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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF THE NEW YORK COUNTY LAWYERS'
ASSOCIATION,

Appellant,

-against-

No. 155

BLOOMBERG, et al.,

Respondent.

20 Eagle Street
Albany, New York 12207
September 5, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

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1 CHIEF JUDGE LIPPMAN: Let's start with
2 number 155, Matter of New York County Lawyers'
3 Association v. Bloomberg.

4 MR. PRESSMENT: Good afternoon, Your
5 Honors. Jonathan Pressment of Haynes and Boone for
6 the petitioner-appellants, the five County Bar
7 Associations of New York City.

8 CHIEF JUDGE LIPPMAN: Any rebuttal time,
9 counselor?

10 MR. PRESSMENT: Yes, Your Honor. We'd like
11 to reserve three minutes of my time today for
12 rebuttal.

13 CHIEF JUDGE LIPPMAN: Three minutes. You
14 have it; go ahead.

15 MR. PRESSMENT: I would also like to state
16 a word about our intended order of presentation
17 today.

18 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

19 MR. PRESSMENT: Next to me at co-counsel's
20 table is Zoe Jasper from the firm of Satterlee
21 Stephens, representing the intervenor-petitioner-
22 appellants. Ms. Jasper is going to be addressing the
23 question of whether or not the amendment to Section
24 722(3) permits the City to assign conflict counsel to
25 institutional providers. I will be addressing the

1 first two points of the County Bars' brief: the
2 first point, whether or not under Section 722(3) the
3 County Bars and only the County Bars have the
4 authority to declare something a plan of a bar
5 association; and two, whether the City's proposed
6 plan is a combined option under Section 722(4).

7 CHIEF JUDGE LIPPMAN: Okay, counsel.
8 Proceed; go ahead.

9 MR. PRESSMENT: May it please the court,
10 Your Honors, this case comes down to a very simple
11 question. What is the plain meaning of a plan of a
12 bar association. Because if the answer to that
13 question is a plan that at the very least has been
14 approved of by a bar association and the decision of
15 the first - - -

16 JUDGE SMITH: Is the plan now in effect
17 different from what it was before the City
18 promulgated its new rule?

19 MR. PRESSMENT: Yes, it is, Your Honor.

20 JUDGE SMITH: And what are the most
21 important differences?

22 MR. PRESSMENT: Well, there are a number of
23 important differences. The first, Your Honor, is who
24 determines what the conflict or if there is a
25 conflict. Under the old plan, it was left to the

1 court.

2 CHIEF JUDGE LIPPMAN: Define "the old
3 plan", counselor.

4 MR. PRESSMENT: The old plan is the 1965
5 Bar Plan - - -

6 CHIEF JUDGE LIPPMAN: 1965, the Wagner
7 plan? Yes.

8 MR. PRESSMENT: - - - promulgated in 1965.

9 JUDGE CIPARICK: When there only existed
10 one institutional provider, right?

11 MR. PRESSMENT: Correct.

12 JUDGE CIPARICK: At that time there was
13 only one?

14 MR. PRESSMENT: Correct, Your Honor.

15 JUDGE CIPARICK: Okay.

16 CHIEF JUDGE LIPPMAN: Go ahead. And the
17 modification that Judge Smith asked you about dates
18 from when?

19 MR. PRESSMENT: Well, it dates, under the
20 City's proposed plan, which is Chapter 13, effective
21 as of February 2010.

22 CHIEF JUDGE LIPPMAN: No, no. I think the
23 judge is asking you if it changed between the
24 original plan - - -

25 JUDGE SMITH: No, no. I -- no. I was

1 asking the question he thought I was asking.

2 CHIEF JUDGE LIPPMAN: Okay.

3 JUDGE SMITH: But you want to ask that one,
4 I'll - - -

5 CHIEF JUDGE LIPPMAN: Well, give us - - -

6 JUDGE SMITH: One at a time.

7 CHIEF JUDGE LIPPMAN: - - - give us answers
8 to both. What happened in between?

9 MR. PRESSMENT: Sure. And Judge Lippman, I
10 may want to return to you just to clarify and
11 understand what your question is. But with respect
12 to your question, Judge Smith, it differs in at least
13 four ways. The first is under the 1965 Bar Plan, the
14 determination of whether or not there was a conflict
15 was made by the court.

16 JUDGE SMITH: Right.

17 MR. PRESSMENT: Second, under the 1965 Bar
18 Plan - - - I will add - - -

19 JUDGE SMITH: Is that really no longer
20 true. The court can't say hey, you've got a
21 conflict?

22 MR. PRESSMENT: Under the new plan,
23 certainly the court always has the inherent power to
24 determine whether or not there's a conflict. But
25 inherent power versus a mandate to actually have a

1 determining effect on a decision is two different
2 things.

3 JUDGE SMITH: Is there - - - I mean, I
4 understand that's the way you read the City's rule.
5 Is that the way it's been implemented in practice?
6 The City is ruling on whether there are conflicts or
7 not?

8 MR. PRESSMENT: Currently, I mean, I think
9 that there's a variation in how it's done. But Judge
10 Smith, if I may, the big point here is whether or not
11 the plan proposed by the City matches exactly with
12 the 1965 Bar Plan.

13 JUDGE SMITH: So you say if they changed
14 anything, it's no longer a Bar Association Plan?

15 MR. PRESSMENT: No, Your Honor, I'm
16 actually going one step further. I'm saying that if
17 the plan matched up identically to the one that was
18 issued in 1965, the City still does not have a right
19 to use that plan in the context of a new plan.

20 CHIEF JUDGE LIPPMAN: Well, let me now come
21 to my question, because I think now it fits into this
22 mix. How are they able to change in between what
23 they did? In other words, when they started to go to
24 more institutional providers before this latest
25 change --

1 MR. PRESSMENT: Sure.

2 CHIEF JUDGE LIPPMAN: -- how did they do
3 that?

4 MR. PRESSMENT: The prior changes, Judge
5 Lippman - - -

6 CHIEF JUDGE LIPPMAN: Yes.

7 MR. PRESSMENT: - - - were not with respect
8 to the 722(3), that is the Bar Plan component. The
9 prior changes were with respect to the 722 component,
10 that is, a Legal Aid provider. And in fact, at the
11 time, when the City moved to more institutional
12 providers to serve the legal aid function, Legal Aid
13 challenged that.

14 CHIEF JUDGE LIPPMAN: But in effect, that
15 in between change markedly changed the way the City,
16 the courts, everyone did their business in terms of
17 conflict situations, right?

18 MR. PRESSMENT: No, it did not.

19 CHIEF JUDGE LIPPMAN: Why not?

20 MR. PRESSMENT: All that changed, Your
21 Honor, was who would be the first up at arraignment?
22 Who would be the primary provider?

23 CHIEF JUDGE LIPPMAN: So they just added
24 more providers? That's all that - - - in effect,
25 that's all that happened?

1 MR. PRESSMENT: Correct, Your Honor.

2 JUDGE SMITH: But couldn't the plan - - -
3 the 1965 plan as it's written, seems to say, it's got
4 to be either Legal Aid or a private 18-B lawyer.

5 MR. PRESSMENT: Well, Your Honor is
6 correct. That's what the plan says - - -

7 JUDGE SMITH: But couldn't the 18-B lawyers
8 or you have complained in whenever it was, the 1990s
9 or 2000, when they say, wait a minute; what are these
10 strangers doing in here; they're not entitled to have
11 these cases?

12 MR. PRESSMENT: I don't believe so, Your
13 Honor. I don't believe, frankly, that we would have
14 had standing to challenge what the City did under the
15 Legal Aid option, just as the City has no authority
16 to dictate - - -

17 CHIEF JUDGE LIPPMAN: So the City enlarged
18 the pool - - -

19 MR. PRESSMENT: They enlarged the primary
20 provider pool.

21 CHIEF JUDGE LIPPMAN: - - - and you weren't
22 - - - say it again?

23 MR. PRESSMENT: They enlarged the primary
24 provider pool.

25 CHIEF JUDGE LIPPMAN: Right. And you

1 weren't in a position to say anything about that?

2 MR. PRESSMENT: I don't believe so, Your
3 Honor. And quite frankly, Your Honor.

4 CHIEF JUDGE LIPPMAN: Because?

5 JUDGE CIPARICK: They're conflict.

6 CHIEF JUDGE LIPPMAN: Because it was only
7 the primary - - -

8 MR. PRESSMENT: Because the plan of the Bar
9 Association is only with respect to conflict work.

10 CHIEF JUDGE LIPPMAN: The primary?

11 JUDGE GRAFFEO: And subdivision (1) and (2)
12 of the statute don't make - - - those subdivisions
13 don't refer to any conflict defendants?

14 MR. PRESSMENT: They do not. They do not.
15 And in fact, subdivision (1) is inapplicable in this
16 case, because New York City does not have a public
17 defender.

18 JUDGE PIGOTT: Before you go. What did you
19 cede to the Appellate Divisions that they now have -
20 - - you know, there's fifty-six other counties in the
21 state besides those, and I'm familiar with them more
22 than I am this one. And the Appellate Divisions are
23 not involved in the assigned counsel programs in most
24 if not all of those counties, to my knowledge.

25 But as I'm reading this, and Judge Andrews

1 talked about it, at some point the Appellate
2 Divisions were involved in the assigned counsel
3 program, can you explain how that happened and - - -

4 MR. PRESSMENT: Absolutely. It happened
5 pursuant to the original 1965 Bar Plan. Because when
6 you look at the statute, 722(3) says counsel provided
7 pursuant to a plan of a bar association, whereby
8 private counsel will be rotated and coordinated by an
9 administrator - - - an undefined term.

10 JUDGE PIGOTT: Right.

11 MR. PRESSMENT: What the County Bars did in
12 1965 was they determined that the best administrator
13 would be a representative picked by the Appellate
14 Division's First and Second Departments.

