NEW YORK COUNTY LAWYERS' ASSOCIATION
POSITION PAPER
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The New York County Lawyers' Association ("NYCLA") issues this paper to clarify its position on the effect of the automatic stay pursuant to CPLR 5519(a)(1) on the judgment issued by New York State Supreme Court Justice Lucindo Suarez against New York State (the "State") and New York City (the "City") in the lawsuit captioned NYCLA v. State and City of New York, Index No. 102987/00 (the "Judgment"). NYCLA has received numerous inquiries concerning the effect of the Judgment pending its appeal by the State and City.

NYCLA anticipates that immediately following entry of the Judgment on February 26, 2003, the State and City will serve notices of their intent to appeal, which will trigger the automatic stay of "proceedings to enforce the judgment . . . appealed from pending the appeal" that is available to the State and its political subdivisions under CPLR 5519(a)(1). As set forth below, it is NYCLA's position that while the CPLR 5519(a)(1) automatic stay will operate to stay those portions of the Judgment that grant permanent injunctive relief against the State and City, it will not apply to the declaratory relief granted in the Judgment. As a result, NYCLA believes that there is no valid statutory requirement now in effect in New York City which mandates that individual trial and appellate judges award compensation to assigned counsel at rates not exceeding $25 and $40 per hour for out-of-court and in-court work, respectively, absent "extraordinary circumstances," and that judges instead, in the exercise of their inherent judicial authority and discretion, may determine, in an individual case, that such a higher rate is appropriate.

I. The Judgment in NYCLA v. State and City of New York

In the Judgment, which was issued February 5, 2003 and revised on February 13, 2003, Justice Suarez granted NYCLA's request for a declaratory judgment and permanent injunction against the State and City. A copy of the Judgment is available on-line at www.nycla.org.

Justice Suarez granted NYCLA's request for relief as follows. First, Justice Suarez issued a declaratory judgment that contained the following three decretal provisions:

> (1) First, "[i]t is DECLARED that Defendant State of New York has a constitutional and statutory obligation to ensure that qualified assigned private counsel are available and able to provide meaningful and effective representation to children and indigent adults in New York City";
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> (2) Second, "[i]t is DECLARED that Defendant State of New York's failure to increase the rates paid to assigned private counsel, to abolish the arbitrary distinction between the rates paid for in-court and out-of-court work, and to remove the caps on total per case compensation has created a severe and unacceptably high risk that children and indigent adults are receiving inadequate legal representation in New York City in violation of the New York and United States Constitutions"; and
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> (3) Third, "[i]t is DECLARED that those portions of § 722-b of the County Law, § 245 of the Family Court Act, and § 35 of the Judiciary Law fixing these rates and limits are unconstitutional as applied to the representation of children and indigent adults in New York City."[1]

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[1] The County Law and the Family Court Act both include separability provisions which provide that if any part of the statute is adjudged to be invalid, that judgment will not impair the remainder of the statute. See N.Y. County Law § 1000(3); N.Y. Family Court Act § 1211. Justice Suarez's declaratory judgment, accordingly, affects the validity of only those portions of County Law § 722-b, Family Court Act § 245 and Judiciary Law § 35 that fix the rates and limits of compensation for assigned counsel.

The portion of County Law § 722-b that fixes the rates of compensation for assigned counsel provides, in relevant part, that:

"All counsel assigned . . . shall at the conclusion of the representation receive compensation at a rate not exceeding forty dollars per hour for time expended in court or before a magistrate, judge or justice, and twenty-five dollars per hour for time reasonably expended out of court . . . ; except that counsel assigned for representation in an appellate court shall receive compensation at a rate not exceeding forty dollars per hour for time reasonably expended, whether in court or out of court."

The portion of County Law § 722-b that fixes the limits on compensation for assigned counsel provides, in relevant part, that

"Where a defendant is charged with one or more other felonies, compensation shall not exceed one thousand two hundred dollars. Where a defendant is charged with one or more other crimes, compensation shall not exceed eight hundred dollars. For representation pursuant to the provisions of section two hundred sixty-two of the family court act, article six-C of the correction law or section four hundred seven of the surrogate's court procedure act, compensation shall not exceed eight hundred dollars. For representation upon the hearing of a motion for a writ of error coram nobis or a motion to vacate judgment or set aside sentence made pursuant to article four
(…continued)

Second, Justice Suarez also issued the following mandatory permanent injunctive relief against the State and City:

