

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : ALPart 38

Present: Honorable Lucindo Suarez, Justice

NEW YORK COUNTY LAWYERS' ASSOCIATION,

Plaintiff,

Index No. 102987/00

-against-

DECISION and ORDER

GEORGE E. PATAKI, in his official capacity as
the Governor of the State of New York, and THE
STATE OF NEW YORK,

Defendants.

Recitation, as required by CPLR §2219(a) of the papers considered in the review of Defendants' motion to dismiss is set out as follows:

<u>Papers Submitted</u>	<u>Dated</u>	<u>Court Numbered</u>
Notice of Motion, Affirmation in Support (Olson) and Exhibits	3-31-00	1, 2, 3
Memorandum of Law	3-31-00	4
Affidavit in Opposition (Hoffman) and Exhibits	5-04-00	5, 6
Memorandum of Law	5-08-00	7
Affirmation in Support of Hoffman's Affidavit in Opposition (Moseley)	5-11-00	8
Exhibits	5-11-00	9
Memorandum of Law- (Exhibit A of Notice of Motion and Affirmation for leave to appear as Amicus - Suffolk County Bar Assn. & Suffolk County Pro Bono Foundation)	5-31-00	10
Reply Memorandum of Law (Olson)	6-02-00	11
Memorandum of Law - (NYS Assn. of Criminal Defense Lawyers, et al)	6-09-00	12
Affidavits and Affirmations in Opposition (B. Berlin, Esq., W. Dalsimer, Esq., H. Fishbein, Esq., M. R. Goldstein, A. Hirsch, Esq., R. Loving, Esq., D. Ollen, Esq., A. Reinger, Esq.)	7-20-00	13
Plaintiff's Letter Brief (McGee)	7-21-00	14
Supplemental Memorandum of Law (Olson)	7-31-00	15
Defendants' Letter Brief (Olson)	8-09-00	16
Memorandum of Law in Opposition (Moseley)	8-11-00	17

The primary issues in this motion to dismiss the complaint are whether plaintiff bar association has standing to challenge the statutory compensation rates paid to assigned private counsel, and whether such challenge presents a justiciable claim. This court answers both

questions in the affirmative. The secondary and tertiary issues are whether Defendant Governor George E. Pataki is a proper party to this action, and whether Plaintiff New York County Lawyers' Association has stated a cause of action in its tortious interference with contract claim. This court answers both questions in the negative.

New York County Lawyers' Association (NYCLA) commenced this action against New York State Governor George E. Pataki and the State of New York (collectively "State") seeking declaratory and injunctive relief, pursuant to CPLR §3001, §6301, and 42 U.S.C. §1983, challenging the compensation levels and limits for assigned private counsel, and the distinction between in-court and out-of-court work, as set by New York County Law §722-b, Family Court Act §245, and Judiciary Law §35,¹ and barring interference with performance of its obligations under the assigned counsel program to prevent state and federal constitutional violations that result in ineffective legal representation to children in family court proceedings and indigent adults in criminal court actions at the trial and appellate levels in New York City. NYCLA alleges that the State's failure to take measures to ensure adequate levels of compensation has placed the system of assigned counsel on the brink of collapse, creating an imminent threat of widespread due process and right to counsel violations, and allowed the First Department's assigned counsel program to deteriorate to a point where it subjects children and indigent adults to a severe and unacceptable risk where meaningful and effective legal representation is no longer provided.

¹ Assignments under Article 18-B of the County Law are paid by each county within the State of New York, and by the City of New York for the five counties therein. *See*, County Law §722, §722-e. Appointments under Judiciary Law §35 are paid by the State. *See*, Judiciary Law §35(5); *Matter of St. Luke's Roosevelt Hosp. Center*, 89 N.Y.2d 889, 675 N.E.2d 1209, 653 N.Y.S.2d 257 (1996). Both were passed during the same legislative session, in great measure, to bring New York State into compliance with *People v. Witek*, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965) and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.E.2d 799 (1963). *See*, (L. 1966, Ch. 761); New York State Legislative Annual 1966 at p. 352.

The State moves to dismiss the complaint pursuant to CPLR §3211(a)(3) and (7) contending that: NYCLA lacks organizational and third party standing to raise the claims asserted as it seeks a declaration of the rights of its members, and of some of its members' clients and potential clients, and that the complaint demonstrates nothing more than a speculative injury or risk to their rights; NYCLA is not the proper organization to assert the constitutional rights of the individual and potential clients, particularly claims involving ineffective assistance of counsel because its members have or may have a direct conflict with those rights, and the individual clients have the ability to litigate any such claims by post-conviction remedies; the complaint fails to state a justiciable case or controversy against Governor Pataki as he is not the official to whom the Legislature delegated responsibility to implement the provisions of the challenged statutes, is not a necessary party, and is entitled to absolute legislative immunity; the relief sought interferes with executive and legislative discretion, is not subject to judicial review, and would require an order directing the expenditure of state funds; and NYCLA fails to state a cause of action on its tortious interference with contract claim.