15 CHIEF JUDGE LIPPMAN: But that changed as
16 to who the administrator works for?

17 MR. PRESSMENT: It changed under the new
18 plan, certainly. Under the old - - -

19 CHIEF JUDGE LIPPMAN: So that only under
20 the new plan did the administrator then work for the
21 City rather than the Appellate Division?

22 MR. PRESSMENT: Correct, Your Honor. The
23 Office of Assigned Counsel Plan in the City's
24 proposed plan, is something entirely created by the
25 City.

1 JUDGE CIPARICK: There's still oversight by
2 the Appellate Divisions, right? They're still doing
3 the screening of the attorneys to see if their
4 qualified to sit on these various panels, correct?

5 MR. PRESSMENT: In part. In part they are,
6 Your Honor.

7 JUDGE CIPARICK: In part.

8 MR. PRESSMENT: The County Bars also play a
9 role in that.

10 JUDGE CIPARICK: Right, right.

11 MR. PRESSMENT: But under the new proposed
12 plan - - -

13 JUDGE CIPARICK: But I mean the - - -
14 versus the City. The City isn't doing it. The
15 Office of the Mayor is not screening candidates for
16 these panels?

17 MR. PRESSMENT: Well, with respect to the
18 screening portion, I don't believe so. However, the
19 Office of the Mayor, now, administers the panels.

20 JUDGE CIPARICK: Well, they pay for it.

21 JUDGE GRAFFEO: Who decides who handles
22 homicide cases and who handles other criminal
23 defense?

24 MR. PRESSMENT: Well, pursuant to the
25 statute, certain types of homicide automatically go

1 to private counsel. I believe under the statute, all
2 felonies - - -

3 JUDGE GRAFFEO: And who would - - - who
4 administers that? That's my question?

5 MR. PRESSMENT: My under - - -

6 JUDGE GRAFFEO: Is that the Appellate
7 Divisions or is the County Bar doing that?

8 MR. PRESSMENT: I think the Appellate
9 Divisions - - -

10 JUDGE GRAFFEO: Somebody must retain a
11 list, right?

12 MR. PRESSMENT: - - - with the County Bars.
13 Correct.

14 JUDGE GRAFFEO: Somebody must maintain a
15 list - - -

16 MR. PRESSMENT: Correct.

17 JUDGE GRAFFEO: - - - because they're
18 supposed to be rotated.

19 JUDGE CIPARICK: They have a homicide
20 panel, right? They have a homicide panel, they have
21 a felony panel, they have a misdemeanor panel?

22 MR. PRESSMENT: Correct. There are
23 different panels.

24 JUDGE CIPARICK: Family court panel.

25 MR. PRESSMENT: The panel lists, under the

1 old system, however, were supposed to be given to the
2 state administrator for approval. And ultimately,
3 when they're certified by the administrator, the
4 panel members - - -

5 CHIEF JUDGE LIPPMAN: Counsel, let me get
6 your main point while you're here. Your point is
7 that there is - - - the new City plan is not a Bar
8 Plan, period? Is that your - - - the thrust of your
9 point?

10 MR. PRESSMENT: No, the thrust of my
11 argument is - - -

12 CHIEF JUDGE LIPPMAN: Yes.

13 MR. PRESSMENT: - - - the City plan cannot
14 be a combined option plan. Okay? Because in New
15 York City, in order to have a combined option, the
16 only possible combination is a combination of Legal
17 Aid and a Bar Plan. And in this case - - -

18 CHIEF JUDGE LIPPMAN: Could you have - - -

19 MR. PRESSMENT: - - - if I may, Your Honor?

20 CHIEF JUDGE LIPPMAN: Go ahead.

21 MR. PRESSMENT: In this case, there is no
22 Bar Plan.

23 CHIEF JUDGE LIPPMAN: Could you have a plan
24 that - - - a noncombination plan, under (2), let's
25 say?

1 MR. PRESSMENT: Absolutely, Your Honor.

2 But that is not the plan that has been offered. And

3 Your Honor - - -

4 CHIEF JUDGE LIPPMAN: It's not the plan
5 because it is denominated a combination plan and your
6 contention is, in reality, there is no bar component
7 of it?

8 MR. PRESSMENT: Correct.

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. PRESSMENT: Your Honor, if the City
11 wants to - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. PRESSMENT: - - - institute a Legal Aid
14 - - - a pure Legal Aid option plan, they can do that,
15 but they have not done so in this - - -

16 CHIEF JUDGE LIPPMAN: Okay. But this isn't
17 it, in your view?

18 MR. PRESSMENT: This is not it - - -

19 CHIEF JUDGE LIPPMAN: Okay.

20 MR. PRESSMENT: - - - because there's no
21 Bar Plan.

22 CHIEF JUDGE LIPPMAN: Okay. Let's hear
23 from - - - oh, I'm sorry, Judge Smith, go ahead.

24 JUDGE SMITH: Are you, at some - - - is
25 somebody going to address the severability question,

1 that is, the argument that if there is no Bar Plan,
2 well, then why doesn't it just convert to a
3 subdivision (2) plan?

4 MR. PRESSMENT: I will certainly address
5 that.

6 CHIEF JUDGE LIPPMAN: Why don't you address
7 it right now. Go ahead.

8 MR. PRESSMENT: Judge Smith, it's
9 impossible to sever the components of the Bar Plan
10 panels from this current plan. First of all, the
11 City has never offered this as anything other than a
12 722(4) plan. And by the City's own - - -

13 CHIEF JUDGE LIPPMAN: But the question is,
14 what if, in reality, it's a (2) plan, even though
15 it's denominated as a combination plan?

16 MR. PRESSMENT: It would in effect - - -

17 CHIEF JUDGE LIPPMAN: What happens then?

18 MR. PRESSMENT: - - - it would require two
19 things, Judge, and Judge Smith. One, it would
20 require this court taking a marker through various
21 provisions of the proposed plan. Two, it would go
22 around and circumvent a process the City themselves
23 says is required, which is the CAPA rulemaking
24 process. CAPA calls for rules such as this, such as
25 the proposed plan, to be openly vetted and subject to

1 public comment. The City has gone to great lengths
2 to say that very few people commented on this plan.

3 CHIEF JUDGE LIPPMAN: Could it be - - -
4 could it be openly vetted but denominated as
5 something that it isn't? You follow what I'm saying?

6 MR. PRESSMENT: No, Your Honor.

7 CHIEF JUDGE LIPPMAN: Could it be - - -

8 MR. PRESSMENT: No, Your Honor, I
9 understand your question.

10 CHIEF JUDGE LIPPMAN: You under - - - could
11 it be - - -

12 MR. PRESSMENT: Could it be vetted - - -

13 CHIEF JUDGE LIPPMAN: - - - denominated as
14 a combination plan, but in reality it's a (2) and had
15 gone through a comment period, but it's just labeled
16 wrong? Could that - - -

17 MR. PRESSMENT: Your Honor - - -

18 CHIEF JUDGE LIPPMAN: - - - could that be
19 possible?

20 MR. PRESSMENT: - - - it would be like
21 telling Your Honor, I am selling you a Cadillac, and
22 sending you home in a subcompact, quite frankly.

23 JUDGE SMITH: Are you really saying that -
24 - -

25 MR. PRESSMENT: You have opened it up - - -

1 Judge Smith?

2 JUDGE SMITH: Are you really saying that
3 because of CAPA, no rule that's been through the CAPA
4 procedure can ever be severable, because after it's
5 severed what you have is something that was not
6 vetted?

7 MR. PRESSMENT: Judge Smith, I don't want
8 to speak in generalities about CAPA. I can say with
9 respect to a proposed indigent defense system, the
10 City has always taken the position, and we must
11 accept that, that any proposed indigent defense
12 system must go through the process of CAPA. That,
13 quite frankly, is the reason the City has always
14 offered for their refusal to cooperate and
15 communicate with the County Bars to amend or alter
16 the plan. They've said it has to go through CAPA.
17 And if it doesn't, it's not going to be an official
18 plan. In this case, they have offered a 722(4)
19 combined option plan - - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 MR. PRESSMENT: but it's not.

22 CHIEF JUDGE LIPPMAN: Okay. Let's hear
23 from Mr. Jasper.

24 JUDGE CIPARICK: Miss.

25 CHIEF JUDGE LIPPMAN: Oh, Ms. Jasper,

1 excuse me.

2 MS. JASPER: Good afternoon, Your Honors.
3 If it please the court, I'd ask to reserve two
4 minutes of my time for rebuttal.

5 CHIEF JUDGE LIPPMAN: You have it. Go
6 ahead. So what are you addressing in this initial
7 aspect?

8 MS. JASPER: I'm going to be addressing in
9 part the amendments to the statute in 2010, and I'd
10 like to begin, if I may, with expanding on the
11 response to Judge Smith's inquiry about the
12 severability question.

13 CHIEF JUDGE LIPPMAN: Yes.

14 MS. JASPER: Something that I think is
15 fundamentally important for the court to keep in
16 mind, the reason this is not an issue about
17 severability is that the plan that is proposed by the
18 City continues to rely on the provision of services
19 by members of the Assigned Counsel Plan. What is at
20 issue here is not whether or not - - -

21 CHIEF JUDGE LIPPMAN: In practice, would it
22 really rely on that? Or are they really excluding
23 members under the combination? Do you know what I'm
24 saying?

25 MS. JASPER: Yes.

1 CHIEF JUDGE LIPPMAN: Are they really
2 taking - - - for all practical purposes, doing away
3 with anything other than an institutional provider?

4 MS. JASPER: The plan, as it has been
5 proposed and as it has been explained in the record,
6 does not do away with assignment of counsel. I
7 believe it's the City's position, it's merely seeking
8 to modify and limit the role of the Assigned Counsel
9 Plan - - -

10 CHIEF JUDGE LIPPMAN: Modify or eliminate
11 the role of assigned counsel?

12 MS. JASPER: To modify, not eliminate. And
13 I think it's also important to remember that - - -

14 CHIEF JUDGE LIPPMAN: But do you buy that?
15 I mean, is that - - - you agree that that's what
16 they're doing, limiting it, not eliminating it?