> "[A]ccordingly, it is ORDERED, that NYCLA's motion for a permanent injunction is granted to the extent that Defendant City of New York is directed to pay assigned counsel the interim rate of $90.00 an hour for in-court and out-of-court work, in Criminal Court, Family Court (other than those Family Court matters for which the State of New York has been paying the vouchers) and Supreme Court, Criminal Term until

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(continued…)

hundred forty of the criminal procedure law, compensation shall not exceed eight hundred dollars. . . . For representation in an appellate court on an appeal from a judgment of conviction for one or more other felonies, compensation shall not exceed one thousand two hundred dollars. For representation in an appellate court on an appeal in any other criminal action or proceeding, or on any appeal described in section eleven hundred twenty of the family court act or section four hundred seven of the surrogate's court procedure act, compensation shall not exceed eight hundred dollars."

Section 722-b further provides that "[i]n extraordinary circumstances a trial or appellate court may provide for compensation in excess of the foregoing limits."

The portion of Judiciary Law § 35 that fixes the rates of compensation for assigned counsel provides, in relevant part, that:

"Counsel assigned hereunder shall at the conclusion of the representation receive compensation at a rate not exceeding forty dollars per hour for time reasonably expended in court, and twenty-five dollars per hour for time reasonably expended out of court . . . ; except that counsel assigned hereunder for representation in an appellate court shall receive compensation at a rate not exceeding forty dollars per hour for time reasonably expended, whether in court or out of court."

The portion of Judiciary Act § 35 that fixes the limits on compensation for assigned counsel provides, in relevant part, that:

"For representation upon a hearing, . . . compensation shall not exceed eight hundred dollars. For representation in an appellate court, . . . compensation shall not exceed eight hundred dollars, except that when counsel is assigned pursuant to paragraph (b) of subdivision one of this section for representation on appeal from . . . (ii) a judgment of conviction for any other felony, compensation shall not exceed one thousand two hundred dollars."

Like County Law § 722-b, Judiciary Law § 35 further provides that "[i]n extraordinary circumstances the court may provide for compensation in excess of the foregoing limits."

The portion of Family Court Act § 245 that fixes the rates and limits on compensation for assigned counsel provides, in relevant part, that: "law guardians shall be compensated and allowed expenses and disbursements in the same amounts established by section thirty-five of the judiciary law."

> modification of County Law § 722-b by the Legislature or further order of this court; and it is further
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> ORDERED, that Defendant State of New York is directed to pay assigned counsel the interim rate of $90.00 an hour for in-court and out-of-court work, as it relates to such representation in Family Court in New York City, until the Legislature modifies Judiciary Law § 35."

Justice Suarez issued the Judgment after a three and a half-week bench trial conducted in July and August 2002. Justice Suarez found, based on the testimony of 41 witnesses and 435 exhibits, that NYCLA established beyond a reasonable doubt that the State's failure to increase the compensation rates for assigned counsel violates the constitutional and statutory rights of children and indigent adults in New York City to meaningful and effective assistance of counsel and obstructs the judiciary's ability to function.

NYCLA entered the Judgment pursuant to CPLR 5016 on February 26, 2003. The Judgment became effective on that date upon its entry.

NYCLA anticipates that the State and City will immediately serve notices of their intent to appeal the Judgment to the Appellate Division, First Department.

II. Applicability of the CPLR 5519(a)(1) Stay to the Judgment Pending the State and City's Appeals

By serving their notices of appeal, the State and City will invoke the automatic statutory stay available to the State and its political subdivisions pursuant to CPLR 5519(a)(1). CPLR 5519(a)(1) provides, in relevant part, that: "[s]ervice upon the adverse party of a notice of appeal . . . stays all proceedings to enforce the judgment or order appealed from pending the appeal."

It is NYCLA's position that while the State and City's service of their notices of appeal will stay those portions of the Judgment that direct them to compensate assigned counsel at $90 an hour pursuant to CPLR 5519(a)(1), the CPLR 5519(a)(1) automatic stay will not apply to either the declaratory relief granted by the Judgment or the findings by Justice Suarez included therein. In other words, Justice Suarez's declaratory judgment declaring that, inter alia, the portions of County Law § 722-b, Family Court Act § 245 and Judiciary Law § 35 fixing the rates and limits on compensation for assigned counsel are unconstitutional as applied to the representation of children and indigent adults in New York City will remain in effect and will not be stayed or vacated pursuant to CPLR 5519(a)(1) while the State and City appeal the Judgment.

