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Committee on Opinions (22 NYCRR 7300.1)**

**SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY**

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THE PEOPLE OF THE STATE OF NEW YORK, : By: STEVEN W. FISHER, J.
 : Administrative Judge
 vs. : 11th Judicial District
 : Supreme Court
 G. C.,¹ :
 : Indictment No. 2037/2000
 Defendant. :

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THE PEOPLE OF THE STATE OF NEW YORK, :
 vs. : Indictment No. 130/1999
 DONAIL BRANCH :
 Defendant. : Dated: June 12, 2001

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The Director of the Assigned Counsel Plan has asked me as Administrative Judge of the Supreme Court, Queens County, to review vouchers submitted by assigned counsel in the above-captioned cases. In each case, counsel is seeking compensation in excess of the hourly billing rates established in section 722-b of the County Law; in each case, counsel's voucher as submitted was authorized and approved by the Justice who presided at trial.

¹ Because the trial in the first captioned case resulted in a complete acquittal, the defendant in that case will be referred to herein only by the initials "G..C."

The threshold issue is whether I have the authority to review an order of a Justice of this Court fixing compensation for an assigned attorney. There are those who hold the view that a trial judge's award of compensation to assigned counsel is final and not subject to review, either appellate or administrative (*see, e.g., People v. Brisman*, 173 Misc.2d 573, 576 n.1 [Sup. Ct. N.Y.Co. 1996][Goodman, J.]). I respectfully disagree.

Section 722-b of the County Law provides that, in addition to reimbursement for expenses reasonably incurred, assigned counsel in a felony case is to receive compensation at a rate not exceeding forty dollars per hour for time expended in court, and twenty-five dollars per hour for time reasonably expended out of court, with total compensation not to exceed one thousand two hundred dollars. The statute authorizes compensation in excess of those limits, but only “[i]n extraordinary circumstances.”

The County Law contemplates that compensation will be fixed by the trial judge, regardless of whether the payment authorized is within the stated limits or exceeds them. Thus, section 722-b provides that, for all representation other than appellate, “compensation and reimbursement shall be fixed by the court where judgment of conviction or acquittal or order of dismissal was entered,” and that compensation exceeding the statutory limits may be provided in extraordinary circumstances by “a trial * * * court.” The terms, “court” and “trial court” have been interpreted to mean the trial judge who is said to be in the best position to assess the nature and extent of the representation and whether it establishes extraordinary circumstances justifying excess compensation (*see, e.g., Byrnes v. County of Monroe*, 129 A.D.2d 229, 232 [4th Dept. 1987]; *People v. Brisman, supra*, 173 Misc.2d 573, 586 [Sup. Ct. N.Y. Co. 1996][Goodman, J.]).

Neither the County Law nor any other statute directly authorizes the appeal of an award of compensation, either by the governmental entity charged with paying it, or by the attorney who is to receive it, regardless of whether the compensation

is within statutory limits or exceeds them (*cf. Matter of Werfel v. Agresta*, 36 N.Y.2d 624 [1975]). And, even if awards of compensation are technically appealable, appellate courts will not review them on the merits (*see, Matter of Director [Bodek]*, 87 N.Y.2d 191 [1995]). But the unavailability of justiciable review does not necessarily mean that a trial judge's award of compensation is beyond challenge.

In 1975, the Court of Appeals wrote that, although there was "no basis for justiciable review of allowances to counsel made within the maximums provided by the statute," that was not to say that an attorney seeking modification of an award "is not entitled to adjustment of the allowance made to him by application through the several layers of judicial administration, that is, to the appropriate Administrative Judges and even to the Administrative Board of the court system" (*Matter of Werfel v. Agresta, supra*, 36 N.Y.2d 624, 627 [1975]). At least one court has found, however, that, "in light of subsequent decisions, * * * currently, Trial Judges' orders fixing compensation for attorneys, pursuant to section 722-b * * * are not subject to review through the layers of judicial administration" (*Matter of Director [Bodek]*, 159 Misc.2d 109, 113 n.3 [Sup. Ct. N.Y.Co. 1993][Goodman, J.], *adhered to on reconsideration* 159 Misc.2d 142, *aff'd on other grounds* 207 A.D.2d 307, *aff'd* 87 N.Y.2d 191). The "subsequent decision" most heavily relied upon for that proposition is *Matter of Kindlon v. County of Rensselaer* (158 A.D.2d 178 [3rd Dept. 1990]).

In *Kindlon*, assigned counsel was awarded compensation in excess of the statutory limit, and the county, responsible for paying it, sought review pursuant to 22 NYCRR §822.4, a rule of the Appellate Division, Third Department. At the time, the rule provided that "[w]hen a trial court fixes an allowance of compensation in excess of the statutory limits * * * the county fiscal officer may submit the claim and order to the presiding justice of the Appellate Division, with a written request that the amount of compensation be reduced * * *."