17 MS. JASPER: That's what the City's
18 representation has been. In practice there's a stay
19 that has maintained, in effect, the 1965 plan as
20 opposed to what the City's proposed.

21 JUDGE SMITH: But if you were - - - suppose
22 you were to persuade us that the City can't do what
23 it wanted to do, it can't modify it in the way that
24 it's trying to modify it, because it doesn't have an
25 approved Bar Plan, and it can't invent its own, it

1 has to have a Bar Plan. If you're right about that,
2 why shouldn't we say, well, as we interpret the
3 City's intention, it would say if we can't have a Bar
4 Plan, we'll do without a Bar Plan, and we'll just
5 have institutional providers?

6 MS. JASPER: If I understand Your Honor's
7 question, could the City have a (2) plan that's not a
8 combination plan? It certainly could. That is one
9 of the options contemplated by the statute.

10 JUDGE SMITH: But why should we - - - I
11 mean, severability, usually, subject to some of this
12 CAPA stuff I don't understand, severability usually
13 depends on an analysis of what the legislating
14 authority - - - which I guess is the mayor, in this
15 case - - - would have done had it foreseen the
16 invalidity of part of the legislation.

17 If you persuade us that the part of this
18 rule that says we're going to use this - - - what
19 they say is a Bar Plan and you say is not a Bar Plan
20 - - - if you persuade us that that's invalid, why
21 aren't we - - - why couldn't we reasonably say, well,
22 that leaves the City, or the City would prefer to be
23 left with pure institutional providers and forget
24 about a plan - - - forget about a private assigned
25 counsel plan?

1 MS. JASPER: I think the statute would
2 permit that interpretation, except that the City has
3 unambiguously, including in his briefing before this
4 court - - -

5 CHIEF JUDGE LIPPMAN: Didn't they try,
6 though orig - - - isn't that what the City tried to
7 do initially before you objected?

8 MS. JASPER: That's a - - -

9 CHIEF JUDGE LIPPMAN: To do a number (2)
10 plan. You said wait a second, you can't do that;
11 they pulled it back; and then they did the
12 combination, right? Is that what happened here?

13 MS. JASPER: I actually think - - - I think
14 what the City has represented in its amendments to
15 their RFP is that that was a mistaken representation;
16 that it had always intended to maintain a combination
17 plan, but to simply modify in a manner that we say -
18 - -

19 CHIEF JUDGE LIPPMAN: But you said, you
20 know, that's not what they're doing. You said
21 they're doing a straight plan, you can't do that, and
22 - - -

23 MS. JASPER: Correct.

24 CHIEF JUDGE LIPPMAN: - - - and that was
25 really the precipitating factor to them pulling it

1 back, right? Or was it?

2 MS. JASPER: I don't know that that was
3 their precipitating factor. The intervenors
4 intervened at a later point that relates to the 2010
5 amendments.

6 JUDGE CIPARICK: So how would it work
7 practically if you're a trial judge, and you have,
8 let's say, a three-defendant case, and you have Legal
9 Aid representing one defendant, and you have another
10 institutional provider defending the second
11 defendant. I mean, it would revert back to the judge
12 assigning somebody, right? So there would have to
13 still be a list; there'd have to still have to be
14 panels, because you don't want to go back to
15 favoritism and nepotism - - - so and so you're here,
16 you know, you take this case, which used to be
17 practice. So you still need the panel list; you
18 still need people who've been approved.

19 MS. JASPER: It's a very good question. If
20 I could - - - two things. One, the 1965 plan does
21 not contemplate that in the event of a conflict, in
22 the conflict created by a multi-defendant case, that
23 multiple institutional providers simultaneously serve
24 in that case as primary defense counsel. What occurs
25 is that primary defense - - - the primary insti - - -

1 JUDGE CIPARICK: No, where we have three
2 defendants.

3 MS. JASPER: Correct. If there were three.

4 JUDGE CIPARICK: Right.

5 MS. JASPER: One would be assigned to the
6 primary institutional provider - - -

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MS. JASPER: - - - and the other two would
9 be assigned to members of the panel.

10 Additionally, what would happen - - - Your
11 Honor's observation about needing a list, is
12 precisely what I believe has been the City's argument
13 about the impracticality in New York City of
14 maintaining a (2)-only plan, because as the record
15 reflects, the City handles, on average, between 250-
16 and 500,000 indigent criminal cases that require
17 assignment through one of these mechanisms.

18 One of the things that happened with the
19 2010 amendment was in response to a need to expand
20 these options and to recognize the need to cover
21 these conflict cases in a way that had arisen in
22 Cortland County: an Office of Conflict Defender.

23 Important to recognize, however, when this
24 was ultimately adopted, this additional option was
25 incorporated into subsection (3), a bar planning

1 option, and reserved for the bar associations, not
2 for the City through an Office of the Mayor, to
3 create an institution that would endeavor to assign
4 counsel and some mechanism leading to conflicts.

5 CHIEF JUDGE LIPPMAN: In their plan - - -

6 MS. JASPER: Um-hum? I'm sorry, Your
7 Honor, do you mean the City?

8 CHIEF JUDGE LIPPMAN: - - - in their plan,
9 is it inevit - - - the City's plan - - -

10 MS. JASPER: Yes, sir.

11 CHIEF JUDGE LIPPMAN: - - - is it
12 inevitable that there would still always be a role
13 for the judge, or could an administrator do whatever
14 the judge did? Is that feasible?

15 MS. JASPER: If you're talking about the
16 specific judicial intervention contemplated by
17 subsection (4) - - -

18 CHIEF JUDGE LIPPMAN: Is the judge always
19 going to play a role here, or under the City's plan,
20 the judge would not anymore?

21 MS. JASPER: The way the City's plan is
22 written, it seeks to eliminate the oversight of the
23 judiciary, as well as any State administrative body,
24 and basically allowing conflicts to be handed off
25 among a group of institutional providers, who would

1 internally, amongst themselves, vet potential
2 conflicts, with any cases they then couldn't manage
3 trickling out to the panel attorneys.

4 CHIEF JUDGE LIPPMAN: And to the extent
5 there's a problem, an administrator deals with that
6 who works for the City?

7 MS. JASPER: That appears to be what's been
8 proposed by the City.

9 JUDGE GRAFFEO: So you mean if there's
10 three or four defendants involved, after the primary
11 assignment and then, say, an institutional - - -

12 JUDGE CIPARICK: Conflicts.

13 JUDGE GRAFFEO: - - - conflict provider for
14 the first - - - for the second defendant. The judge
15 can't select somebody from the 18-B panel for the
16 third or fourth defendant?

17 MS. JASPER: The plan doesn't contemplate
18 that kind of intervention. Of course, the court
19 always reserves inherent - - -

20 JUDGE GRAFFEO: I'm lost. Is that a yes or
21 no? The judge no longer would have the authority?
22 That's your interpretation?

23 MS. JASPER: Our understanding of the plan
24 is that that wouldn't come before the court to even
25 be aware that the cases had been assigned by an

1 administrative determination among those
2 institutional providers. So yes, in the first
3 instance, the court would be unaware that any
4 conflicts were being managed administratively without
5 any judicial or state oversight or bar association
6 input among the institutional providers.

7 JUDGE GRAFFEO: At what juncture in the
8 proceedings, then, is this administrative entity
9 making the appointments?

10 MS. JASPER: It's our understanding that
11 that would be occurring at arraignment, which it
12 speaks in part to why this is such an untenable plan.
13 The right to conflict-free representation attaches at
14 arraignment. Passing a case around and resolving
15 those conflicts among a handful of institutional
16 providers circumvents the judicial oversight
17 expressly contemplated in subsection (4), as well as
18 the administrative oversight - - -

19 JUDGE CIPARICK: So before the case comes
20 to the judge - - -

21 MS. JASPER: Yes.

22 JUDGE CIPARICK: - - - there would have
23 already been assignments in place - - -

24 MS. JASPER: Yes, Your Honor.

25 JUDGE CIPARICK: - - - like A, you're

1 represented by Legal Aid; B you're represented by
2 somebody; et cetera?

3 MS. JASPER: Yes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 MS. JASPER: Thank you.

6 CHIEF JUDGE LIPPMAN: Thanks. You'll both
7 have rebuttal time.

8 Counselor?

9 MR. KALKSTEIN: Good afternoon. May it
10 please the court, my name is Julian Kalkstein. I
11 appear on behalf of the City of New York.

12 CHIEF JUDGE LIPPMAN: Counselor,
13 characterize your plan. Is it an either/or? Is this
14 a combination plan or a straight number (2) plan?

15 MR. KALKSTEIN: No, it's a combination
16 plan.

17 CHIEF JUDGE LIPPMAN: Period. And what's
18 the role of the Bar Association Plan in this
19 combination proposal?

20 MR. KALKSTEIN: The role of the bar
21 association's is there will be a determina - - -
22 there would be like a schedule set up as to what - -
23 - assuming we have RFPs and we have contracted with
24 certain institutional providers. And we would set up
25 a schedule. And on certain days or certain evenings,

1 when we have arraignments, there would be assignments
2 according to a schedule where certain institutional
3 providers would be present to represent primary
4 conflict, and on certain other days, then 18-B would
5 - - -

6 JUDGE PIGOTT: How do you - - -

7 CHIEF JUDGE LIPPMAN: I'm sorry. Judge
8 Pigott, go ahead.

9 JUDGE PIGOTT: How do you have a Bar Plan
10 without the bar association agreeing?

11 MR. KALKSTEIN: I will explain that. We
12 have - - - we have adopted a Bar Plan.

13 JUDGE PIGOTT: No, you haven't. You've got
14 a plan that they did in 1965 - - -

15 MR. KALKSTEIN: Correct.

16 JUDGE PIGOTT: - - - and you've decided to
17 modify that. And - - -

18 MR. KALKSTEIN: No, we didn't modify it.

19 JUDGE PIGOTT: Well, let's assume you have,
20 because Abdus-Salaam seems to think you have, and
21 your opponents seem to think you have, and you've got
22 different procedures here. If you haven't, and they
23 agree with you that this works, then everything is
24 copacetic.