New York State has historically been concerned with the protection of children and adult indigent defendants and has chosen as a matter of state constitutional law to grant the right to counsel protection exceeding the minimum requirements of the federal constitution. *People v. Bing*, 76 N.Y.2d 331, 339, 558 N.E.2d 1011, 1015, 599 N.Y.S.2d 474, 478 (1990); *rearg. den.*, 76 N.Y.2d 890, 562 N.E.2d 876, 561 N.Y.S.2d 551 (1990). The right to counsel in New York State is a “cherished principle,” rooted in the State’s pre-revolutionary constitutional law and developed independent of its federal counterpart. *People v. Harris*, 77 N.Y.2d 434, 438, 579 N.E.2d 1051, 1054, 568 N.Y.S.2d 702, 705 (1991)(quoting *People v. Settles*, 46 N.Y.2d 154,

160-161, 385 N.E.2d 612, 615, 412 N.Y.S.2d 874, 877 (1978)). *See also, People v. Witek*, *supra*; *Matter of Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975); Liotti, *Does Gideon Still Make a Difference*, 2 N.Y.City L. Rev.105 (1998).²

In 1961 Article 18-A was added to the County Law permitting counties and New York City to establish plans to aid indigent defendants.³ Then, only a few counties accepted this responsibility and established assignment of counsel systems for the indigent. In 1962 the New York State Legislature passed Family Court Act §241 which codified a legislative declaration, finding counsel indispensable to a practical realization of due process for litigants appearing before the Family Court.⁴ In 1965 the New York Legislature then enacted Article 18-B of the County Law mandating local governments to implement their own system for providing legal representation for children in family court proceedings and indigent adults charged with crimes. Representation had to be provided in one of the following four forms: 1) by a public defender pursuant to Article 18-A of the County Law; 2) by a private legal aid bureau or society designated by the county or city; 3) by counsel provided pursuant to a plan of a bar association; or 4) according to a plan containing a combination of any of the foregoing. Simultaneously with Article 18-B, the Legislature enacted Judiciary Law §35 which charged the Administrator of the Courts with the duty to fund Judiciary Law §35 assignments, within its budget, and contract with

² In 1963 the United States Supreme Court held that, as a matter of constitutional law, the Fourteenth Amendment of the United States Constitution incorporates the Sixth Amendment right to counsel making it applicable to the states in all criminal prosecutions. *See, Gideon v. Wainwright, supra* at fn 1.

³ County Law Article 18-A, (L. 1961, Ch. 365).

⁴ Family Court Act §245 sets forth the compensation schedule for attorneys assigned to represent the indigent by reference to Judiciary Law §35. *See, Family Court Act §245(c)*. New York State statutorily required the right to counsel prior to the United States Supreme Court extending the constitutional right to counsel to children involved in delinquency proceedings. *See, In Re Gault*, 387 U.S.1, 87 S.Ct.1428, 18 L.E.2d 527 (1967).

legal aid service providers to insure uniform State compliance with the mandate. *See*, Judiciary Law §35(4). The system adopted in New York City is a combination of contracts with the Legal Aid Society, the assigned counsel program (18-B) and other legal services organizations. *See*, Judiciary Law §35(4); Family Court Act §245(a). NYCLA was one of the original co-sponsors and drafters of the assigned counsel program, approved by then Mayor Robert F. Wagner pursuant to Executive Order 178.

As enacted in 1965, County Law §722-b set the compensation rates for assigned counsel at \$15 per hour for in-court time and \$10 per hour for out-of-court time, with monetary caps of \$500 and \$300, respectively, for felony and misdemeanor representation.⁵ These fees have been increased twice since 1965. Currently, participating attorneys receive \$25 per hour for out-of-court work and \$40 for in-court work. There is a monetary cap of \$800 for all misdemeanor and family court cases and \$1,200 for felonies and appellate matters. Compensation in excess of the above rates may be obtained from the trial court under “extraordinary circumstances,” which determination is not subject to judicial review. *Werfel v. Agresta*, 36 N.Y.2d 624, 331 N.E.2d 668, 370 N.Y.S.2d 881 (1975). *See, People v. Fortune*, 178 Misc.2d 499, 682 N.Y.S.2d 803 (Sup. Ct. Bx. Co. 1998); *People v. Brisman*, 173 Misc.2d 573, 661 N.Y.S.2d 422 (Sup. Ct. N.Y. Co. 1996); *Matter of Sheppard*, N.Y.L.J. 11-17-00, p. 28, col. 6 (Fam. Ct. N.Y. Co. 2000); *Matter of D.H.*, N.Y.L.J., 8-15-00, p.24, col. 4 (Fam. Ct. Dutchess Co. 2000). These rates have been in effect since 1986. Only the monetary cap provisions of County Law §722-b and Judiciary Law §35(2) are the subject of this lawsuit.

The State’s pre-answer motion seeks dismissal of NYCLA’s complaint pursuant to CPLR

⁵ Judiciary Law §35(2) contains identical monetary cap provisions.

§3211(a)(3) and (7) upon the respective grounds that it lacks standing and fails to set forth a justiciable claim. CPLR §3211(a)(3) addresses the issue of whether a party has the “capacity to sue.” Although it is not within the language of the statute, this dismissal ground includes “lack of standing.” *See*, Siegel Practice Commentaries, (McKinney’s Cons. Laws of N.Y., Book 7B, C3211:13, at 23). CPLR §3211(a)(7) addresses the issue of whether a claim can withstand dismissal for “failure to state a cause of action.” Its language does not refer to questions of justiciability; however, if a party makes a non-justiciable claim, it has failed to state a cause of action upon which relief can be granted by the court. *Id.* (McKinney’s Cons. Laws of N.Y., Book 7B, C3211:23 at 37).⁶ Capacity and standing are elements of the larger question of justiciability. *See*, 82 N.Y. Jur.2d Parties §7 (Supp.1999). Capacity focuses on the legal ability of an individual or entity to seek judicial relief, and not on the cause of action which may nonetheless belong to the individual or entity. *See, Silver v. Pataki*, 274 A.D.2d 57, 711 N.Y.S.2d 402 (1st Dept. 2000). The State does not challenge NYCLA’s status or legal ability to bring this action, but rather the justiciability of its claims and its standing to do so. This court finds NYCLA has the capacity and standing to sue, and that its claims are justiciable.