While the county sought review under the rule, the attorney brought a

combined article 78 proceeding and declaratory judgment action to compel the county to pay the compensation, and to declare the rule invalid. The attorney argued that, by authorizing the Presiding Justice to reduce compensation, the rule was in direct and irreconcilable conflict with section 722-b of the County Law which, as noted, directs that compensation be fixed “by the court where judgment of conviction or acquittal or order of dismissal was entered.”

The Court agreed that, by affording the county an avenue of review, the rule was in direct conflict with the general statewide procedure established by the County Law. But, citing *Matter of Werfel v. Agresta, supra*, the Court noted that the fixing of compensation for assigned counsel was an administrative act, performed in the trial judge’s administrative capacity (*see, also, Matter of Director [Bodek], supra*, 87 N.Y.2d 191, 194 [1995]). This was significant, the Court observed, because the 1978 amendments to the New York State constitution conferred complete administrative power and control over the trial courts, not to the legislature or even to the Appellate Divisions, but to the Chief Judge and the Chief Administrator.²

Thus, the Court concluded, the legislature was without power to foreclose by statute the ultimate authority of court administrators to exercise their constitutionally-derived administrative powers, even when those powers are in excess of those conferred by statute. As a result, the Court held that section 722-b of the County Law could not limit the Chief Administrator’s power to review a trial judge’s administrative act of awarding compensation to an assigned attorney.

In the case before it, however, the *Kindlon* Court held that the particular rule under which review was sought was invalid because it was promulgated by the Appellate Division without a clear and effective delegation by the Chief Administrator

² Section 28 of article IV of the New York State constitution now provides in pertinent part: “The chief judge of the court of appeals shall be the chief judge of the state of New York and shall be the chief judicial officer of the unified court system. * * * The chief administrator, on behalf of the chief judge, shall supervise the administration and operation of the unified court system.”

of the power to do so. Thus, the county was not entitled to have the Presiding Justice review the award.

In my view, *Kindlon* does not stand for the proposition that a trial judge's award of compensation to assigned counsel is unreviewable. To the contrary, the case recognizes a right to review, but holds that its exercise lies exclusively within the constitutionally-derived administrative powers of the Chief Judge and the Chief Administrator, and therefore may be exercised only by them or by those to whom they effectively delegate the power.

Part 127 of the Rules of the Chief Administrator of the Courts (22 NYCRR §127.2[b]), which, as amended, became effective April 16, 2001, provides in pertinent part:

“The order of the trial judge with respect to a claim for compensation in excess of the statutory limits may be reviewed by the appropriate administrative judge, with or without application, who may modify the award if it is found that the award reflects an abuse of discretion by the trial judge.”

Promulgated by the Chief Administrative Judge himself, this rule plainly constitutes a clear and effective delegation to the State's administrative judges of the constitutionally-derived administrative power to review awards of compensation to assigned attorneys (*cf. Matter of Kindlon v. County of Rensselaer, supra*, 158 A.D.2d 178 [3rd Dept. 1990][rule promulgated by Appellate Division]; *Byrnes v. County of Monroe, supra*, 129 A.D.2d 229, 232 [4th Dept. 1987][rule promulgated by Appellate Division]).

Accordingly, I hold that I do have the authority, pursuant to Part 127 of the Rules of the Chief Administrator of the Courts, to review the instant orders, and I therefore turn to the issue of whether, and to what extent, compensation in excess of statutory limits was properly awarded in the cases at bar.

Along with many others, I have spoken out publicly about the appallingly low rate of compensation – the second lowest of any state in the nation – paid to

attorneys who accept assignments to represent indigent criminal defendants in New York (*see*, John Caher, *Judicial Wish List Is Offered at Statewide Budget Hearing*, N.Y.L.J., October 5, 2000, at 1, col. 1). I fully recognize that statutory compensation is meant only to ease the burden of lawyers who, in the highest traditions of the profession, accept these assignments, “knowing that the limited fees provided fall short of full, or even fair, compensation for their services” (*People v. Perry*, 27 A.D.2d 154, 158 [1st and 2nd Dept. 1967]; *see, also, Matter of Werfel v. Agresta, supra*, at p. 626-627). But even if the legislature remains unmoved by considerations of fairness to attorneys, it should still increase compensation rates out of concern for the criminal justice system itself.

The profound inadequacy of compensation has markedly reduced the number of attorneys choosing to accept assignments to represent indigent defendants. And among those now unwilling to do so are many experienced and highly-skilled defense attorneys. In many instances, the smaller pool of available and competent lawyers has resulted in delays in moving cases to trial or disposition, and has given rise to the risk that the legal assistance provided to indigent defendants will be less than effective (*see, e.g.,* Chief Administrative Judge Jonathan Lippman and Deputy Chief Administrative Judge Juanita Bing Newton, *Assigned Counsel Compensation in New York: A Growing Crisis*, Unified Court System, Jan. 2000).

For those defendants who are innocent, this means longer waits to be free of unfounded criminal accusations, and raises the specter of wrongful conviction. For those defendants who are guilty, it means welcome delays, with an increased likelihood that witnesses will become lost and memories will fade.