25 MR. KALKSTEIN: Correct.

1 JUDGE PIGOTT: They apparently are not.
2 And even if it is the same plan, if they don't agree,
3 you don't have them, right? I mean, you can't force
4 the bar association to be part of a program if they
5 don't want to be?

6 MR. KALKSTEIN: That is correct.

7 JUDGE PIGOTT: All right. So it's not a
8 Bar Plan, if they say this is not our plan.

9 MR. KALKSTEIN: No. That's where I beg to
10 - - -

11 JUDGE PIGOTT: So you're going to say to
12 the - - - I don't know the names of these county
13 bars. Let's say the New York County Bar. You're
14 going to say, this is your plan. And they say, no,
15 it's not. You say, yes, it is. Now, where do you
16 resolve that? I mean, it seems to me, the bar ought
17 to know what their plan is and what they want. And
18 apparently they don't like some of the things that's
19 within this, those little four things that Mr.
20 Pressment was talking about.

21 MR. KALKSTEIN: We have to define what's
22 the City Plan and what's the Bar Plan.

23 JUDGE PIGOTT: Don't you need their
24 consent?

25 MR. KALKSTEIN: Excuse me?

1 JUDGE PIGOTT: Don't you need the County
2 Bar's consent for a Bar Plan?

3 MR. KALKSTEIN: We need their consent to
4 participate in the City Plan that we devise.

5 JUDGE SMITH: If they say - - - now I'm
6 just repeating Judge Pigott's question - - - if they
7 say it's not our plan, how can you say it is?

8 MR. KALKSTEIN: Because - - - because we -
9 - - the Bar Plan that we've adopted is the plan
10 whereby those bar associations within the scope of
11 the Appellate Division rules, promulgate and create
12 bar panels - - -

13 CHIEF JUDGE LIPPMAN: Yes, but aren't - - -

14 MR. KALKSTEIN: - - - of attorneys. And we
15 - - -

16 CHIEF JUDGE LIPPMAN: - - - counselor - - -

17 MR. KALKSTEIN: I'm sorry.

18 CHIEF JUDGE LIPPMAN: Aren't you
19 marginalizing if not eliminating their plan and then
20 saying, but it's still their plan?

21 MR. KALKSTEIN: Not at all. We're using -
22 - -

23 CHIEF JUDGE LIPPMAN: Why not? Why isn't
24 that - - - what isn't that effectively what you're
25 doing?

1 MR. KALKSTEIN: The statute empowers the
2 City of New York as a governing body to utilize
3 attorneys from a public defender, from institutional
4 providers and from a Bar Plan.

5 CHIEF JUDGE LIPPMAN: What is the role of
6 the bar in that Bar Plan?

7 MR. KALKSTEIN: It creates panels of
8 attorneys that are available - - -

9 CHIEF JUDGE LIPPMAN: Pursuant to your
10 direction?

11 MR. KALKSTEIN: Pursu - - -

12 CHIEF JUDGE LIPPMAN: Is that what this is
13 about?

14 MR. KALKSTEIN: No. No. Pursuant to the
15 Appellate Division - - -

16 CHIEF JUDGE LIPPMAN: Or - - -

17 MR. KALKSTEIN: - - - rules and regul - - -
18 rules.

19 CHIEF JUDGE LIPPMAN: But do they - - -
20 what discretion do they have in making the bar
21 association plan?

22 MR. KALKSTEIN: Their plan, they have total
23 discretion. It is their plan. We do not touch their
24 plan - - -

25 CHIEF JUDGE LIPPMAN: So what is their

1 plan?

2 MR. KALKSTEIN: Their plan is they have
3 administrators, and they have - - - and pursuant to
4 the plan that they created in 1965, you look in the
5 last paragraph, they anticipated the promulgation of
6 Appellate Division rules, which have been passed.
7 And pursuant to the - - -

8 CHIEF JUDGE LIPPMAN: So is your position
9 that once they adopt a plan in 1965, they're
10 finished, and then you take that - - - and even if
11 the practical effect, I think is what I'm driving at
12 - - - if the practical effect is very much to
13 diminish their role and their plan - - -

14 MR. KALKSTEIN: Yes.

15 CHIEF JUDGE LIPPMAN: - - - does that
16 matter? Can you just do that at that point, once
17 they've adopted a plan in 1965? Or do they have to
18 say in 2010, we agree with what you're doing to our
19 plan, whatever it might be? Do they have no role at
20 that point?

21 MR. KALKSTEIN: That's correct, Your Honor.

22 JUDGE PIGOTT: Well, see, that chan - - -
23 let me - - - that that changes the plan. I mean, as
24 I understand it, where you say, "they will now be
25 administered by the Office of Assigned Counsel Plan,"

1 that's new; "that the providers will be selected by
2 an RFP," that's new; "these providers in the
3 Appellate Division panels will provide the services,"
4 that's new; "the conflicts assigned will be handled
5 by the Appellate Division panels or by alternative
6 providers selected by the City," that's new.

7 None of those are the County Bar Plan. And
8 you either get to say - - - get their consent, it
9 seem to me, or you cannot call it a County Bar Plan.
10 What's the flaw in my reasoning?

11 MR. KALKSTEIN: Okay. The flaw in your
12 reasoning, Your Honor, is you have described a City
13 Plan. You have described a City Plan where we are
14 going to utilize institutional providers and members
15 of the bar panels.

16 JUDGE PIGOTT: The bar says you can't - - -
17 you cannot call it a Bar Plan, because it's our plan,
18 and we're saying what you've done to it makes it not
19 our plan. Now, what do you do with that?

20 MR. KALKSTEIN: What I do with that, Your
21 Honor, is what is intellectually correct is the fact
22 that we are adopting their plan, the same plan - - -

23 JUDGE PIGOTT: All right. Let me ask - - -
24 let me interrupt and ask you this. Can Erie County -
25 - -

1 MR. KALKSTEIN: Yes.

2 JUDGE PIGOTT: - - - can the County
3 Executive in Erie County say we're going to adopt the
4 Bar Plan that the City of New York just adopted,
5 because we think that works for us - - -

6 MR. KALKSTEIN: No.

7 JUDGE PIGOTT: - - - without the Erie
8 County Bar Association consenting?

9 MR. KALKSTEIN: No, Your Honor.

10 JUDGE PIGOTT: Why not? You're just saying
11 you can call it a Bar Plan.

12 MR. KALKSTEIN: No, Your Honor, because the
13 statute begins with a governing body, and that would
14 be Erie County, and they would devise their plan,
15 where they're going to get their attorneys.

16 JUDGE PIGOTT: And they're going to use the
17 bar association?

18 MR. KALKSTEIN: And they would say to the
19 bar association, in part or in total, we want to use
20 your attorneys from the bar association.

21 JUDGE PIGOTT: Right.

22 MR. KALKSTEIN: So you, pursuant to 722(3),
23 have to create a plan. It has to be approved by a
24 state administrator, and you create panels of
25 attorneys that will be utilized by the Erie County

1 Plan. So you have an Erie - - -

2 JUDGE PIGOTT: And on top of that, the
3 County Executive is going to decide which lawyers are
4 assigned, and the County Executive's going to put in
5 an RFP to see who goes on your panel, Erie County
6 Bar.

7 MR. KALKSTEIN: That's not part - - -
8 that's not part of the Bar Plan.

9 JUDGE PIGOTT: That's right. And that's
10 what they're saying, that what you're doing is not
11 part of the Bar Plan.

12 MR. KALKSTEIN: No. The RFP is under
13 722(2), the provi - - -

14 JUDGE PIGOTT: That's the Legal Aid
15 Society.

16 MR. KALKSTEIN: But that's how - - -

17 JUDGE PIGOTT: Haven't you got one?

18 MR. KALKSTEIN: - - - that's how we utilize
19 Legal Aid.

20 CHIEF JUDGE LIPPMAN: Counselor, say we
21 disagree with you.

22 MR. KALKSTEIN: Yes.

23 CHIEF JUDGE LIPPMAN: Is your position that
24 if it's not a combination plan, then it's a
25 freestanding Section (2) plan?

1 MR. KALKSTEIN: I think so. Indeed, I do.

2 CHIEF JUDGE LIPPMAN: Why is that? So - -
3 - because you're then not going to rely on the bar
4 association at all. You're just going to go under
5 the second prong of that. How does that work as a
6 freestanding number (2)? And do you agree with the
7 question asked before about severability? Go ahead.

8 MR. KALKSTEIN: Under 722 we - - - the City
9 takes the position that we can utilize more than one
10 institutional provider. And there's no limit - - -

11 CHIEF JUDGE LIPPMAN: Why did you pull back
12 from what seemed like a pretty much a straight number
13 (2) plan? Earlier, when they objected, why did you
14 pull back from that and then do a combination again?

15 MR. KALKSTEIN: Because we - - - because
16 the powers that be that have devised a City Plan,
17 think it's in the best interests of the City, in
18 terms of efficiency and economics, to both use
19 multiple institutional providers and 18-B bar
20 association attorneys.

21 CHIEF JUDGE LIPPMAN: But when they said
22 you're doing something - - - but originally, that
23 wasn't really where you were going, right? You were
24 going towards a subdivision (2); they objected; and
25 then you came back and said gee, no, this is a

1 combination plan. Forget what we said before. Is
2 that what happened?