The question of whether an individual or organization is a proper party to bring an action is an aspect of justiciability which must be considered at the outset of the litigation. *Matter of Dairylea Coop. v. Walkley*, 38 N.Y.2d 6, 9, 339 N.E.2d 865, 867, 377 N.Y.S.2d 451, 453 (1975). Justiciability is used to describe issues appropriate for judicial resolution as opposed to those that belong in the legislative or executive branches. *New York State Inspection, Security and Law*

⁶ *See also*, CPLR § 3001 which empowers “[t]he supreme court [to] render a declaratory judgment ... to a justiciable controversy ...” (emphasis added).

Enforcement Employees, Dist. Council 82 v. Cuomo, 64 N.Y.2d 233, 238, 475 N.E.2d 90, 92, 485 N.Y.S.2d 719, 721 (1984). The fact that this case may have political overtones, involve public policy, or possibly touch upon executive or legislative functions does not negate its justiciability. *Matter of Boung Jae Jang v. Brown*, 161 A.D.2d 49, 55, 560 N.Y.S.2d 307, 310 (2d Dept. 1990); *see also, McCain v. Koch*, 117 A.D.2d 198, 216, 502 N.Y.S.2d 720, 731 (1st Dept. 1986). Courts have, and continue to be called upon to protect the rights of the indigent and the administration of the courts, to insure compliance with the State's obligation. *See, Campaign for Fiscal Equality v. New York State*, ___ Misc.2d ___, ___ N.Y.S.2d ___ (Sup. Ct. N.Y. Co. 2001)(www.courts.state.ny.us/cfe.htm)(statutory funding scheme for New York City Board of Education found unconstitutional); *McCoy v. Mayor of the City of New York*, 73 Misc.2d 508, 342 N.Y.S.2d 83 (Sup Ct. N.Y. Co. 1971)(city had obligation to appropriate adequate funds for operation of Housing Part of the Civil Court); *Zarabia v. Bradshaw*, 185 Ariz.1, 912 P.2d 5 (1996)(Sup. Ct. in banc)(court ordered a hearing to protect the rights of indigent criminal defendants to determine new compensation rates); *Carlson v. State*, 247 Ind. 631, 220 N.E.2d 532 (1966)(court is empowered to order that it be provided reasonable and necessary operating expenses).

Accordingly, when the Legislature creates a duty of compensation "... it is within the court's competence to ascertain whether [the State] has satisfied [that] duty ... and, if it has not, to direct that the [State] proceed forthwith to do so." *See, Klostermann v. Cuomo*, 61 N.Y.2d 525, 531, 463 N.E.2d 588, 590, 475 N.Y.S.2d 247, 249 (1984)(non-discretionary statutory scheme obligated the state to provide continued treatment and adequate housing for persons treated for mental illness); *see also, Jiggetts v. Grinker*, 75 N.Y.2d 411, 415, 553 N.E.2d 570,

572, 554 N.Y.S.2d 92, 94 (1990)(commissioner must establish adequate shelter allowances that bear a reasonable relation to the cost of housing in New York City).

The State's contentions that sustaining NYCLA's claims would require an order directing the expenditure of state funds and impose judicial review of the Legislature's refusal or present reluctance to amend or modify its choice of compensation levels "... is particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights," (*Klostermann, supra*, 61 N.Y.2d at 537, 463 N.E.2d at 594, 475 N.Y.S.2d at 253) and pose no barrier to a judicial declaration, if necessary, of the constitutional infirmities of the monetary cap provisions. Furthermore, the State's claim that any finding by this court that the compensation rates are unconstitutional would constitute judicial interference with gubernatorial legislative immunity and both executive and legislative discretion, is premature as the only issue before this court is the procedural question of whether NYCLA has pleaded a *prima facie* case. *See, Campaign for Fiscal Equity, Inc. v. New York*, 86 N.Y.2d 307, 316 n4, 655 N.E.2d 661, 666 n4, 631 N.Y.S.2d 568, 565 n4 (1995).

This court's power to entertain a claim or direct enforcement of a duty is dependent upon NYCLA establishing standing. NYCLA admits it does not have direct standing to bring this action. However, it claims both third-party and organizational standing: third-party - on behalf of its association members' assigned panel clients; and organizational - on behalf of its association members who are members of the assigned counsel panels.

Generally, there are three categories that provide the standing necessary to bring a claim: direct, third-party and organizational. All, as an initial determination, require the litigant party to

demonstrate a grievance or injury⁷ different from the public at large, subject to prudential limitations, and if applicable, requisite representational standing principles.

Direct or common law standing requires that the litigant party shows it has suffered a grievance, harm or injury in fact. Added to this essential principle of direct standing are court imposed rules of self restraint also referred to as rules of prudential limitations, *to wit*: a general prohibition on the litigant party raising the legal rights of the non-litigant third party; a ban on adjudication of generalized grievances more appropriately addressed by the representative branches of government; and, in the case of administrative action or inaction, the requirement that the interest or injury asserted fall within the zone of interests protected by the statute or other governmental enactment.⁸ A further established principle of direct standing is that the injury in fact is different from the public at large. *See, Society of Plastics Industry Inc. v. County of Suffolk*, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991).

NYCLA claims third-party standing to assert the rights of its member attorneys' 18-B and Judiciary Law §35 clients. The New York Court of Appeals has not definitively addressed the requirements of third-party standing; therefore, this court will partially rely upon a federal case

⁷ The litigant party must show, under the federal counterpart of injury under article III, §2 of the United States Constitution: (1) a personal injury; (2) proximately caused by defendant's alleged unlawful conduct; (3) which is likely to be redressed by the requested relief. *See, Allen v. Wright*, 468 U.S. 737, 751 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700, 709 (1982)). This requirement has been adopted by New York case law, although it is not a constitutional mandate. *See, New York Criminal Bar Association v. Newton*, 33 F.Supp.2d 289, 293 (S.D.N.Y. 1999).