CPLR 5519(a)(1), by its express terms, operates to stay only "proceedings to enforce the judgment or order appealed from pending the appeal." In Matter of

Pokoik, 220 A.D.2d 13, 15, 641 N.Y.S.2d 881, 884 (2d Dep't 1996), the Second Department held that "the scope of the automatic stay of CPLR 5519(a) is restricted to the executory directions of the judgment or order appealed from which command a person to do an act, and . . . does not extend to matters which are not commanded but which are the sequelae of granting or denying relief." Id. at 15, 641 N.Y.S.2d at 884. The Second Department stated that "an appeal by the State . . . does not suspend the operation of the order or judgment and restore the case to the status which existed before it was issued. A motion decided by an order does not become undecided and the declaratory provisions of a judgment are not undeclared when a governmental party serves a notice of appeal therefrom." Id. It reasoned that a declaratory judgment is "self-executing" and "effective immediately upon promulgation of the order" and, thus, no "proceedings to enforce" the declaratory judgment are necessary and the automatic stay pursuant to CPLR 5519(a) is inapplicable. See id. at 17, 641 N.Y.S.2d at 885; see also State v. Haverstraw, 219 A.D.2d 64, 65-66, 641 N.Y.S.2d 879, 880-81 (2d Dep't 1996); Schwartz v. New York City Hous. Auth., 219 A.D.2d 47, 48, 641 N.Y.S.2d 885, 886-87 (2d Dep't 1996).

The Third and Fourth Departments have followed the Second Department's reasoning. See Ulster Home Care, Inc. v. Vacco, 255 A.D.2d 73, 78, 688 N.Y.S.2d 830, 835 (3d Dep't 1999); Matter of Roger Hicks v. Schoetz, 261 A.D.2d 944, 945, 691 N.Y.S.2d 219, 221 (4th Dep't 1999); White v. City of Jamestown, 242 A.D.2d 979, 980, 664 N.Y.S.2d 697, 698 (4th Dep't 1997). The Second Department's holdings in Pokoik and its companion cases, Haverstraw and Schwartz, have also been cited with approval and followed by several lower courts within the First Department. See Lopez v. New York City Hous. Auth., 178 Misc. 2d 719, 720-21, 680 N.Y.S.2d 402, 403 (Civ. Ct. N.Y. Cty. 1998); A.R.E.B.A. Casriel, Inc. v. Miller, Nov. 23, 2001 N.Y.L.J. 21, col. 2 (Sup. Ct. N.Y. Cty.) (Goodman, J.); Elzee Constr., Inc. v. New York City Hous. Auth., July 29, 1999 N.Y.L.J. 22, col. 4 (Sup. Ct. N.Y. Cty.) (Cahn, J.); Estate of Sol Goldman, Nov. 14, 1997 N.Y.L.J. 26, col. 4 (Surr. Ct. N.Y. Cty.).

The declaratory provisions of Justice Suarez's Judgment declaring that, inter alia, the portions of County Law § 722-b, Family Court Act § 245 and Judiciary Law § 35 fixing the rates and limits on compensation for assigned counsel are unconstitutional as applied in New York City are self-executing and effective immediately. Accordingly, they will not be stayed by CPLR 5519(a)(1) pending the State and City's appeals. The permanent injunction directing the State and City to pay assigned counsel the interim rate of $90 an hour is an executory direction and, as such, NYCLA concedes that CPLR 5519(a)(1) will automatically stay its effect pending the appeals. NYCLA, however, intends to file a motion in the Appellate Division, First Department to vacate the stay of these portions of the Judgment granting permanent injunctive relief as soon as possible.

III. Effect of the Judgment and the Stay on the Submission, Review and Approval of Vouchers for Compensation in Individual Family and Criminal Court Cases

NYCLA has received numerous inquiries concerning the effect of the Judgment and the CPLR 5519(a)(1) stay on the process by which assigned counsel submit, and trial and appellate judges review and approve, vouchers for compensation for work performed in individual family and criminal court cases. It is NYCLA's position that because the declaratory provisions of the Judgment will not be stayed by CPLR 5519(a)(1), there is no valid statutory requirement now in effect in New York City which mandates that individual trial and appellate judges award compensation to assigned counsel at rates not exceeding $25 and $40 per hour for out-of-court and in-court work, respectively, absent "extraordinary circumstances."