3 MR. KALKSTEIN: No. Well, Your Honor, with
4 all due respect, when we promulgated Chapter 13 - - -

5 CHIEF JUDGE LIPPMAN: Yes.

6 MR. KALKSTEIN: - - - under the CAPA rules,
7 and we had a period during which people could comment
8 and say no, this plan's not good; this plan is not
9 good; the bar associations were silent, and we passed
10 the plan. Now, in the eleventh hour, we have this
11 litigation.

12 JUDGE PIGOTT: Let's assume then. But I
13 want to go back a minute. If you've got a Legal Aid
14 Society and you have a public defender, that's fine.
15 And they can represent defendants. If you have a
16 third, if you now have another conflict; public
17 defender can't do it because they've got one; Legal
18 Aid can't do it because they've got one; you now need
19 another lawyer. All right. That can come from a
20 plan that the bar association approves, right?

21 MR. KALKSTEIN: Yes.

22 JUDGE PIGOTT: All right. Now, they have
23 to approve it, because you can't simply say we're
24 calling it your plan even though you don't approve.
25 Just stick with my point.

1 MR. KALKSTEIN: Okay. I beg your pardon.

2 JUDGE PIGOTT: If that's not there, it
3 seems to me, the catchall in 722(4) is the judge then
4 says, got no plan, we've got the PD, we've got the
5 LAS. So what we're going to do, I'm going to call
6 somebody and see if they'll handle this case. It's
7 with the judge, right? And the rates are set. So
8 you don't have to do an RFP.

9 MR. KALKSTEIN: I understand that - - -

10 JUDGE PIGOTT: Does that work?

11 MR. KALKSTEIN: - - - Your Honor. But I
12 think what this all boils down to is that the bar
13 associations are real unhappy, and rightfully so,
14 where they're going to lose their monopoly in
15 providing conflict counsel.

16 JUDGE PIGOTT: Well, you're going to - - -
17 no. I mean, I just gave you a scenario where you got
18 conflict counsel, in most cases, where you've only
19 got two defendants.

20 MR. KALKSTEIN: Right.

21 JUDGE PIGOTT: I think when you've got a
22 third one, you can do an assigned counsel plan. And
23 this is what Erie County's got by the way. But the
24 bar association's the one that handles it. And
25 what's the big deal, because the rates are set. Your

1 controller, I guess, is going to review these things,
2 but - - -

3 MR. KALKSTEIN: Well, if I understand your
4 question correctly, that's okay, by us. But that's
5 exactly what the bar association - - - what
6 petitioners are objecting to.

7 JUDGE CIPARICK: They want all the conflict
8 work, right?

9 MR. KALKSTEIN: Yes.

10 JUDGE CIPARICK: You have all the conflict
11 work. They see this plan is diminishing their
12 resources because they're going to get less 18-B
13 assignments.

14 MR. KALKSTEIN: Yes.

15 JUDGE CIPARICK: So they only want one
16 institutional provider in the mix.

17 MR. KALKSTEIN: Well, they only want one
18 institutional provider - - -

19 JUDGE CIPARICK: As the primary.

20 MR. KALKSTEIN: - - - only doing primary
21 cases.

22 JUDGE CIPARICK: Right. They want all the
23 - - -

24 MR. KALKSTEIN: They don't want any - - -

25 JUDGE CIPARICK: - - - conflict work.

1 CHIEF JUDGE LIPPMAN: Okay. Judge Graffeo?

2 JUDGE GRAFFEO: So your argument is that if
3 the City attempt - - - that the City attempted here
4 to broaden the options for who could be appointed
5 conflict - - -

6 MR. KALKSTEIN: Absolutely.

7 JUDGE GRAFFEO: - - - counsel.

8 MR. KALKSTEIN: Correct.

9 JUDGE GRAFFEO: And that you therefore
10 didn't touch the City Plan (sic), you're adding like
11 another - - -

12 MR. KALKSTEIN: We didn't touch the Bar
13 Association Plan.

14 JUDGE GRAFFEO: - - - the Bar Plan, and
15 you're - - -

16 MR. KALKSTEIN: We changed the City Plan.

17 JUDGE GRAFFEO: - - - and you're adding a
18 City Plan to the Bar Plan. But if that has a
19 substantial effect on the Bar Plan, does that - - -

20 MR. KALKSTEIN: It has the - - -

21 JUDGE GRAFFEO: - - - that doesn't require
22 their approval?

23 MR. KALKSTEIN: It requires their having
24 their membership still participate in a City Plan.
25 The City Plan still contains the Bar Plan insofar as

1 CHIEF JUDGE LIPPMAN: Judge Smith?

2 JUDGE SMITH: I'm not sure you ever
3 answered the chief judge's question. How do you
4 stand on severability? If you lose on whether this
5 is a Bar Plan or not, is the Bar Plan severable?

6 MR. KALKSTEIN: Well, for the most part, I
7 will leave that to my colleague, because I did not
8 address that in - - -

9 JUDGE SMITH: Well, when he speaks, is he
10 going to be speaking for you on that issue?

11 MR. KALKSTEIN: He would speak for us on
12 that issue. But I do not see why we could not go
13 forward with a severed plan. But, Your Honor, quite
14 frankly, I would just say this. We have a
15 combination plan. We are using the same structure
16 which is a Bar Plan for the provision of attorneys.
17 And what I said in the last two pages of my brief is
18 that we would hope and we would expect that the bar
19 associations, notwithstanding the fact that they no
20 longer have a monopoly on conflict cases, would still
21 participate in the new City Plan.

22 The fact of the matter is, their Bar Plan,
23 that Office of Assigned Counsel office doesn't touch
24 their plan. That's always been there insofar as we
25 pay the administrators - - -

1 JUDGE SMITH: When you say "their plan" - -
2 -

3 MR. KALKSTEIN: - - - of the plan.

4 JUDGE SMITH: - - - when you say "their
5 plan", are you talking about the piece of paper that
6 is pages 501 to 507 of the record, or is it something
7 else?

8 MR. KALKSTEIN: It's their plan - - - if
9 that is the part - - -

10 JUDGE SMITH: Can you answer that one? I
11 mean, is - - -

12 MR. KALKSTEIN: Yes, I - - -

13 JUDGE SMITH: - - - is their plan this
14 thing in the record, or is this something else?

15 MR. KALKSTEIN: No, that is the plan - - -

16 JUDGE SMITH: It's not their plan?

17 MR. KALKSTEIN: - - - that is their plan
18 insofar as it - - - insofar as it provides a method
19 whereby attorneys are provided and are made available
20 for use in court.

21 JUDGE SMITH: So you say some - - -

22 JUDGE JONES: Who would oversee the
23 assignment?

24 MR. KALKSTEIN: But there's something else
25 besides the 501, Your Honor. There is the subsequent

1 Appellate Division rules which is now part of that
2 plan.

3 CHIEF JUDGE LIPPMAN: Judge Jones?

4 JUDGE JONES: Who would oversee the
5 assignments?

6 MR. KALKSTEIN: Who oversees the
7 assignments?

8 JUDGE JONES: The conflict assignments?

9 MR. KALKSTEIN: The City of New York
10 oversees the assignments.

11 JUDGE JONES: And the bar would have no
12 input into that?

13 MR. KALKSTEIN: No, they would not. They
14 would not insofar as 722(4) anticipates that the City
15 would - - - that the plan would be set up so as to
16 decide - - - determine who is going to represent whom
17 on given periods of time.

18 JUDGE JONES: That would be the City?

19 MR. KALKSTEIN: If the plan doesn't provide
20 for an attorney, then the court steps in and counsel
21 is - - -

22 JUDGE CIPARICK: Is it more cost effective
23 for the City to do it this way? I mean, are you
24 saving money by doing this?

25 MR. KALKSTEIN: I think that is the

1 viewpoint of the Office of Assigned Counsel Plan, who
2 promulgated this plan. Yes.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.
4 Thank you. Let's hear from Mr. Kolb.

5 MR. KOLB: Dan Kolb for the Legal Aid
6 Society. May it please the court.

7 CHIEF JUDGE LIPPMAN: Counselor, what's - -
8 - talk about the severability issue.

9 MR. KOLB: Well, I'd do that, and I'd also,
10 at the same time, Your Honor, make a point which is
11 crucial to Legal Aid.

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. KOLB: That is - - - if I can start
14 with that - - -

15 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

16 MR. KOLB: - - - and then go to
17 severability?

18 CHIEF JUDGE LIPPMAN: Absolutely.

19 MR. KOLB: The way 722(2) works is it says
20 in so many words, the City can assign cases to a
21 Legal Aid Society and that's where Legal Aid fits in.
22 That's how Legal Aid has been for all of the time - -
23 -

24 CHIEF JUDGE LIPPMAN: It's an institutional
25 provider.

1 MR. KOLB: An institutional provider. It -
2 - -

3 JUDGE CIPARICK: But at the time the
4 statute was drafted, there was only institutional
5 provider.

6 MR. KOLB: At the time that st - - - that
7 the original plans were adopted, that was true. And
8 then in the mid-90s, multiple providers were created.

9 JUDGE CIPARICK: Right. After the strike.

10 MR. KOLB: And the court - - - yes. And
11 the court approved that, said it was okay - - -

12 JUDGE GRAFFEO: You have what, six or seven
13 now, institutional - - -

14 MR. KOLB: Seven or eight - - -

15 JUDGE GRAFFEO: - - - providers?

16 MR. KOLB: - - - I believe. It depends on
17 exactly how the RFP is - - -

18 CHIEF JUDGE LIPPMAN: Does that lay the
19 groundwork for what's happening now, in your view?

20 MR. KOLB: In a sense, yes. Because the
21 City is taking advantage of the fact that they have
22 multiple providers. And they didn't back at the time
23 this started. And the point I want to make - - - and
24 if I may, for Legal Aid - - -

25 CHIEF JUDGE LIPPMAN: Sure, go ahead.

1 MR. KOLB: - - - is if you take the
2 multiple defendant case, the situation has been
3 historically, Legal Aid or then an alternative
4 provider would get the first case. Then the second
5 case would go to 18-B lawyers, and the third case or
6 fourth case, the same thing.