⁸ Administrative action in the context of standing suggests governmental exercise in its broadest form. *See and compare, Rudder v. Pataki*, 93 N.Y.2d 273, 711 N.E.2d 978, 689 N.Y.S.2d 701 (1999)(executive order); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, ___ A.D.2d ___, 712 N.Y.S.2d 687 (3rd Dept. 2000)(gubernatorial compact); *New York State Association of Criminal Defense Lawyers v. Kaye*, **269 A.D.2d 14**, **710 N.Y.S.2d 146 (3rd Dept. 2000)**(administrative order); *State Farm Mutual Automobile Ins.Co. v. Levin*, 263 A.D.2d 233, 702 N.Y.S.2d 694 (3rd Dep't 2000)(statute); *Professional Insurance Agents of New York State, Inc. v. New York State Insurance Department*, 197 A.D.2d 258, 611 N.Y.S.2d 370 (3rd Dep't 1994) (governmental legal opinion); *New York Criminal Bar Association v. Newton, supra*, at fn 7. (unofficial judicial administrative policy).

law analysis. Third-party standing or *jus tertii* requires that the litigant party shows that it has direct standing, and in addition the court consider: 1) the relationship of the litigant to the person whose right he, she or it seeks to assert; 2) the ability of the rightholder to vindicate his or her rights; and 3) the risk that the third-party's rights or interests will be diluted or adversely affected unless the litigation is permitted to proceed.⁹ See, *Singleton v. Wulff*, 428 U.S.106, 114-116, 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826, 833 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 444-445, 92 S.Ct. 1029, 1034, 31 L.Ed.2d 349, 357-358 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510, 513 (1965); *United States v. Musto*, 540 F.Supp. 346, 353 (D.N.J. 1982); *People v. Gary M.*, 138 Misc.2d 1081, 1091, 526 N.Y.S.2d 986, 996 (Sup. Ct. Kings Co. 1988). This court finds NYCLA has third-party standing.

NYCLA satisfies the test for direct standing as it has suffered an injury in fact within the zone of interests protected by the statute, different from the public at large. Where governmental administrative action is present, the term "statute," considered in its broadest sense, includes court rules. See, footnote 8, *supra*. The court rules applicable here are those derivatively enacted as a direct result of Article 18-B of the County Law, Judiciary Law §35, pertinent provisions of the Family Court Act, Executive Order 178 of the Mayor of the City of New York, and the Assigned Counsel Plan approved by the Administrative Board of the Judicial Conference. See, 22 N.Y.C.R.R. §§611.1 and 612.0.

NYCLA's injury within the zone of interests protected by these court rules is its inability

⁹ The approach to the application of the principles varies in degree: *Singleton v. Wulff*, *supra*, 428 U.S. at 114, 96 S.Ct. at 2874, 49 L.Ed2d at 833 (looks primarily to the first two factual elements); *Eisenstadt v. Baird*, *supra*, at 405 U.S. at 445, 92 S.Ct. at 1034, 31 L.Ed.2d at 357 (relaxed application of third-party standing rules to particular case); *United States v. Musto*, *supra*, 540 F.Supp. at 353 (examine all three factors); *People v. Gary M.*, *supra* 138 Misc.2d at 1092, 526 N.Y.S.2d at 995 (consider all three factors).

to discharge its responsibilities to provide and maintain a list of available and adequately trained attorneys for the family and criminal courts' assigned counsel panels in its capacity as a member of the Departmental Advisory Committee to the Family Court, and the Departmental Central Screening Committee of the Criminal Courts Panel Plan of the Assigned Counsel Plan pursuant to 22 N.Y.C.R.R. §§611.5, 612.3 and 612.8. This court, therefore, finds NYCLA has suffered an injury in fact within the zone of interests of the court rules implemented to facilitate effective assistance of counsel to the indigent from the statutes setting the compensation rates. NYCLA's injury is certainly different from that of the public at large, and substantially different from most other bar groups and associations in that it plays a vital role in how the family court and criminal justice system affect the poor in New York City.¹⁰

The prudential limitation which prohibits a litigant raising the legal rights of another does not prevent, in an appropriate case, the bringing of an action on behalf of another. The application of this prudential limitation is determinative upon the application of the third-party standing principles, which this court finds NYCLA has satisfied. The prudential limitation of a ban on the adjudication of generalized grievances that are more appropriately addressed by the representative branches of government is not applicable here, where NYCLA alleges a systemic problem directly related to the monetary cap provisions and its inability to fulfill its assumed obligations. The State contends NYCLA's claims are not justiciable and that the Legislature is the appropriate forum for redress. However, NYCLA's claim is not a general grievance, and one this court finds justiciable. *See, Matter of Boung Jae Jang, supra; McCain, supra; McCoy,*

¹⁰ The bar association members that sit on the Central Screening Committee are the Association of the Bar of the City of New York, the Bronx County Bar Association, and the New York County Lawyers' Association (NYCLA).

supra.