The portions of County Law § 722-b, Family Court Act § 245 and Judiciary Law § 35 fixing the rates and limits on compensation for assigned counsel have been adjudged by a court of competent jurisdiction to be unconstitutional as applied in New York City and will remain stricken as unconstitutional pending the State and City's appeals.[2] As a result, there is no valid statute now in effect in New York City which mandates that individual judges compensate assigned counsel at rates not exceeding $25 and $40 per hour for out-of-court and in-court work, respectively, or at any specified hourly rate.

As a result, individual trial and appellate judges approving vouchers are no longer constrained by a valid statute to compensate assigned counsel at rates not exceeding $25 and $40 per hour absent "extraordinary circumstances."[3] Individual trial and appellate judges instead, in the exercise of their own inherent judicial authority and discretion, may grant a higher rate if they determine, in an individual case, that such a higher rate is appropriate. Likewise, assigned counsel may, and should, submit vouchers seeking compensation at a rate that exceeds $25 and $40 per hour, accompanied by a written request that, in the absence of any valid statute now in effect in New York City mandating compensation rates no higher than $25 and $40 per hour, the trial or appellate judge exercise his or

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[2] See N.Y. County Law § 1000(3).

[3] Because the Judgment declares the portions of County Law § 722-b, Family Court Act § 245 and Judiciary Law § 35 fixing the rates and limits on compensation for assigned counsel unconstitutional as applied in New York City, the portions of County Law § 722-b and Judiciary Law § 35 that permit a trial or appellate court to grant compensation "in excess of the foregoing limits" in "extraordinary circumstances" are irrelevant and inapplicable. Because there now are no valid "foregoing limits" on compensation, "extraordinary circumstances" are not required to grant a rate exceeding $25 or $40 per hour. Accordingly, Rule 127.2 of the Rules of the Chief Administrator also is irrelevant and inapplicable.

her own inherent judicial authority and discretion to grant a higher rate in the individual case at issue. NYCLA suggests that assigned counsel submit vouchers seeking $90 per hour for work performed in-court and out-of-court. NYCLA believes that $90 is the minimal amount necessary to ensure that constitutionally adequate representation can be provided. In determining the appropriate rate, an individual trial or appellate judge may refer to the findings made by Justice Suarez in the Judgment and by United States District Judge Jack B. Weinstein in his decision in Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

It is important, however, that the award of a higher rate by an individual trial or appellate judge be made pursuant to that judge's own inherent judicial authority and discretion and not in reliance on, or as an attempt to enforce, the permanent injunction granted by Justice Suarez in the Judgment directing the State and City to compensate assigned counsel at the interim rate of $90 per hour. So long as an individual trial or appellate judge's order granting a compensation rate exceeding $25 and $40 per hour is expressly based upon his or her own inherent judicial authority and discretion and does not expressly rely on or seek to enforce the injunctive portions of Justice Suarez's Judgment that direct the State and City to compensate assigned counsel at $90 per hour, it cannot be deemed "a proceeding to enforce" the Judgment within the meaning of CPLR 5519(a)(1).

A request that an individual trial or appellate judge sign and approve a voucher submitted by an attorney for work performed in a particular case and the judge's subsequent review and approval of that voucher are administrative, rather than judicial, acts and, thus, are not "proceeding[s] to enforce" the Judgment within the meaning of CPLR 5519(a)(1). Cf. Werfel v. Agresta, 36 N.Y.2d 624, 626, 331 N.E.2d 668, 668, 370 N.Y.S.2d 881, 881-82 (1975) (noting in dicta that "[t]he assignment and compensation of counsel in criminal matters under sections 722 and 722-b of the County Law, and the plans adopted pursuant to statute do not, for purposes of review, fall within either civil or criminal proceedings and the practice statutes are structured" and that the "responsibilities" of courts and judges to "fix[] compensation for assigned counsel pursuant to the statute" "might be characterized as 'administrative'").

New York appellate courts, moreover, have made clear that the CPLR 5519(a) stay does not apply to future acts "which are not commanded but which are the sequelae of granting . . . relief." Pokoik, 220 A.D.2d at 15-16, 641 N.Y.S.2d at 884. The request that an individual trial or appellate judge sign and approve a voucher for compensation for work performed in a particular case at a higher rate and the judge's subsequent review and approval of that voucher, in the absence of any valid statutory authority mandating the payment of rates not exceeding $25 and $40 per hour, may be the "sequelae of granting" the declaratory relief in the Judgment, but are not future acts "commanded" by the Judgment and, thus, are not stayed by CPLR 5519(a)(1).