7 Now, under the City's Plan - - - and I
8 stress, the City's Plan, not the Bar Plan, because -
9 - -

10 JUDGE JONES: That decision would be made
11 by a judge. Isn't that so?

12 MR. KOLB: Which decision, Your Honor?

13 JUDGE JONES: The decision as to conflict
14 assignment?

15 MR. KOLB: I think the way it actually
16 works is that the Legal Aid Society - - - speaking
17 for us - - - first decides whether it has a conflict
18 - - -

19 JUDGE JONES: Yes.

20 MR. KOLB: - - - and then if it does, it
21 announces that and the case is then reassigned. I
22 think that's really what happens most of the time.

23 CHIEF JUDGE LIPPMAN: Not reassigned.

24 MR. KOLB: Of course the judge could do it
25 - - -

1 CHIEF JUDGE LIPPMAN: What the judge's - -
2 -

3 MR. KOLB: - - - a judge could do it.

4 CHIEF JUDGE LIPPMAN: - - - Mr. Kolb - - -

5 MR. KOLB: Yes.

6 CHIEF JUDGE LIPPMAN: - - - the judge's
7 question is, though - - - Judge Jones' question is,
8 does the judge make that decision or the
9 administrator make that decision?

10 MR. KOLB: Oh, I think on a conflict it
11 would first be Legal Aid or whoever the other - - -

12 CHIEF JUDGE LIPPMAN: Right. But once - -
13 -

14 MR. KOLB: - - - provider was.

15 CHIEF JUDGE LIPPMAN: - - - Legal Aid has a
16 conflict, who decides where it goes after that?

17 MR. KOLB: Then it moves on, in sequence,
18 to 18-B lawyers, as - - -

19 CHIEF JUDGE LIPPMAN: But not through the
20 judge?

21 JUDGE GRAFFEO: Who decides - - -

22 MR. KOLB: No, not through the judge,
23 primarily.

24 JUDGE GRAFFEO: - - - what 18 - - - who
25 decides - - -

1 MR. KOLB: The judge knows this is going
2 on.

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. KOLB: But that's not primarily what
5 happens. I'm sorry, Your Honor.

6 CHIEF JUDGE LIPPMAN: Judge Graffeo?

7 JUDGE GRAFFEO: No, my question was who
8 decides what 8-B (sic) attorney gets - - -

9 MR. KOLB: 18-B lawyer?

10 JUDGE GRAFFEO: - - - the appointment?

11 MR. KOLB: First of all, the panels are
12 decided based on screening by the Appellate Division.
13 The lawyers are recommended by the bar associations,
14 and - - -

15 JUDGE JONES: Well, the panel approves the
16 lawyers.

17 JUDGE GRAFFEO: No, I understand that. I'm
18 saying, in your scenario, where there's one, two,
19 three, four - - -

20 MR. KOLB: And then the - - -

21 JUDGE GRAFFEO: - - - who's going to say -
22 - -

23 MR. KOLB: The administrators. They
24 decide.

25 JUDGE GRAFFEO: - - - Jane Doe, you're

1 representing defendant number 3?

2 MR. KOLB: They decide who's first up and
3 second.

4 CHIEF JUDGE LIPPMAN: Counsel, now get to
5 the severability.

6 MR. KOLB: Yes. Well, again, if I may, the
7 severability point turns on the fact that Section
8 722(2) says a case can be assigned to Legal Aid, and
9 whether in a multiple defendant case, that's the
10 first case or the second case, has no effect on Legal
11 Aid's ability or the statute's provisions, that
12 afford Legal Aid the right to be - - -

13 JUDGE PIGOTT: That's all conceded. What
14 happens next?

15 MR. KOLB: Well, it may not be conceded by
16 the other side, Your Honor. But it's very important
17 to us that we're just - - - that's where we fit in.

18 JUDGE PIGOTT: You're okay. You're okay.

19 MR. KOLB: That's where we fit in.

20 JUDGE PIGOTT: You're 722(2) - - -

21 MR. KOLB: Right.

22 JUDGE PIGOTT: - - - and you've got the
23 first case. Now, here comes the second case.

24 MR. KOLB: Now, as to severability, I think
25 there's, in a sense, two answers. First, if the City

1 Plan were struck down because, as part of it, the Bar
2 Plan were deficient - - - because it's just part of
3 it; the City has the overarching authority - - - if
4 it were struck down for that reason - - -

5 CHIEF JUDGE LIPPMAN: Say it's struck down
6 because there is no Bar Plan, in effect?

7 MR. KOLB: Well, then you could have a
8 722(2) plan that went at least as far as the
9 providers go.

10 JUDGE SMITH: And is it your - - -

11 JUDGE GRAFFEO: You could make - - - is
12 this - - - you could make your plan into a 722(2)?

13 MR. KOLB: Well, it's not our plan.

14 JUDGE GRAFFEO: Well - - -

15 MR. KOLB: But - - -

16 CHIEF JUDGE LIPPMAN: The City Plan.

17 JUDGE GRAFFEO: - - - the City's Plan. I'm
18 sorry.

19 MR. KOLB: - - - but you could convert it.
20 And the City could convert it either because - - -

21 JUDGE GRAFFEO: You're sitting on that side
22 of the table.

23 MR. KOLB: - - - the court said so - - -

24 JUDGE GRAFFEO: That's what's confusing.

25 MR. KOLB: Right. Well, part of the

1 problem is, it's confusing.

2 JUDGE SMITH: But where - - - let me worry
3 about - - -

4 CHIEF JUDGE LIPPMAN: Judge Smith?

5 JUDGE SMITH: - - - we're going to - - -
6 the City can do what it does. But what you are
7 asking us to do as an alternative, first of all, you
8 want us to say that everything that's going on now is
9 fine. But if we say it's not fine, because the
10 statute says - - - subdivision (3) says you've got to
11 have a plan of a bar association, and we don't see
12 one here, so we don't think you're acting pursuant to
13 722(3), does that invalidate Chapter 13 or does it
14 simply convert Chapter 13 to a 722(2) plan? That's
15 what I mean by the severability question.

16 MR. KOLB: I think the answer is, Your
17 Honor, that under Chapter 13, the City Plan can
18 constitute a 722(2) plan, and so you would be left
19 with a 722(2) plan, as counsel said. That's what
20 you'd be left with. And, if I could answer the
21 practical question?

22 JUDGE SMITH: I think I - - - I think I
23 unders - - - I think you're just saying, yeah, it's
24 severable. Is that what you're saying?

25 MR. KOLB: I think you could put it that

1 way. But I'm trying to be as accurate as I can as to
2 how the statute works. And the way the statute works
3 is the 722(2) part would be preserved, be there, and
4 it would work as far as it would work.

5 CHIEF JUDGE LIPPMAN: Say it wasn't
6 preserved, what stops them from going back and - - -
7 the City - - - and then putting together a part (2)
8 plan?

9 MR. KOLB: Nothing. They could perfectly
10 well do that.

11 CHIEF JUDGE LIPPMAN: So tomorrow, if we
12 invalidate what's going on here, tomorrow they could
13 do a section (2) plan?

14 MR. KOLB: They could do that. Absolutely.

15 JUDGE CIPARICK: That would be worse for
16 the petitioners here.

17 MR. KOLB: Absolutely. It would be much
18 worse. But that - - - it's certainly doable.

19 Now, worse with some qualifications.

20 JUDGE CIPARICK: Right.

21 MR. KOLB: The statute actually covers the
22 situation where the plan in operation does not
23 provide for all the cases. That's 722(4). It says
24 if the cases aren't all covered by a plan in
25 operation - - -

1 JUDGE SMITH: Then the plan in operation -
2 - -

3 MR. KOLB: - - - the judiciary may appoint
4 the - - -

5 JUDGE SMITH: - - - in that context, is the
6 City Plan not the Bar Plan, right?

7 MR. KOLB: Yes, that's correct.

8 JUDGE SMITH: Okay.

9 MR. KOLB: And if I may on that? I think,
10 as a practical matter, it's very important to
11 distinguish between the two plans. The City's is the
12 overarching plan, and the 722(3) component of that is
13 the Bar Plan. And that's all that when you're
14 addressing the Bar Plan, you're addressing. It's not
15 the rest of the plan.

16 And if I could just address a comment, Your
17 Honor, a question you asked early on, the Bar Plan
18 for '65 refers to the fact that the City has already
19 decided that Legal Aid will be the primary provider.
20 It says that at the beginning. That isn't their
21 choice; that's the City's choice. The City chooses
22 who - - -

23 JUDGE CIPARICK: But Legal Aid cannot be
24 primary - - -

25 MR. KOLB: - - - the 722 - - -

1 JUDGE CIPARICK: - - - and conflict,
2 obviously. So this is where some other institutional
3 provider would be the primary provider, and then
4 Legal Aid would be the conflict?

5 MR. KOLB: That's correct. We wouldn't
6 handle - - -

7 JUDGE READ: And can you - - -

8 MR. KOLB: - - - a conflict - - -

9 JUDGE CIPARICK: That's because the City
10 wants to have contracts with a lot of different - - -

11 MR. KOLB: Well - - -

12 JUDGE CIPARICK: - - - institutional
13 providers - - -

14 MR. KOLB: - - - several; several.

15 JUDGE CIPARICK: - - - that serves their
16 interests.

17 MR. KOLB: And the City has that option to
18 choose. They could choose them. And that's what
19 they've done in the RFP. They've chose - - -

20 JUDGE GRAFFEO: I'm not sure I follow what
21 you were saying about subdivision (4).

22 MR. KOLB: In subdivision - - -

23 JUDGE GRAFFEO: When does that kick in and
24 how does that operate?

25 MR. KOLB: It kicks in - - - it kicks in if

1 there is no plan under 722 operating to cover cases.