The measure of the relationship between the litigant and the third-party is whether “... the enjoyment of the right (of the third-party indigent clients) is inextricably bound up in the activity the litigant (NYCLA) wishes to pursue,” *Singleton, supra* 428 U.S. at 114, 96 S.Ct. at 2874, 49 L.Ed.2d at 833. The relationship here is that of an essential bar association participant in the Assigned Counsel Plan and the assigned 18-B panel members’ clients.¹¹ The right of the third-party indigent clients is the assignment of counsel, at an appropriate stage of the litigation, who will provide meaningful and effective legal representation. A significant portion of NYCLA’s activities are toward that end. NYCLA has played a significant and unique role in the creation and implementation of the Assigned Counsel Plan that reflects its history and charitable purposes in the monitoring and oversight of the Plan, and the training of its attorneys. This court finds the third-parties’ rights to assigned counsel to be inextricably intertwined with the litigant’s activities toward the provision of same, thereby making NYCLA an effective proponent of the rights of the third-party children and indigent adults, despite any allegations of conflict of interests with its members or its members’ clients.

The ability of the rightholders to vindicate their own rights rests on: “[i]f there is some genuine obstacle to such assertion, ... the third party’s absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right’s best available proponent.” *Singleton, supra*, 428 U.S. at 116, 96

¹¹ The courts have addressed different kinds of relationships. *See, e.g., Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)(beer vendor had third party standing to challenge statute prohibiting the sale of beer to males under age 21); *Griswold v. Connecticut, supra*, (doctor-patient); *Caplin & Drysdale, Chartered v. U. S.*, 391 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989)(attorney-client relationship allowing attorney to assert client’s sixth amendment right to counsel in forfeiture action).

S.Ct. at 2875, 49 L.Ed.2d at 834. NYCLA alleges that the rightholders would not be able to assert their own rights because of the magnitude of the litigation in question and the lack of resources available to them. The State correctly points to the remedies available to the third-party non-litigants: CPL §470.05 - direct appeal, CPL §440 - post conviction motions, and 28 U.S.C. §2254 - *habeas corpus* petitions. However, several factors support granting NYCLA third-party standing. First, this case strikes at the monetary cap provisions which may have a profound impact on the rights and interests of indigent adults accused of crimes, and indigent litigants appearing in family court. Second, these indigents lack the resources, knowledge and experience to pursue claims for ineffective assistance of counsel. Third, claims for ineffective assistance of counsel can be raised only after a court has made an adverse determination or conviction. These factors prevent the resolution of the systemic problem *prima facie* presented here. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984); *Lindstadt v. Keane*, ___ F.3d ___, (2d Cir. 2001); 2001WL 10325; *People v. Wroten*, ___ Misc.2d ___, ___ N.Y.S.2d ___ (Sup. Ct. N.Y. Co. 2000), N.Y.L.J. 10/26/00, p.27, col. 5.

Finally, the third-party must show that its rights or interests will be diluted or adversely affected if the litigation is not permitted to proceed. The State contends, as before, that the third-parties can pursue post-conviction remedies without dilution of their rights or interests. NYCLA alleges that the constitutional rights of the children and indigent adults are being infringed upon by the critical decrease in the number of available panel attorneys and the continuing increase in the demand for assigned private counsel. The substantial empirical evidence submitted by NYCLA provides strong indication that the third-parties' rights and interests will be protected by this litigation. This consideration, therefore, also weighs in favor of granting NYCLA third-party

standing.

NYCLA claims organizational standing to assert the rights of its member attorneys who are members of the Assigned Counsel Plan.¹² Associational or organizational standing requires that the litigant organization shows it has direct standing, and that: 1) some or all its members have direct standing to sue; 2) the interests it asserts are germane to its purposes; and 3) neither the asserted claim nor the appropriate relief requires participation of the individual members. *See, Dental Society of the State of New York v. Carey*, 61 N.Y.2d 330, 462 N.E.2d 362, 474 N.Y.S.2d 262 (1984); *Society of Plastics Industry Inc. v. County of Suffolk, supra*.¹³ This court finds NYCLA has organizational standing.

This court's determination that NYCLA has direct standing to obtain third-party standing provides the equivalent basis to find that NYCLA has direct standing to assert organizational standing. The analysis now shifts to the application of the organizational standing principles.

NYCLA members who are panel members of the Assigned Counsel Plan and/or the Family Court Law Guardian Plan have suffered injury within the zone of interests protected by the statute - in the instant matter: County Law §722(b); by extension the monetary caps in Judiciary Law §35(2); and the court rules regulating attorney professional conduct. Attorneys have duties and obligations to their clients in their capacity as officers of the court, including a duty of loyalty, a duty to avoid conflict of interest, (*see*, 22 NYCRR §1200.20 and 24), a duty to

¹² Pursuant to the New York Court Rules, NYCLA members participate in the Oversight Committee (22 NYCRR §613.4), on the Central Screening Committee (22 NYCRR §612.4), on the Advisory Committee to the Family Court (22 NYCRR §611.6), and NYCLA is charged with the obligation to provide training to the 18-B participants, (22 NYCRR §612.8).

¹³ The burden of establishing standing to raise a claim is on the party seeking judicial intervention. *See, Society of Plastics, supra*. The determination of whether standing exists must also comport with the manner and degree of evidence required at the successive stages of the litigation. As this case remains at the pleading stage, all facts alleged by the plaintiff must be taken as true for purposes of the standing inquiry. *See, Lerman v. Board of Elections*, 232 F.3rd 135, 142 (2d Cir. 2000).

investigate the facts, the controlling law and to zealously advocate the litigant's cause. *See*, 22 NYCRR §1200.32. NYCLA's members' injury in fact is their inability to comply with their obligations to their clients, subjecting them to possible sanctions and ethical violations. NYCLA submits affidavits and affirmations from three of its members who currently serve as assigned private counsel in family and criminal court proceedings,¹⁴ two members who are former or inactive members of the family and criminal court panels,¹⁵ and two members who serve on the Central Screening Committee for the First Judicial Department.¹⁶ As set forth in their affidavits, the compensation rates and potential breach of professional responsibilities place them at risk of rendering ineffective assistance of counsel. The affirmation of Raymond Loving avers:

... I often do not have the time or opportunity to perform my own investigation of the facts of my clients' cases or personally interview significant witnesses. Similarly, I have neither the time nor the resources for extensive legal research or lengthy motion papers and at times am unable to fully prepare for trial. *See*, Aff' at ¶12

The affirmation of Daniel J. Ollen, states:

... I seldom had the opportunity to fully investigate the facts of my clients cases, and I had neither the time nor the resources for extensive legal research or lengthy motion papers. *See*, Aff' at ¶11

These affirmations sufficiently establish that the current rate of compensation and the severe shortage of assigned counsel cause harm and injury to NYCLA's members who serve as assigned counsel, including pressure from judges and court officers to accept additional case assignments

¹⁴ *See*, Affidavits of Bemkaom B. Berlin, Raymond Loving, and Affirmation of Daniel J. Ollen - Court submission numbered 13.

¹⁵ *See*, Affidavit of William R. Dalsimer and Affirmation of Andrea G. Hirsch - Court submission numbered 13.

¹⁶ *See*, Affidavits of Harvey Fishbein and Anne Reiniger - Court submission numbered 13.

despite an already heavy caseload,¹⁷ and high caseloads that impair their abilities to effectively represent their clients, exposing them to possible sanctions.¹⁸ In addition, attorneys have duties and obligations to their clients in their capacity as officers of the court, including a duty of loyalty, a duty to avoid conflict of interest, (*see*, 22 NYCRR §1200.20 and 24), a duty to investigate the facts, the controlling law and to zealously advocate the litigant’s cause. *See*, 22 NYCRR §1200.32. Accordingly, this court finds NYCLA members have suffered injury in fact.

The injury in fact suffered by the NYCLA members is within the zone of interests protected by County Law §722-b, Judiciary Law §35¹⁹ and various court rules. The State claims it is exclusively the non-litigant indigent who falls within the zone of interests of the applicable statutes. **The State’s reliance upon *New York State Association of Criminal Defense Lawyers v. Kaye, supra*, at fn 8**, for the proposition that NYCLA is not within the zone of interest required to confer standing is misplaced. In *NYSACDL* the Supreme Court of Albany County granted NYSACDL standing in its attempt to bring an Article 78 petition challenging an administrative order set forth by the Administrative Board of the Courts, which includes the four Appellate Division presiding justices and Chief Judge Judith S. Kaye, that had approved a reduction in a proposed fee schedule applicable to assigned private counsel in capital cases. NYSACDL alleged, based on a single self generated survey, that reduced fees would impinge on a capital defendant obtaining effective assistance of counsel. The Appellate Division Third Department reversed, holding that the legislative intent of Judiciary Law §35-b(5)(a) was “to ensure that

¹⁷ *See*, Berlin Aff. ¶¶ 6-9; Dalsimer Aff. ¶¶ 9-11; Loving Aff. ¶¶ 14-15; Ollen aff. Aff. ¶¶ 6-9 - Court submission numbered 13.

¹⁸ *See*, Berlin Aff. ¶¶ 10-13; Loving Aff. ¶¶ 9-12; Ollen Aff. ¶¶ 10-13 - Court submission numbered 13.

¹⁹ Family Court Act §245 sets forth the compensation schedule by reference to Judiciary Law §35.

qualified attorneys are available to represent [capital] defendants.” *NYSACDL, supra*, 269 A.D.2d at 16, 710 N.Y.S.2d at 148. The injury claimed by the attorneys was monetary, and “therefore not within the zone of interests required to confer standing.” *Id.* 269 A.D.2d at 17, 710 N.Y.S.2d at 149.

Unlike Judiciary Law §35-b(5)(a)(McKinney’s Supp. 1998) which imposes on each screening panel of the respective Appellate Divisions the obligation to promulgate and periodically update a schedule of fees to be paid attorneys with the approval of the Administrative Board, County Law §722-b provides a statutorily set amount of compensation to 18-B panel attorneys, and was designed to ease the burden of lawyers who serve on the said panels, rendering *NYSACDL* factually distinguishable.²⁰ *See generally, People v. Perry*, 27 A.D.2d 154, 278 N.Y.S.2d 323 (P.Js 1st and 2d Depts.1967); *Werfel v. Agresta, supra*.

This court finds NYCLA’s members fall within the zone of interests of the statutes and related court rules, satisfying the first requirement of organizational standing that one or some of its members have direct standing to sue. In addition, the NYCLA members’ injury is different from the public at large because they are an advocate class enlisted to defend the indigent.

The interests NYCLA seeks to protect are germane to its organizational purposes. NYCLA was created with the purpose of securing legal assistance for children and indigent adults dating back nearly 100 years.²¹ NYCLA’s Certificate of Incorporation reads in part, “[t]he Association is organized and shall be operated as a bar association exclusively for charitable and

²⁰ *See*, Governor’s Bill Jacket, Chapter 878 (1965) where the proponent of the bill, Assemblyman Richard J. Bartlett, in a letter dated July 1, 1965, urging the Governor’s signature, described the purpose of County Law §722-b as one that “... will simply provide the means by which attorneys will be compensated”

²¹ *Id.* (April 23, 1908 - date of incorporation).

educational purposes with the primary object of promoting the public interest”²² Although the State argues that the existing statutory scheme neither requires that legal services be provided through assigned counsel panels, nor mandates that any particular local bar association take part in the First Department screening panels, the State does not dispute that the interests NYCLA seeks to protect are germane to its organizational purposes. Finally, the State does not seriously refute NYCLA’s claim that its 18-B panel members’ participation is unnecessary.