In my view, therefore, far from reflecting a toughness on crime, the refusal to increase compensation paid to assigned counsel has the effect of hurting the innocent and aiding the guilty.

One distinguished Justice recently found that New York’s current statutory rates are so unreasonable as to have given rise to “an institutionalized, systemic crisis”

jeopardizing the ability of our courts to provide effective legal representation to indigent criminal defendants (*People v. Johnson*, N.Y.L.J. April 18, 2001, at 19, col. 2 [Sup. Ct. N.Y.Co.][Kahn, J.]) “Such circumstances,” the Justice concluded, “are, by any measure, extraordinary,” and, standing alone, warrant the award of enhanced compensation even in entirely unremarkable criminal cases. (*Id.*)³

Although I am not unsympathetic to this view, I cannot agree that the inadequacy of compensation to assigned counsel has created a present crisis in the criminal term of the Supreme Court, Queens County, so grave as to warrant a finding that, in every case, no matter how commonplace, ordinary circumstances must now be deemed extraordinary within the meaning of the statute. Instead, I believe that, as we await long-overdue legislative action, each application for enhanced compensation must still be judged on its own merits as measured against the circumstances of the particular case in which services were rendered.

At bar, counsel in *People v. G. C.* was awarded compensation of \$9,575.00, calculated at the enhanced rate of \$75 per hour for time spent in court, and \$50 per hour for time expended out of court. He represented the defendant for less than one year on charges of attempted murder, gang assault, criminal possession of a weapon, and related charges. Counsel appeared for the defendant at a two-day hearing and at a trial that lasted a little over a week. Four others were tried together with the defendant.

Counsel asserts that “[t]his case was particularly difficult in that the defendants were arrested in four separate locations, property was recovered and statements were taken.” But his voucher does not indicate that he went to any of the

³ In reaching that conclusion, Justice Kahn joined several Family Court Judges who had announced their intention to award enhanced compensation in every matter involving assigned counsel, regardless of the particular circumstances of the case (*see, e.g., Matter of Wager*, N.Y.L.J., Feb. 8, 2001, at 32, col. 6 [Fam. Ct., Dutchess Co.][Forman, J.]; *Matter of D.S.S. o/b/o Anthony S. and Patricia K. v. Patricias*, N.Y.L.J., Feb. 1, 2001, at 32, col. 4 [Fam. Ct., Dutchess Co.][Amodeo, J.]; *Matter of Sweat*, N.Y.L.J., Jan. 24, 2001, at 31, col. 1 [Fam. Ct., Dutchess Co.][Brands, J.]; *but, see, Matters of Vouchers for Compensation*, N.Y.L.J., Dec. 8, 2000, at 28, col. 5 [Fam. Ct., Kings Co.][Elkins, J.]).

arrest locations, or ever even visited the scene of the crime. Nor does counsel's voucher or affirmation suggest why the recovery of property or the taking of statements in the case, which apparently resulted in the two-day pretrial hearing, presented him with extraordinary circumstances.

Moreover, counsel points to a letter, issued to accommodate the schedules of five attorneys, selecting a trial date some three weeks in advance and directing counsel not to become engaged in any proceeding that would interfere with the commencement of the trial. He claims that, as a consequence, he had to "postpone other matters to comply with the court order * * * [resulting] in a financial impediment to his practice." Counsel offers no specific information on any proceeding in which he was scheduled to appear but which had to be postponed or delayed on account of the letter issued in this case. General allegations like those offered here are, in my view, insufficient to establish extraordinary circumstances.

By contrast, extraordinary circumstances were shown in *People v. Donail Branch*. There, counsel was awarded compensation of \$10,762.50, calculated at the enhanced rate of \$75 per hour for time spent both in and out of court. Counsel represented the defendant for almost two-and-a-half years on charges of murder and robbery. He maintained close contact with the defendant, visiting him several times in jail, meeting with his family, taking his frequent telephone calls, and responding to his many letters.

Moreover, on five separate occasions, a pretrial hearing was scheduled but had to be postponed because the People were not ready to proceed. On each occasion, counsel expended substantial time and effort in preparation. The hearing eventually consumed three days, and the subsequent trial lasted approximately three weeks. Counsel's preparation included careful review of voluminous *Rosario* material and a visit to the scene of the crime.

In my view, the Justice who presided at this trial had sufficient grounds to

conclude that the representation afforded to the defendant established extraordinary circumstances justifying enhanced compensation.

Accordingly, pursuant to Part 127 of the Rules of the Chief Administrator of the Courts (22 NYCRR §127.2[b]), I conclude that, in *People v. G. C.*, the award should be modified by calculating it at the statutory rate of \$40 per hour for time expended in court, and \$25 per hour for time expended out of court, for a total of \$5,030. In *People v. Donail Branch*, the application of the Director of the Assigned Counsel Plan to modify the award should be denied.⁴

It is so ordered.

Steven W. Fisher

⁴ I do not question the hours claimed to have been expended in either case, and I decline to modify either award on the basis of the statutory maximum of \$1,200 because to do so would be to discourage assigned counsel from devoting necessary time to the defense of their clients.