2 JUDGE SMITH: It's the default.

3 MR. KOLB: It's a default provision.

4 JUDGE GRAFFEO: A default.

5 MR. KOLB: And judges - - - the judiciary
6 then steps up and appoints counsel.

7 JUDGE CIPARICK: And they have to appoint
8 from that list? So - - -

9 MR. KOLB: Well, I imagine they would - - -

10 JUDGE PIGOTT: No, they don't.

11 JUDGE CIPARICK: Well, they should.

12 MR. KOLB: They would, but they don't have
13 to.

14 JUDGE PIGOTT: And that's - - - Mr. Kolb,
15 that's one of the things that I'm kind of being
16 defensive about here. I mean, Lewis County is
17 probably smaller than what's in this room, and the
18 judge just decides. I mean, there is no Legal Aid
19 Society - - -

20 MR. KOLB: Sure.

21 JUDGE PIGOTT: - - - there's no - - - so
22 they can assign anybody in the county that they want
23 to represent somebody in a case. My concern in this
24 case is that we're focused on a very large city, but
25 the 722 applies to all sixty-two counties. And I

1 think you're right. I think 72 - - - you can have a
2 one and a two; you can have a Legal Aid Society and a
3 PD, and they can do conflict cases, et cetera. It's
4 when you get to the third one, and the catchall is
5 the judge then just has the authority to assign.

6 MR. KOLB: I believe that's right.

7 JUDGE PIGOTT: In theory, as I understand
8 your argument, if there's a severability and 722(2)
9 becomes it, I'm guessing you're big enough, you could
10 probably split your staff in two, move one across the
11 street, and have two Legal Aids and do conflict by
12 yourself.

13 MR. KOLB: Well, we have no intention of
14 doing that.

15 JUDGE PIGOTT: I didn't say you had
16 intention to do that. I'm saying in theory, at
17 least, there could be another Legal Aid Society - - -
18 I'll create one for you - - - across the street - - -

19 MR. KOLB: Well, you could have a different
20 society.

21 JUDGE PIGOTT: Exactly my point.

22 MR. KOLB: And that's, in a sense, what's
23 happened with the providers - - -

24 CHIEF JUDGE LIPPMAN: Well, that's the
25 different institutional providers, right now.

1 MR. KOLB: Different institutions and so
2 forth. Could I just, though, address one other
3 thing?

4 CHIEF JUDGE LIPPMAN: One point, go ahead -
5 - -

6 MR. KOLB: Okay.

7 CHIEF JUDGE LIPPMAN: - - - Mr. Kolb.

8 MR. KOLB: This question of when the City
9 promulgated this plan, was there a Bar Plan to which
10 it could assign cases. Now, my co-counsel here spoke
11 to this, but didn't get to go through the whole step
12 - - - whole thing.

13 When that decision was made, the City
14 promulgated its plan, there was a Bar Plan in effect,
15 for sure. That was the one that had been in effect
16 in its current form since 1979.

17 JUDGE SMITH: That's not the document
18 that's in the record? That's - - -

19 MR. KOLB: No, that document was modified
20 in '79, at the urging of the bar association.

21 JUDGE SMITH: Is the plan you just
22 described in writing somewhere?

23 MR. KOLB: Yes, it's a combination of that
24 plan, and then the rule change that was spoken to - -
25 - the Appellate Division rules. And it was all at

1 the bar association's insistence. The City had
2 nothing to do with it.

3 JUDGE SMITH: So it's this document, as
4 modified by a 1979 - - -

5 MR. KOLB: Correct.

6 JUDGE SMITH: - - - Appellate Division
7 rule? That's the Bar Plan?

8 MR. KOLB: That was what was in effect when
9 the City decided on its plan.

10 JUDGE SMITH: That was the Bar Plan in
11 2010?

12 MR. KOLB: Yes, correct.

13 JUDGE SMITH: And is it still the Bar Plan?

14 MR. KOLB: Well, as far as I know, it
15 hasn't been changed. But we could - - -

16 CHIEF JUDGE LIPPMAN: But it's - - -

17 JUDGE SMITH: Is the City's - - -

18 CHIEF JUDGE LIPPMAN: - - - but it's been
19 marginalized, right?

20 MR. KOLB: We've heard the bar associations
21 want to have the chance to approve and change.

22 CHIEF JUDGE LIPPMAN: Right, but the
23 practical effect, cutting aside the technical issue,
24 the practical effect is the bar association plan
25 under the 2010 new City Plan would be marginalized -

1 - -

2 MR. KOLB: It could be - - -

3 CHIEF JUDGE LIPPMAN: - - - almost
4 eliminated?

5 MR. KOLB: - - - marginalized in theory.
6 But there's another point, and again, I think it's
7 critical. Counsel themselves analogize the situation
8 we're in to what would happen if Legal Aid didn't
9 sign a contract for a given year. And I think there
10 is an analogy. I think that if the City has a plan,
11 and it says Legal Aid is going to get the bulk of the
12 cases, which has always been true - - -

13 CHIEF JUDGE LIPPMAN: Right.

14 MR. KOLB: - - - but Legal Aid doesn't sign
15 the contract, there's nothing wrong with the plan;
16 the problem is implementation of the plan. And if in
17 this instance, the design of the plan is send the
18 cases to the plan, to the system that's been used for
19 decades, and the bar associations put up their hand
20 and say, well, we don't want to participate, it's not
21 the plan that's the problem, it's the implementation
22 of the plan.

23 JUDGE SMITH: Well, you're saying that a -
24 - - you're saying that subdivision (3) which calls
25 for a plan of a bar association can still be

1 implemented even when the bar associations are
2 standing up and screaming we don't have any plan;
3 that's not our plan; we - - -

4 MR. KOLB: No, I - - -

5 JUDGE SMITH: - - - disavow that plan?

6 MR. KOLB: - - - I think not. I think it
7 couldn't, practically speaking, be implemented if
8 they didn't participate. But that doesn't mean the
9 design of the plan was deficient. Because the design
10 of the plan was to send the cases to the plan, which
11 at the time the City - - -

12 JUDGE PIGOTT: Well, you're defining two
13 different plans. When you say - - -

14 MR. KOLB: I am.

15 JUDGE PIGOTT: - - - "the plan", you're
16 talking about the City Plan, Mr. - - -

17 MR. KOLB: I'm talking about the City Plan.

18 JUDGE PIGOTT: Not the Bar Plan.

19 MR. KOLB: That's correct.

20 JUDGE PIGOTT: So you're saying, as he
21 said, there's this overreaching thing. If the bar
22 doesn't want to go along, we still have 722(1) and
23 (2) - - -

24 MR. KOLB: Correct.

25 JUDGE PIGOTT: - - - and we can do whatever

1 we're going to do there.

2 MR. KOLB: I'm also - - -

3 JUDGE PIGOTT: But the bar's saying you
4 can't call it a Bar Plan if it's not ours.

5 MR. KOLB: But I'm also saying that the
6 City Plan contemplated assignment of cases to the
7 very same Bar Plan that had been in existence for
8 decades. At the time that plan was promulgated - - -
9 the City Plan - - - that's what happened.

10 JUDGE PIGOTT: Yes, but their point is just
11 what you were saying. If they say we're not playing,
12 we're not doing this, then you can't ask them to do
13 it.

14 MR. KOLB: Then you can't implement it.

15 JUDGE PIGOTT: Just like you said, if you
16 don't sign your contract, you're not in the business
17 anymore.

18 MR. KOLB: That's right. But if Legal Aid
19 didn't sign the contract, it would not have been
20 unreasonable or irrational for the City to have a
21 plan which would call for the Legal Aid Society to
22 participate. The problem would be different.

23 JUDGE PIGOTT: Well, then there wouldn't be
24 - - - then there wouldn't be a 722(2) portion to it.
25 There'd either be a (1) with the PD, or a (3) with

1 assigned, but there wouldn't be a Legal Aid Society,
2 because you're gone.

3 MR. KOLB: See, I differ - - - I differ
4 with you. I think there would be plan to have the
5 Legal Aid Society do it, but the Legal Aid Society
6 wouldn't be doing it for the period of time that
7 there was a dispute.

8 CHIEF JUDGE LIPPMAN: Thank you. Okay.

9 MR. KOLB: That's the distinction I draw.

10 CHIEF JUDGE LIPPMAN: Okay. Thanks,
11 counsel. Appreciate it.

12 Counselor, could they, today, if we throw
13 out what they did, could they tomorrow go and put a
14 number (2) - - - a section (2) plan into effect?

15 MR. PRESSMENT: No, Your Honor, they could
16 not.

17 CHIEF JUDGE LIPPMAN: Why not?

18 MR. PRESSMENT: Three reasons. First, Your
19 Honor, Your Honor, this would be legislation from the
20 bench, because in order to allow them to do that, the
21 court would essentially have to take a black marker
22 through a number of provisions of their plan.

23 CHIEF JUDGE LIPPMAN: No, no, no, no. We
24 throw the whole thing out. Could they, the next day,
25 do a section (2) plan?

1 MR. PRESSMENT: If they want to go through
2 the CAPA process and raise it as a section 722(2)
3 plan, absolutely. Absolutely could do that.

4 CHIEF JUDGE LIPPMAN: So they can really do
5 whatever they want in the end?

6 MR. PRESSMENT: There's no question - - -
7 and I want there to be no confusion, because the City
8 has tried to confuse the issue.