This court further finds, traditional standing principles aside, based on NYCLA’s role as an essential participant in the assigned counsel system, coupled with the vast amount of empirical data submitted, that to deny NYLCA standing would erect an impenetrable barrier to any judicial scrutiny of legislative action or inaction in this case, where presumptively innocent citizens are subjected to increased risks of adverse adjudications and convictions merely because of their poverty. The State’s failure to properly fund its obligation to the indigent has an adverse impact on how our criminal justice system functions in New York.²³ Accordingly, under the liberalized recognition of standing announced in *Boryszewski v. Brydges*, 37 N.Y.2d 361, 334 N.E.2d 579, 372 N.Y.S.2d 623 (1975), and extended in a string of cases,²⁴ this court cannot ignore the obvious fact that if NYCLA is denied standing, the practical effect would be to exempt from

²² See, Hoffman Aff. and NYCLA’s Certificate of Incorporation attached as exhibit “C” - Court submission numbered 5 & 6.

²³ N.Y.S. Constitution, Article VI, §29.

²⁴ *National Organization for Women v. State Division of Human Rights*, 34 N.Y.2d 416, 314 N.E.2d 867, 358 N.Y.S.2d 124 (1974)(recognized *bona fide* organization dedicated to eliminating discriminatory practices against women); *Babigan v. Wachtler*, 133 Misc.2d 111, 506 N.Y.S.2d 506 (Sup. Ct. N.Y. Co. 1986), *aff’d* 126 A.D.2d 445, 510 N.Y.S.2d 473 (1st Dept. 1987); *aff’d*, 69 N.Y.2d 1012, 511 N.E.2d 49, 517 N.Y.S.2d 905 (1987)(unsuccessful applicant for position of housing judge had standing to challenge appointment procedure); *Grant v. Cuomo, supra*, (child-advocacy organization); *Mixon v. Grinker*, 157 A.D.2d 423, 556 N.Y.S.2d 855 (1st Dept. 1990) (organization representing the interest of HIV-infected homeless persons); and *Community Serv. Soc. v. Cuomo*, 167 A.D.2d 168, 561 N.Y.S.2d 461 (1st Dept. 1990)(medicaid provider had standing to challenge new medicaid regulations on behalf medicaid recipients).

judicial review the failure of the State to comply with its statutory and constitutional obligations. *Grant v. Cuomo*, 130 A.D.2d 154, 158, 518 N.Y.S.2d 105, 108 (1st Dept. 1987).

The State contends the Governor is not a proper party to this law suit because he plays no role in the implementation of the statutes governing the provision of assigned counsel to children and indigent adults.²⁵ NYCLA points to the Governor's comments, reported in the media, coupled with the State constitutional provision that the Governor shall faithfully execute the laws. *See*, N.Y. Const. Art. IV, § 3. The test is whether NYCLA has alleged a sufficient nexus, independent of the general duty to enforce state laws,²⁶ between the Governor and the statute alleged to be unconstitutional. *See, Gras v. Stevens*, 415 F.Supp. 1148, 1153 (S.D.N.Y. 1976)(3 Judge Ct.). This court finds the allegations in the complaint do not draw a sufficient connection between the Governor and the alleged unconstitutional conduct of the State to conclude that the Governor, independent of the State of New York, is a real party in interest, requiring his removal as a party to this action.

A motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), must be construed in the light most favorable to the plaintiff and all factual allegations accepted as true. *Grand Realty Co. v. City of White Plains*, 125 A.D.2d 639, 510 N.Y.S.2d 172 (2d Dept. 1986); *Barrows v. Rozansky*, 111 A.D.2d 105, 489 N.Y.S.2d 481 (1st Dept. 1985); *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 389 N.E.2d 314, 389 N.Y.S.2d

²⁵ (*see*, Def. Mem. at 35-37, and Def. Rely Mem. at 19-20).

²⁶ Pursuant to New York Constitution Article III, §1, the legislative power is vested in the senate and assembly, and "no law shall be enacted except by bill" (NY Const. Art III, §13). Only after a bill passes both houses of the legislature is it presented to the Governor for his action. (N.Y. Const. Art. III, §14; Art. IV, §7). The power and discretion to approve or to veto a bill is exclusively vested in the Governor (N.Y. Art. IV, Const. IV §7) and not subject to judicial review. The State constitution further provides that "[t]he executive power shall be vested in the governor" (N.Y. Const. Art. IV, §1), who "shall take care that the laws are faithfully executed." (N.Y. Const. Art. IV, §3).

314 (1976); *Leon v. Martinez*, *supra* at 87-88 (1994); *Torturously v. Carlin*, 260 A.D.2d 201, 688 N.Y.S.2d 64 (1st Dept. 1999); *Wall Street Asso. v Brodsky*, 257 A.D.2d 526, 684 N.Y.S.2d 244 (1st Dept. 1999). NYCLA’s eight of nine causes of action against the State allege that “failure to provide sufficient compensation to private counsel” in County Law §722-b, Family Court Act §245(b) and Judiciary Law §35(2), has resulted in “systematic deficiencies in the assigned counsel system” in the Supreme, Criminal and Family Courts in New York City, and a “risk” that indigent adults and children “will be denied their rights to meaningful and effective assistance of counsel and due process of law,” thereby violating the rights of children and indigent adults under Article I, §§ 5 and 6 of the New York State Constitution (First, Third, Fifth and Seventh Causes of action) and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution (Second, Fourth, Sixth, Seventh and Eighth Cause of Action). *See*, Complaint at ¶¶ 83-98.

