when they're in a privately retained case, then say
21 now I've run - - - my client's run out of money and I
22 want to be retained. But Judge, if the court wants -
23 - -

24 JUDGE SMITH: It's - - - I have actually
25 found it: "It shall be considered a violation of the

1 ACP rules for an attorney to present any voucher for
2 payment when such is done after the attorney has
3 represented to the court that he/she has been
4 retained on the particular case." Is that kosher?

5 MR. FELLOWS: Judge, that - - - the way I
6 read - - - the way I interpret what you read is if
7 the attorney just simply presents a voucher, without
8 being appointed, that would be a violation of the
9 rules. If, however, the court exercises its inherent
10 authority - - - and there's cases out there that are
11 cited in the brief and in the Fourth Department's
12 cases - - -

13 JUDGE SMITH: So you say there's no
14 restriction on a lawyer, in the middle of a trial,
15 say, saying, Judge, I was retained, I've run out of
16 money, I'd like you to assign me.

17 MR. FELLOWS: Well, my client's run out of
18 money.

19 JUDGE SMITH: Yes.

20 MR. FELLOWS: The way I interpret what you
21 just read out loud, Judge Smith, is that what it
22 means is you can't just start sending in vouchers.
23 But if the court - - -

24 JUDGE SMITH: You say that there is no
25 restriction on a lawyer - - - a retained lawyer

1 applying to the court to be assigned.

2 MR. FELLOWS: I certainly think that the
3 lawyer who's been privately retained can say to the
4 court I'm moving to withdraw, Your Honor, because my
5 client has exhausted funds. Now, in People v. Ward,
6 which is a reported case - - -

7 JUDGE SMITH: Can he say please assign me?

8 MR. FELLOWS: What? I'm sorry.

9 JUDGE SMITH: Can he say please assign me?

10 MR. FELLOWS: I don't think it would be a
11 vi - - - I don't think there would be a violation of
12 the rules to say that, and I think the lawyer has a
13 duty to his client to say, I think in the inherent
14 interest of justice in this case you should assign me
15 because I've done all this work and I'm ready and
16 we're in the middle of the trial. People v. Ward - -
17 -

18 JUDGE RIVERA: So then is he going to get
19 back on your panel? Is he going to get - - - are you
20 going to send vouchers?

21 MR. FELLOWS: I don't know - - -

22 JUDGE RIVERA: What happens after that?

23 MR. FELLOWS: Your Honor, for example, in
24 the People v. - - - Smith v. Tormey was a case I was
25 here on last year, and we were contesting second

1 chair's compensation. But first chair was privately
2 retained, and in the middle of a complicated case,
3 the Stacey Castor case, Ms. Castor ran out of money,
4 and that lawyer asked to be appointed, and we did not
5 object. And he wasn't sanctioned, disciplined,
6 anything.

7 JUDGE PIGOTT: Just the possibility. And
8 you know the reason - - - I know your time is up - -
9 - I think everybody in the Fourth Department has
10 experienced, you know, assigned counsel and some of
11 the difficulties that can happen. I think that's why
12 everybody wants to reach the merits. Just my
13 thought.

14 MR. FELLOWS: It's an important issue, Your
15 Honor. I don't dispute the importance of it. My
16 point is if you're going to decide very important
17 questions you ought to have a real record in front of
18 you instead of Mr. Roulan, who never says I
19 represented someone as a privately retained attorney
20 and then I couldn't get appointed, never was
21 sanctioned. So I believe the court should build a
22 rec - - - have a record before it when it decides
23 important questions. Thank you.

24 MR. PARRY: Thank you once again. I'm a
25 mediocre - - -

1 JUDGE PIGOTT: It seems like, you know, one
2 of the arguments here is you ought to go talk to the
3 Onondaga County Bar Association, who either knows or
4 doesn't know what's going on in this plan. Some of
5 it reads like it's a problem with the director,
6 between the director and some lawyer or lawyers, all
7 of which is not before us. And so the - - - you
8 know, the - - -

9 MR. PARRY: Sir, the fact of the matter is,
10 is that the plan and the law ought to be able to
11 overcome a corrupt county government, and that's what
12 we have.

13 JUDGE PIGOTT: We're not going to get into
14 corruption, I don't think. But you mentioned - - -
15 you made the point about mileage. All right, I don't
16 know how we can address that. I mean, it's not, you
17 know - - - I mean, we're not going to get down to the
18 question what is - - - you know, what are the - - -

19 MR. PARRY: You don't have to, sir. The
20 statute says that the judge must decide upon
21 reasonable expenses and that they shall be paid.
22 What Onondaga County has said is, is your biggest
23 expense, which is travel time, is not going to be
24 paid. And just incidentally, that's worth about
25 3,500 dollars in the pocket of every lawyer in

1 Onondaga County.

2 JUDGE SMITH: But a judge can overrule the
3 plan and say I'm going to pay it.

4 MR. PARRY: There is only one way to do it,
5 sir, and if you look at the final page of the
6 appendix that my opponent provided you, there's an
7 order to withdraw. And at the bottom of that it
8 says, "This form directs continuation of
9 representation but does not constitute an order to
10 pay for services of counsel." That's the only way a
11 judge can order you to continue. So what it says is,
12 is that the judge, by telling you you can keep
13 working, is saying you can work but they're going to
14 decide how much you're going to get.

15 JUDGE SMITH: But you're not saying that
16 they decide unreviewably, or are you? I mean, you
17 may be saying that that's true as a practical matter,
18 but you're not saying that if you don't like the
19 result that you eventually torture the plan into
20 giving you, three years down the road, you can go to
21 the judge and say, that's not enough, I want more
22 money.

23 MR. PARRY: Your Honor, the problem is two-
24 fold. If you wait three years, you're out of
25 business. And that is in the record, and that's what

1 happened to Mr. Roulan.

2 JUDGE SMITH: I understand the problem, and
3 I would think that maybe if they're taking three
4 years you might have the right to go to the judge and
5 say tell him - - - tell him to decide. But you - - -
6 in principle, you do have that right. I can
7 understand how the day-to-day details drive you nuts,
8 but you're not denying that you have the right to go
9 to the judge.

10 MR. PARRY: Sir, I'm not denying we have a
11 right to go to the judge; my opponent is denying I
12 have the right to go to the judge. And the specific
13 rule says that I can't go to the judge until after
14 their review process is done, which takes months.
15 And the rules say that the determine of their
16 executive committee, not the judge, is final.

17 I would bring one other thing to your
18 attention; it is page 31 of my appendix, where the
19 administrator of the Onondaga County plan said upon
20 the raises going through for assigned counsel
21 attorneys in 2004, that quote, unquote, "that was
22 unacceptable to Onondaga County". She put in for a
23 budget that was approximately in line with the pay
24 raise of 2004, that was reduced to the amount that
25 was available for 2003, and it has not risen to this

1 day. In other words, the attorneys of Onondaga
2 County never got the pay raise. That's what brought
3 this here.

4 JUDGE GRAFFEO: Counselor, your time is up.
5 Thank you very much.

6 MR. PARRY: Thank you, ma'am, and if I got
7 a little loud, excuse me.

8 (Court is adjourned)

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I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of TIMOTHY A. ROULAN v. COUNTY OF ONONDAGA, et al., No. 62 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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Date: March 21, 2013