9 CHIEF JUDGE LIPPMAN: You're just saying
10 they're not doing what they're saying they're doing?

11 MR. PRESSMENT: We're not talking about the
12 overriding plan. They can certainly do what they
13 want - - -

14 CHIEF JUDGE LIPPMAN: How long would that
15 take for them to get a section (2) plan in effect - -
16 -

17 MR. PRESSMENT: Your Honor - - -

18 CHIEF JUDGE LIPPMAN: - - - if we threw it
19 out tomorrow?

20 MR. PRESSMENT: - - - Your Honor, I have no
21 idea. But I can say this: that a plan that was put
22 forth for public comment that relied entirely upon
23 institutional providers to the exclusions of the
24 thousands of men and women who have dedicated their
25 lives - - -

1 JUDGE SMITH: Except for the default
2 provision of subsection (4).

3 MR. PRESSMENT: Correct, Your Honor.
4 However - - - and this needs to be noted - - - under
5 722(4), the panels do not continue to exist. If
6 there is a 722(2) plan, the panels don't exist
7 anymore. And as Judge Pigott - - -

8 JUDGE SMITH: They can exist. They don't
9 have to have legal status to exist. They can - - -
10 anybody can type a list and a judge could read it and
11 pick a name off it.

12 MR. PRESSMENT: Absolutely. But it
13 wouldn't be a County Bar panel plan, for sure.

14 JUDGE SMITH: No, but - - -

15 MR. PRESSMENT: But as Judge Pigott noted -
16 - -

17 JUDGE SMITH: - - - if the judge chooses to
18 say oh, here this thing that used to be the County
19 Bar list, and I'm going to pick names off it - - -

20 MR. PRESSMENT: Correct.

21 JUDGE SMITH: - - - he could do that.

22 MR. PRESSMENT: Absolutely, Your Honor.
23 Absolutely they could do that. But if they went
24 through the CAPA process - - -

25 CHIEF JUDGE LIPPMAN: Right.

1 MR. PRESSMENT: - - - they would certainly
2 have comments, comments that they have not received
3 before, because they tried to do it as a masqueraded
4 combination plan. It is not.

5 CHIEF JUDGE LIPPMAN: So that's really what
6 you're objecting to is it's not what they say it is.

7 MR. PRESSMENT: Correct, Your Honor. And
8 if it is what they say - - -

9 CHIEF JUDGE LIPPMAN: Because there's no
10 Bar Plan, in your view.

11 MR. PRESSMENT: And if it's a 722(2) plan,
12 it has to be brought by the process they themselves
13 have said it needs to go through.

14 CHIEF JUDGE LIPPMAN: And no severability,
15 in your view?

16 MR. PRESSMENT: No, Your Honor. And I must
17 say, counsel for the City stood up here and said the
18 county bars have complete discretion. Judge Pigott
19 posed the question, and not surprisingly, in a much
20 better way than I did. Because that is the only
21 question of this case. And it is: how do you have a
22 Bar Plan without the bar associations agreeing to it?
23 The answer is, you cannot. And that's not the
24 strength of our argument; that's the power of logic.

25 That's exactly what Justice Abdus-Salaam

1 said. And what we have here, Your Honors, is a race
2 to the bottom. That's what this is. It's an attempt
3 to save money, and an attempt by an executive to
4 insert himself into the judiciary process.

5 JUDGE SMITH: Saving money isn't such a
6 terrible thing for an executive to do. It's not a
7 crime.

8 MR. PRESSMENT: Not at all. But, Your
9 Honor, John Adams once said, we are a government of
10 laws, not of men. In this case - - -

11 CHIEF JUDGE LIPPMAN: Counsel, you think
12 this is all about money, in your view?

13 MR. PRESSMENT: Your Honor, I think that's
14 a large part of it, yes. Because when you look at
15 the dedication of the County Bars, when you look at
16 their efforts over the years, and the efforts of the
17 men and women who are their constituents, there is no
18 question the system benefits from their continued
19 participation. This is about one executive who
20 wishes to insert himself into a process, and he does
21 so in defiance - - -

22 CHIEF JUDGE LIPPMAN: Okay.

23 MR. PRESSMENT: - - - and with disregard
24 for the law.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 Thank you, counsel.

2 Counselor?

3 MS. JASPER: A few points, Your Honors. If
4 I could begin with the question about the economic
5 concern. It may be an acceptable and even preferable
6 practice for an executive to seek to conserve public
7 resources. But that is precisely why the statutory
8 amendment in 2010 provided the expanded option for
9 conflict counsel to be designated as something that
10 required the planning of a bar association, to
11 insulate the important Constitutional rights of
12 indigent criminal defendants from the seasonal whims,
13 variations, and demands - - -

14 JUDGE PIGOTT: Well, we're getting awfully
15 personal - - -

16 MS. JASPER: - - - of the executive
17 government.

18 JUDGE PIGOTT: - - - here. But isn't it a
19 fact, I mean, that you can have conflict counsel from
20 two institutions? You don't have any problem with
21 that?

22 MS. JASPER: No, I'm glad that you raised
23 that, Your Honor. We do object to that.
24 Fundamentally, we were - - - if I may continue just
25 on this point? Assuming, arguendo, that's this was a

1 (2) plan; I think that counsel for the City has
2 divorced from that idea, and is firmly holding the
3 idea that it's a (3) plan. But assuming it were a
4 (2) plan, it fails nonetheless, because a 722(2) plan
5 unambiguously requires, pursuant to subsection (4),
6 that conflict counsel be appointed by the judiciary,
7 not by the City of New York, as is unambiguously
8 expressed as the intent of the City.

9 CHIEF JUDGE LIPPMAN: So an administrator
10 can't make those decisions anymore, if it was a
11 freestanding number (2) plan?

12 MS. JASPER: That's correct, Your Honor.
13 It requires the judicial intervention. And that
14 section (4) is different from the inherent authority
15 that the court has to appoint counsel. To read that
16 any other way is simply a repeat or recitation of
17 that authority, really renders it superfluous. It's
18 there because it's mandating and recognizing the
19 inherent possibility of conflict.

20 And we're not just talking about prior
21 representation. Conflicts most frequently occur when
22 you're talking about - - - initially, at an
23 arraignment stage - - - codefendants who are
24 arraigned together. And the second counsel - - -
25 excuse me, the second defendant is assigned to an

1 attorney from the panel as opposed to an
2 institutional provider.

3 JUDGE SMITH: Which language in subdivision
4 (4) is it you're relying on to say - - - that you say
5 is violated by the City's rule?

6 MS. JASPER: Where the City doesn't have a
7 combination plan, which would mean a (2)-only plan,
8 that evokes the rest of the language - - - I have to
9 turn to it, Your Honor - - -

10 JUDGE PIGOTT: The catchall.

11 MS. JASPER: - - - that requires - - -

12 JUDGE READ: The default language.

13 JUDGE PIGOTT: Right.

14 JUDGE SMITH: You said - - -

15 MS. JASPER: "The justice may assign" - - -

16 JUDGE SMITH: "The judge, justice or
17 magistrate may assign any attorney in such county or
18 city." Is that it?

19 MS. JASPER: Yes. Yes, Your Honor. Thank
20 you.

21 JUDGE SMITH: And how does - - - I mean, if
22 we were to find this thing severed and say okay,
23 there's no more Bar Association Plan; all you've got
24 is a subdivision (2) plan. And when a subdivision
25 (2) plan fails, when it doesn't generate a lawyer,

1 then the judge - - - judge or magistrate may assign
2 any attorney. Why doesn't that work?

3 MS. JASPER: Your Honor, it does work, but
4 it does also require the invalidation of Chapter 13,
5 which expressly provides that the City makes the
6 determination about who provides the conflict
7 defense. The City's fundamental purpose in enacting
8 that chapter was to allow it the administrative
9 flexibility of designating who the assigned counsel
10 was for conflicts.

11 JUDGE SMITH: On our hypothesis - - - I
12 mean, on our hypothesis, the hypothesis I just gave
13 you, there is no more subdivision (3) plan. There's
14 no list for the City to pick from. All the City has
15 got is the institutional providers. If it doesn't
16 supply an institutional provider, then the judge has
17 to pick a private lawyer. I don't see what the
18 problem is.

19 MS. JASPER: There isn't a problem with
20 that plan pursuant to 722, but that's not what's
21 contemplated under Chapter 13, which continues to,
22 improperly, we submit, reserve for the City the
23 authority - - -

24 JUDGE SMITH: But with our hypothesis,
25 we're invalidating that, in part. That's what

1 severability is.

2 MS. JASPER: Yes, Your Honor. The City
3 could elect to have a 722(2) plan only to provide for
4 primary defense counsel, because the statute provides
5 that the conflicts counsel would be provided by
6 somebody else. In that plan, in the current climate
7 in New York City, with multiple institutional
8 providers that exist today, they could continue to
9 operate as primary counsel, each of those
10 institutions, but not as conflict counsel for one
11 another. That's not contemplated by any portion of
12 722.

13 Importantly, 722 does permit the City, in
14 the first instance, to select the nature of the plan,
15 as counsel for the City and Mr. Kolb have referred
16 to. But this is a limited delegation of power that
17 begins and ends with selecting from one of the four
18 options. Having selected a combination option that
19 implicates the bar association, the City is bound to
20 - - -

21 CHIEF JUDGE LIPPMAN: But we understand
22 that. I think the question that's being asked now,
23 let's say we agree totally with you, we throw that
24 out, either as a - - - on a severability basis or
25 just they go through the process again and they do a

1 plan (2). A plan (2) is feasible?

2 MS. JASPER: A plan (2) would be legally
3 permitted, subject to, as Mr. Pressment elaborated
4 on, the various mechanisms for having that process
5 openly vetted and subject to what I think the City
6 has expressed is its own reservations about that
7 being a practical option in the City of New York.
8 But it certainly would be an option that's
9 potentially compliant with the limitations of 722.

10 CHIEF JUDGE LIPPMAN: Okay. Thank you,
11 counsel. Thank you all. Appreciate it.

12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The New York County Lawyers' Association v. Bloomberg, et al., No. 155 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

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