Additionally, NYCLA alleges in its ninth cause of action, a claim for tortious interference with contract. Specifically, NYCLA charges that the State’s “intentional and persistent failure” to provide higher statutory rates of compensation for assigned counsel in County Law §722-b and Judiciary Law §35(2) has impeded its obligation to render the Assigned Counsel Plan to provide and maintain a list of private attorneys who, in NYCLA’s view, are capable of representing children and indigent adults in the Family, Supreme and Criminal Courts in New York City. *See*, Complaint at ¶¶ 99-100.

NYCLA’s cross section of empirical evidence includes a report by Chief Administrative Judge Jonathan Lippman, and Deputy Chief Administrative Judge for Justice Initiatives Juanita Bing Newton, detailing the current crisis in the assigned counsel program. *See*, Assigned

Counsel Compensation in New York: A Growing Crisis (Jan. 2000)(Exhibit A to the complaint).

In addition, NYCLA submitted official statistics, reports from independent groups, and other material which outlined, in painstaking fashion, the shortage of active panel attorneys and how they are overburdened. The submissions also showed the adverse effects on juvenile delinquency cases, abuse and neglect proceedings, appeal backlogs, arraignments overload, the problem of uncertified panel counsel, prolonged delays and how it relates to the current 18-B compensation rates. *See*, Exhibits A through W to the Moseley Affirmation, dated May 11, 2000.

Accordingly, the State's motion to dismiss the first eight causes of action is denied.

However, the same does not hold true for the ninth cause of action based upon tortious interference with a contract.

The State contends that the complaint fails to allege the existence of a contract between NYCLA and the City of New York. The State further contends that there is no cognizable claim of tortious interference with the contractual relationship in New York where the plaintiff is the breaching party. NYCLA alleges the existence of a contract between the various bar associations and the City of New York, in the form of the Assigned Counsel Plan and the Mayor's Executive Order No. 178. *See*, Complaint ¶¶ 40, 100; Olson Aff. Ex. 2 and Ex. 3 executive order.

A *prima facie* case for tortious interference requires: 1) the existence of a contract; 2) defendant's awareness of the contract; 3) defendant's intentional inducement of the contract's breach; 4) actual breach; and 5) damages. *See, William Kaufman Organization, Ltd v. Graham & James, LLP*, 269 A.D.2d 171, 173, 703 N.Y.S.2d 439, 442 (1st Dept. 2000); *see also*, Prosser, Keeton on Torts §129 pp.995-96 (5th Ed. 1984). No cause of action lies in New York, for tortious interference with contract where the underlying contract is terminable at will by either

party, or is unenforceable for non-compliance with the statute of frauds, lack of mutuality, or lack of consideration. *See generally, Guard-Life Corp. v. Parker Hardware Manufacturing*, 50 N.Y.2d 183, 406 N.E.2d 445, 428 N.Y.S.2d 628 (1980). However, where fraud, threats of violence, or violations of a fiduciary duty is used to breach the contract, then New York will allow a tort claim even though the contract was voidable. *See, Kennan v. Artintype Inc.*, 145 Misc.2d 90, 93, 546 N.Y.S.2d 741, 743 (S.Ct. N.Y. Co. 1989); *see also*, Restatement on Torts §766 (Second).

Claims of tortious interference can only be made where there is a claimed interference with a contractual relationship or a prospective economic advantage. *See, Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d 294, 299, 684, N.Y.S.2d 235, 238 (1st Dept. 1999). Here, there is no contractual relationship between the City of New York and NYCLA, of which the State would be considered an interfering third-party, as the relationship is not one rooted in a pecuniary interest. NYCLA's obligation pursuant to the court rules to provide a list of competent attorneys, coupled with its status as an original drafter of the Assigned Counsel Plan, does not establish a contractual relationship. A binding contract requires mutuality of consideration; that is, each party must furnish consideration to the other, or undergo a detriment. *See generally, Non-Linear Trading Co. Inc.*, 243 A.D.2d 107, 675 N.Y.S.2d 5 (1st Dept. 1998); *Dorman v. Cohen*, 66 A.D.2d 411, 413 N.Y.S.2d 377 (1st Dept. 1979); *see also*, Calamari & Perillo on Contracts §§66, 67 at pp. 130-131. There was no bargained for exchange between the parties here. In fact, NYCLA's obligations under the assigned counsel plan derives from its stated goal "... of promoting the public interest ... by arranging for the provision by its members of free legal services for indigent, low income or other persons in need" *See, Hoffman Aff.* and

NYCLA's Certificate of Incorporation attached as Exhibit C. NYCLA's assumed duties, codified in the court rules, does not create a contract within the meaning of tortious interference, and in the absence of a contractual relationship, there can be no breach. *See, NBT Bancorp v. Fleet/Norstar Fin. Group*, 87 N.Y.2d 614, 620, 664 N.E.2d 492, 495, 641 N.Y.S.2d 581, 584 (1996). Accordingly, NYCLA's tortious interference claim is dismissed.

Therefore, it is

ORDERED, that the branch of Defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(3) and (7) is **denied**; and it is further

ORDERED, that the branch of Defendants' motion to dismiss Plaintiff's ninth cause of action based upon tortious interference with contract is **granted**; and it is further

ORDERED, that the branch of Defendants' motion to strike Governor George E. Pataki as a defendant is **granted**; and it is further

ORDERED, that the caption hereinafter read:

NEW YORK COUNTY LAWYERS' ASSOCIATION,

Plaintiff,

-against-

THE STATE OF NEW YORK,

Defendant.

Dated: January 16, 2001

LUCINDO SUAREZ, J.S.C.