



## **Raising Assigned Counsel Rates in New York: Estimating the Impact on County Law Article 18-B Assigned Counsel Costs**

In a January 2022 *New York Daily News* op-ed, Senator Jamaal Bailey decried the current statutory rates paid to assigned attorneys who, as he aptly describes, “are the attorneys on the front lines ... [who] fight day in and day out to ensure that our judicial system is fair for our most vulnerable and marginalized.” He noted that the assigned counsel rates of \$60 per hour for misdemeanor cases and \$75 per hour for non-misdemeanor cases have not increased since 2004, and that attorneys who do this work at the federal level are paid more than twice as much.<sup>1</sup> His words echo those of former Chief Judge Janet DiFiore, who noted in a February 26, 2019 letter to the Governor and legislative leaders that “[f]ailure to adjust assigned counsel rates has led to a growing shortage of attorneys, resulting in excessive caseloads that diminish the quality of legal representation for indigent litigants and impairing the ability of our criminal and family courts to operate efficiently.”

Unfortunately, the 2022 legislative session ended without an increase in assigned counsel rates. Subsequently, on July 25, 2022, in the class action lawsuit *New York County Lawyers Association (NYCLA) v. The State of New York, et al*, the court granted a motion for a preliminary injunction ordering that the defendants pay assigned counsel in New York City \$158 per hour for all case types, commensurate with the federal rate. The Court emphasized that this rate increase was necessary because of the State’s failure to raise the rates for over 18 years, and that without an immediate increase “children and indigent adults would suffer severe and irreparable harm that is ‘imminent, not remote or speculative.’”<sup>2</sup> The Court further stated that “the quality of legal representation for children and indigent adults, as well as their due process rights would continue to decline without a preliminary injunction.”<sup>3</sup> The *NYCLA* Court decision is interim relief that applies only to New York City. But its implications and message about the severity of the assigned counsel crisis transcends its jurisdictional limitations, and since the *NYCLA* decision two additional lawsuits have been filed challenging the State’s failure to increase the assigned counsel rates. The first is a lawsuit filed by the New York State Bar Association, *New York State Bar Association v. The State of New York*, fashioned like the *NYCLA* lawsuit, but applicable to counties outside of New York City. The second is an enforcement action filed by the *Hurrell-Harring v. State of New York* settlement plaintiffs, *The Plaintiff Class Certified in Hurrell-Harring, et al. v. State of New York*, noting that the State’s failure to increase the assigned counsel rates has resulted in substantial non-compliance with the *Hurrell-Harring v. State of New York* settlement.

Given the pending litigation and on-going discussion about the imperative to raise assigned counsel rates for the state to meet its constitutional and statutory obligations to assure the right to counsel for all people in criminal and Family Court matters, this memo estimates the cost impact of 1)

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<sup>1</sup> The op-ed can be found here: <https://www.nydailynews.com/opinion/ny-oped-better-pay-assigned-counsel-20220110-6lytyvg62baifczgnzv2t7nrve-story.html>.

<sup>2</sup> *New York County Lawyers Association v. The State of New York, et al*, Index No. 15691/2012 (NY Co. Sup. Ct., July 25, 2022, Motion Seq. 1).

<sup>3</sup> *Id.*

doubling assigned counsel rates in New York from \$60 per hour to \$120 per hour for misdemeanor cases and from \$75 per hour to \$150 per hour for non-misdemeanor cases; and 2) the cost impact of raising assigned counsel rates in all types of cases to \$158 per hour, which is currently the rate paid to attorneys who handle assigned cases in federal matters and consistent with the rate increase ordered in *NYCLA v. State of New York*. Please note that this memo applies *only* to representation provided under County Law Article 18-B, which includes mandated representation for people facing charges in criminal court and parents in Family Court proceedings.

### **The Cost Impact of Doubling the Assigned Counsel Rates**

To estimate the cost of doubling the assigned counsel statutory rates, we look to expenditure data that assigned counsel programs (“ACPs”) reported to ILS for calendar year 2019.<sup>4</sup> In total, 61 ACPs across New York reported spending \$166,668,314 in 2019.

We cannot simply double the total amount of ACP expenditures to arrive at the cost impact of doubling assigned counsel rates. ACPs also spend sums on administrative expenses and non-attorney experts and raising the hourly rate for attorneys should not impact these costs. Based on our experience in working with ACPs, ILS conservatively estimates that, on average, administrative and other non-attorney costs constitute 10% of ACP expenditures, which for 2019 would have been \$16,666,831.44. Reducing the 2019 total expenditures by these estimated non-attorney fee costs results in an estimate of \$150,001,483 for attorney fees.

***Thus, ILS estimates that doubling the current assigned counsel attorney rates set forth in County Law Article 18-B would result in a \$150,001,483 increase in assigned counsel attorney fees.***

### **The Cost Impact of Raising the Assigned Counsel Rates to \$158 per hour**

As with the above estimate for doubling assigned counsel rates, we use the amount of \$150,001,483 (i.e., the total 2019 assigned counsel expenditures with a 10% reduction to account for administrative and non-attorney expenses) to estimate the cost of increasing assigned counsel rates in all types of cases to \$158 per hour. Because the \$150,001,483 amount does not distinguish between payments made to attorneys in misdemeanor cases (at a rate of \$60 per hour) versus those made to attorneys in all other types of cases (at \$75 per hour), we developed a method to calculate the percentage of payments made to attorneys in misdemeanor cases versus all other types of cases.<sup>5</sup> Using this method, we estimate that 24% of the \$150,001,483 in expenditures were made to attorneys in misdemeanor cases and 76% in all other types of cases. This allowed us to estimate the total number of hours for which attorneys received assigned counsel payment in misdemeanor cases (600,006 hours) and all other types of cases (1,520,015 hours), which is a total number of hours of 2,120,021. If the assigned counsel rates are raised to \$158 per hour, the total costs paid to attorneys

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<sup>4</sup> We look to 2019 rather than 2020 or 2021 expenditures because the Covid-19 pandemic in 2020 impacted expenditures for ACPs across the state. Reliance on 2020 or 2021 expenditures to estimate the cost of doubling assigned counsel statutory rates would result in an underestimate of this cost.

<sup>5</sup> An explanation of this methodology is available upon request to ILS Counsel, Burton Philips, at [burton.philips@ils.ny.gov](mailto:burton.philips@ils.ny.gov).

would be \$334,963,311 (2,120,021 hours x \$158 per hour). Subtract the amount paid at the current rates (\$150,001,483), and the difference is \$184,961,835.

***Thus, ILS estimates that raising the assigned counsel attorney rates set forth in County Law Article 18-B to \$158 per hour would result in a \$184,961,835 increase in assigned counsel attorney fees.***